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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 07.03.2019

+ **ARB.P. 759/2018**

ALL SERVICES GLOBAL PVT LIMITED Petitioner

Through: Mr. Ritesh Khatri, Advocate.

versus

RESIDENT COMMISSIONER GOVERNMENT OF MADHYA
PRADESH Respondent

Through: Mr. V.K. Shukla with Mr. Vishal
Gupta, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (in short "1996 Act").
2. Notice in this petition was issued on 03.10.2018. The respondent entered appearance on 09.01.2019.
3. Since then, I am told that respondent has filed a reply, though the same is not on record.
4. In view of the fact that this is a petition filed under Section 11 of the 1996 Act, to my mind, no further time needs to be given for bringing the reply on record.
- 4.1 A photocopy of the reply, however, has been placed before me which has been examined by me.
5. I have also heard the counsel for the respondent in support of his plea

that relief sought in the petition ought not be granted to the petitioner.

6. Briefly, the record shows that on 01.03.2013, an agreement has been executed by the parties whereby the petitioner was to supply manpower to the respondent.

7. The contract envisaged supply of manpower for the following purposes: Hospitality, Mechanised House Keeping and Maintenance Engineering Services.

8. The supply of manpower had to take place qua the following premises: Madhyanchal, 121 HC Pocket, Institutional Area, Vasantkunj, New Delhi 110070 (hereafter referred to as “subject premises”).

9. It appears that disputes erupted between the parties with regard to non-payment of certain dues.

10. In fact, the petitioner has it appears a claim against the respondent in sum of Rs. 2.40 crores. The details of claim are set out in para 8 of the petition.

11. It is not in dispute that the subject contract was terminated by the respondent on 07.07.2017; an aspect that is also adverted to in the reply of the respondent.

12. It appears that thereafter, the petitioner filed a petition under Section 9 of the 1996 Act in the District Court at Patiala House, New Delhi.

13. Via this petition, injunction was sought qua the respondent from encashing the bank guarantee which had been furnished by the petitioner. This bank guarantee, I am told, was worth Rs. 14,00,000/-.

13.1 Initially, the petitioner had obtained a stay against encashment of the bank guarantee subject to the same being renewed.

13.2. It appears that the order passed by the concerned Court got

communicated to the bank a little late which resulted in the respondent encashing the subject bank guarantee.

14. Be that as it may, on 15.05.2018, the petitioner triggered the arbitration agreement which stands incorporated in Clause 16.1 of the subject contract.

15. The respondent, I am told, in terms of the said arbitration agreement proceeded to appoint as Arbitrator, one, Mr. Amitabh Agnihotri, IFS, Additional Chief Conservator of Forests, on 17.12.2018.

16. As indicated above, by this time, the petitioner had already moved the Court, as despite triggering the arbitration agreement vide communication dated 15.05.2018, the respondent had not moved in the matter.

17. Counsel for the petitioner says that the respondent has lost its right to appoint an Arbitrator in the matter.

18. On the other hand, Mr. Shukla, who, appears for the respondent, says that the right is intact.

19. In support of this submission, Mr. Shukla says that since the petitioner did not act for nearly 10 months after the contract was terminated, the respondent's right to appoint an Arbitrator remained intact.

20. In sum, it was Mr. Shukla's contention that petitioner should have shown due diligence in seeking appointment of an Arbitrator.

21. In addition thereto, Mr. Shukla also says that the arbitration agreement envisages that before proceeding to adjudication of disputes, parties should attempt an amicable settlement of *inter se* disputes.

22. Having heard the learned counsel for the parties and perused the record, what clearly emerges is as follows:-

(i) There is no dispute that an arbitration agreement obtains between the

parties.

(ii) There is also no dispute that the petitioner did trigger the arbitration agreement vide communication dated 15.05.2018.

(iii) Concededly, the respondent appointed an Arbitrator in terms of the arbitration agreement on 17.12.2018, *albeit*, after the captioned petition was filed. Notice in the petition was issued on 03.10.2018.

23. Given these facts, to my mind, the respondent, in law, has lost its right to appoint an Arbitrator. (See: *Datar Switchgears Ltd. v. TATA Finance Ltd. and Anr.*, (2000) 8 SCC 151)

24. Mr. Shukla's argument that parties were required to attempt an amicable settlement of the disputes is untenable in this case as on record, I find that there is a letter dated 07.07.2017, written by the petitioner, which demonstrates that the petitioner had made an offer for an amicable settlement. Therefore, if this requirement contained in arbitration agreement is considered to be a pre-requisite prior to commencement of the arbitration proceedings, the petitioner had clearly done its bit in fulfilling the requisite condition.

24.1. I am, for the moment, not dealing with the aspect as to whether fulfilment of this condition was mandatory or directory in view of what is noted above.

25. Insofar as Mr. Shukla's other argument is concerned, which is that the petitioner did not show due diligence as it failed to trigger the arbitration agreement for nearly 10 months after the said agreement was terminated, in my view, even this objection is not sustainable.

26. The reason why I say so is this: firstly, the delay of 10 months in the given circumstances, to my mind, is not fatal. Secondly, the respondent can

hardly claim that the petitioner was not diligent when the respondent itself took nearly 7 months to appoint an arbitrator, though, after it had lost the authority in law to appoint an Arbitrator.

27. Accordingly, for the foregoing reasons, the petition is allowed.

27.1 Mr. Hiroo Advani, Advocate (Cell No. 9820077950), is appointed as the Arbitrator in the matter.

27.2 The learned Arbitrator will be paid his fee in terms of the provisions of the Fourth Schedule appended to the 1996 Act.

28. Needless to say, before entering upon reference, the learned Arbitrator will file a declaration in terms of Section 12(5) read with other attendant provisions of the 1996 Act.

29. The petition is disposed of in the aforesaid terms.

RAJIV SHAKDHER, J

MARCH 07, 2019

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