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

+ ARB.P. 859/2018 & I.A. No.649/2019 (Stay)

PIONEER PUBLICITY CORPORATION PVT. LTD. Petitioner
Through Mr.Ramesh Kumar, Adv.

versus

FIITJEE LTD. Respondent
Through Mr.Sandeep Sharma and Mr.Sarthak
Mannan, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER
% **13.03.2019**

1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Licence Agreement for Semi Naming Rights of IIT Metro Station executed between the parties on 11.01.2018.
2. The said Agreement contains an Arbitration Agreement in form of Clause 15 thereof which is reproduced hereinbelow:

"15. That any dispute between First Party and Second Party will be settled by mutual discussion and deliberation first, but in case any dispute is not resolved by mutual discussion and deliberation, then the dispute so existing shall be resolved by the Sole Arbitrator in accordance with the provisions of Indian Arbitration and Conciliation Act, 1996. The parties agree that the Sole Arbitrator shall be appointed by the second party and the place of Arbitration shall be at Delhi."

3. The disputes having arisen between the parties, the petitioner invoked

the Arbitration Agreement vide its e-mail dated 24.09.2018. The respondent, however, by its e-mail dated 25.09.2018 refused to appoint an Arbitrator, forcing the petitioner to file the present petition.

4. The present petition was filed by the petitioner on 28.11.2018. Notice on the petition was issued to the respondent on 06.12.2018.

5. The respondent claims that by a communication dated 06.12.2018 the respondent has appointed an Arbitrator in exercise of its power under Clause 15 of the Licence Agreement as reproduced hereinabove.

6. In my opinion, as the petition had already been filed before this Court, the respondent did not have any further right to appoint an Arbitrator having forfeited the same due to its failure to appoint an Arbitrator at the first instance. In this regard reference can be made to the judgment of the Supreme Court in ***Datar Switchgears Ltd v. Tata Finance Ltd. and Anr.*** (2000) 8 SCC 151.

7. Learned counsel for the respondent, further submits that the e-mail dated 24.09.2018, apart from invoking Clause 15 of the Licence Agreement, which is the Arbitration Agreement, also invoked Clause 13 of the Licence Agreement. He submits that under Clause 13 of the Agreement, the petitioner was to give a 15 days notice to the respondent to rectify the alleged defects/breach, if any, on part of the respondent. Therefore, it is only on the expiry of the 15 days period that the petitioner could have invoked the Arbitration Agreement.

8. Clause 13 and 14 of the Licence Agreement are reproduced hereinbelow:

“13. That in case any non-performance of any clause of the agreement or any disagreement or dispute arising between the

parties during the subsistence of the agreement the other party shall in writing notify the other party and the other party shall rectify the same within 15 days.

14. That is case the other party fails to rectify the same then within the time as given in the agreement then at its sole discretion notifying party can terminate the agreement or may claim compensation as the case may be.”

9. A reading of the above two Clauses would clearly show that the same deal with the right to terminate the Agreement or claim compensation for breach of any term thereof. Before terminating the Agreement due to breach of the Agreement by the other party, the party complaining of the breach has to give a 15 days notice to the other party for rectifying such breach. It is only if such breach is not rectified, the party complaining of breach can terminate the Agreement or claim compensation for such breach. This has no bearing with Clause 15 of the Agreement, which is the Arbitration Agreement between the parties.

10. Learned counsel for the respondent has also placed reliance on the e-mail dated 27.09.2018 addressed by the petitioner to the respondent which *inter-alia* states as under:

“In the above circumstances, you are requested to abide by the orders passed by the Honourable High Court and to ensure that the text recommended by you for display is in accordance with the Court orders. You are further requested to clear the outstanding payment within 7 days failing which the same shall be liable to be paid together with interest and will put us under constraints to seek redressal as per dispute resolution mechanism specified in the agreement. We sincerely hope and believe that you shall not put us under constraints to invoke the dispute resolution mechanism and we expect you to make payment of the outstanding amount immediately and to continue

the display of your advertisements in compliance of the orders passed by the Court.”

11. Learned counsel for the respondent submits that the above e-mail would clearly show that the petitioner had waived its right under the previous e-mail dated 24.09.2018 and had threatened to invoke the Arbitration Agreement afresh in case the respondent failed to comply with the request made in the e-mail.

12. I am unable to agree with the submissions made by the learned counsel for the respondent. The petitioner had already invoked the Arbitration Agreement by its e-mail dated 24.09.2018. The e-mail dated 27.09.2018 was yet another attempt on the part of the petitioner to give an opportunity to the respondent to rectify its alleged breach before the arbitration mechanism is put in motion. This e-mail cannot be read as a waiver of the invocation of the Arbitration Agreement already done by the e-mail dated 24.09.2018.

13. In view of above, I see no impediment in appointing an Arbitrator for adjudicating the disputes between the parties in relation to the abovementioned Licence Agreement.

14. I appoint **Mr.G.P.Thareja**, Retired Additional District Judge, Delhi, (B-201, Priyadarshni Appartment, Patparganj, Delhi Ph: 20906899) as an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the abovementioned Licence Agreement.

15. The Arbitrator shall give disclosure under Section 12 of the Act before proceeding with the reference.

16. The Arbitration shall be held under the aegis of the Delhi International Arbitration Centre (DIAC) and rules of the DIAC shall be applicable to such proceedings.

17. The petition is allowed in the above terms, with no order as to cost.

Dasti.

NAVIN CHAWLA, J

MARCH 13, 2019/Arya