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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 11th August, 2023
Pronounced on: 16th August, 2023

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ARB.P. 374/2023

M/S G.S. EXPRESS PVT. LTD.

..... Petitioner

Through: Mr.Karan Luthra, Mr.Pratham
 Mehrotra, Advocates.

versus

NTPC LTD.

..... Respondent

Through: Mr. Gopal Jain, Sr Advocate with
 Mr.Vikram Singh Baid, Mr.Adarsh
 Tripathi and Mr.Ajitesh Garg,
 Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition is filed by the petitioner under Section 11 of Arbitration and Conciliation Act for appointment of an arbitrator to adjudicate the disputes between the parties. The only contention raised in the present petition is the arbitration was not invoked within time and hence petition under Section 11 of the Arbitration and Conciliation Act is not maintainable. The relevant clauses are as under:

“7. Settlement of Disputes

7.1 Mutual Consultation If any dispute of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing, any question regarding its existence, validity or termination, or the execution of the Works, whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract, the parties shall seek to resolve any such dispute or difference by mutual consultation. If the parties fail to resolve such a dispute or difference by mutual consultation, then the

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dispute may be settled through Expert Settlement Council / Arbitration / other remedies available under the applicable laws.

7.2 Resolution of Dispute through Expert Settlement Council If the parties fail to resolve such a dispute or difference by mutual consultation, the dispute if the parties agree, may be referred to Conciliation in cases involving disputed amount up to Rs 250 crores, which is to be arrived at considering the claim and counter claim of the parties to the dispute.

7.3 Arbitration

7.3.1 If the process of mutual consultation and/or ESC fails to arrive at a settlement between the parties as mentioned at GCC Sub-Clauses 7.1 & 7.2 above, Employer or the Contractor may, within Thirty (30) days of such failure, give notice to the other party, with a copy for information to the ESC (as applicable), of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given. The mechanism of settling the disputes through arbitration shall be applicable only in cases where the disputed amount (i.e. total amount of Claims excluding claims of interest) does not exceed Rs. 25 crores. In case the disputed amount exceeds Rs. 25 Crores, the parties shall be within their rights to take recourse to remedies as may be available to them under the applicable laws other than Arbitration after prior intimation to the other party. There shall be no arbitration where the claim amount is only up to Rs. 5 lakhs.

The parties at the time of invocation of arbitration shall submit all the details of the claims and the counter-claims including the Heads/Sub-heads of the Claims/Counter-Claims and the documents relied upon by the parties for their respective claims and counter-claims. The parties shall not file any documents/details of the claims and counter-claims thereafter.

The claims and the counter claims raised by the parties at the time of invocation of the arbitration shall be final and binding on the parties and no further change shall be allowed in the same at any stage during arbitration under any circumstances whatsoever.

The parties to the contract shall invoke arbitration within Six months from the date of completion of the execution of work under the contract or the termination of the contract as the case may be and the parties shall not invoke arbitration later on after expiry of the said period of six months.

The parties shall not invoke arbitration other than in the case of completion of execution of work or the termination of the contract as mentioned above.

Notwithstanding the above, in case of disputes with Indian Contractor who is a Central Government Department /Enterprise /organisation or a State Level Public Enterprise (SLPE), the aforesaid limit of Rs 25 crores shall not be applicable and arbitration proceeding may be commenced irrespective of the amount involved in dispute if the dispute could not be



resolved through Conciliation as brought out at GCC Sub Clause 7.2 above.”

2. It is submitted by the learned counsel for the respondent *per* clause 7.3.1 of the contract the parties could invoke arbitration only within six months from the date of completion of the execution of work under the contract or the termination of contract but not thereafter. It is submitted the work was completed on 30.06.2021 and the petitioner could have invoked the arbitration only till 30.12.2021 and not thereafter. However the letter of the petitioner for mutual consultation come only on 02.09.2022, much beyond the limitation period, hence the petitioner is barred to file this petition.

3. The learned counsel for the respondent has referred to *United India Insurance Company Limited and Another vs. Hyundai Engineering and Construction Company Limited and Others* (2018) 17 SCC 607, wherein the Court held as under:

“10. xxxxxx “23. It does not need special emphasis that an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. It can also lay the postulate in which situations the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.

*12. From the line of authorities, it is clear that the arbitration clause has to be interpreted strictly. The subject clause 7 which is in pari materia to clause 13 of the policy considered by a three-Judge Bench in Oriental Insurance Company Limited (supra), is a conditional expression of intent. Such an arbitration clause will get activated or kindled only if the dispute between the parties is limited to the **quantum** to be paid under the policy. The liability should be unequivocally admitted by the insurer. That is the pre- condition and sine qua non for triggering the arbitration clause. To put it differently, an arbitration clause would enliven or invigorate only if the insurer admits or accepts its liability under or in respect of the policy concerned.”*

4. In *Harsha Constructions vs. Union of India and Others* (2014) 9



SCC 246, it was held:

“14. Upon perusal of both the clauses included in the contract, which have been referred to hereinabove, it is crystal clear that all the disputes were not arbitrable. Some of the disputes which had been referred to in Clause 39 were specifically not arbitrable and in relation to the said disputes the contractor had to negotiate with the concerned Engineer of the respondent and if the contractor was not satisfied with the rate determined by the Engineer, it was open to the contractor to file an appeal against the decision of the Engineer before the Chief Engineer within 30 days from the date of communication of the decision to the contractor.

17. The question before this Court is whether the Arbitrator could have decided the issues which were not arbitrable.

18. Arbitration arises from a contract and unless there is a specific written contract, a contract with regard to arbitration cannot be presumed. Section 7(3) of the Act clearly specifies that the contract with regard to arbitration must be in writing. Thus, so far as the disputes which have been referred to in Clause 39 of the contract are concerned, it was not open to the Arbitrator to arbitrate upon the said disputes as there was a specific clause whereby the said disputes had been “excepted”. Moreover, when the law specifically makes a provision with regard to formation of a contract in a particular manner, there cannot be any presumption with regard to a contract if the contract is not entered into by the mode prescribed under the Act.”

5. Thus it is the submission of the learned counsel for the respondent if there is any condition in the arbitration agreement which makes certain disputes unarbitral or which restricts the arbitration to a particular amount of dispute; these terms need to be adhered to by the parties. It is submitted since the arbitration was invoked after a period of 180 days, hence against clause **7.1.3** (supra), thus Section 11 petition would not be maintainable. He also further referred to In *Pandit Construction Company vs. Delhi Development Authority and Anr.* 2007 SCC OnLine Delhi 993, wherein the following was held:

“xxxxxx.... But there could be agreement which do not seek to curtail the time for enforcement of the right but which provides for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act. to put it differently, curtailment of the period of limitation is not permissible in view of Section

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28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy the benefits flowing from the policy shall stand extinguished and any subsequent action would be time-barred. Such a clause would fall outside the scope of Section 28 of the Contract Act. This in brief, seems to be the settled legal position. We may now apply it to the facts of this case.”

6. Heard. The facts are on 02.09.2022 an application was moved with the respondent by the petitioner for mutual consultation but no response was received from the respondent. Further on 02.10.2022 a letter was again sent by the petitioner to the respondent for referring the matter to an expert settlement council but yet again no response was received from the respondent. On 15.11.2022 the petitioner sent a notice to the respondent for invocation of arbitration and on 09.12.2022 an email was received from the respondent wherein it asked for the petitioner to attend a meeting on 19.12.2022 wherein the respondent offered to send the matter to an expert settlement council, which the petitioner refused and thereafter he filed this petition.

7. In *Municipal Corporation of Delhi vs. Natraj Construction Company* in FAO 432/2010 decided on 22.03.2023, this Court held:

“9. Insofar as the appellant’s contention regarding the claim having been time barred is concerned, it is noted that the same is of no merit in view of amended Section 28 of the Indian Contract Act. In this regard, reference may profitably be made to the decision in Pandit Construction Company v. Delhi Development Authority & Anr. reported as 2007 SCC OnLine Del 993, where also plea of limitation was taken by pressing a clause similar to Clause 25 of the Agreement between the present parties.

11. In view of the amended Section 28 of Indian Contract Act therefore, the appellant cannot be permitted to press Clause 25 of the Contract Agreement and restrict the period of limitation for invoking arbitration clause to 120 days. The contention being meritless is rejected”

8. Further in *Grasim Industries Limited vs. State of Kerala* (2018) 14 SCC 265, the Court held:

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“11. Section 28(b) unequivocally provides, that an agreement which extinguishes the right of a party on the expiry of a specified period, would be void. Therefore, even if a restricted period for raising an arbitral dispute had actually been provided for (as was determined, in the impugned order), the same would have to be treated as void.”

9. In *Sagar Construction through Subhash Chand Saini vs. Govt. of NCT of Delhi* 2021 SCC OnLine Delhi 4648, the Court held as under:

“8. Mr. Khan, learned counsel appearing for the respondent does not dispute the existence of the Arbitration Clause or that the petitioner had invoked the same. He, however, submits that since the request for arbitration was not made within a period of one hundred and twenty days from the date of preparation of the Final Bill, the petitioner has lost its rights to seek the aforesaid remedy. He also submits that in any event, the petitioner's claims are barred by limitation.

9. Mr. Bansal, learned counsel appearing for the petitioner, has countered the aforesaid submissions.

10. The question whether the period of invoking the arbitration could be restricted to a period less than as provided under the Limitation Act, 1963 is no longer res integra.”

11. In Grasim Industries Limited v State of Kerala: (2018) 14 SCC 265, the Supreme Court considered an appeal from an order where the appellant was non suited on the ground that the demand for appointment of the Arbitral Tribunal was not made within the time as stipulated in the arbitration agreement. The Supreme Court found that the relevant clause did not stipulate any time and further held as under:

“11. Section 28(b) [of the Contract act, 1872] unequivocally provides that an agreement which extinguishes the right of a party on expiry of the a specified period, would be void. Therefore, even if a restricted period for raising an arbitral dispute has actually been provided for (as was determined in the impugned order), the same would be treated as void”

10. In *Shanti Prasad Goenka vs. Mahanagar Telephone Nigam Ltd.* 2016 SCC OnLine Delhi 5256, it was held:

“4. She also submits that in view of express condition in the arbitration clause, the petitioner is deemed to have waived his right for invoking the arbitration.

7. In Chander Kant & Co (supra), a Division Bench of this Court was concerned with a petition under Section 11 (5) of the Act for appointment of an arbitrator. In that case, the work was completed on 11.10.1990 and the final bill was released on 07.11.2002. The petitioner therein invoked



the arbitration clause by a notice dated 17.06.2004. As in the present case, the respondent therein had urged that failure to make demand for appointment of the arbitrator beyond the specified period of 90 days had resulted in forfeiture or waiver of the right to invoke the arbitration clause. The Division Bench noted the earlier decisions and concluded that the clause which restricts the period of limitation or provides for waiver of the right, if no action is commenced within the specified period, is violative of Section 28 of the Indian Contract Act, 1872 as amended.”

11. Thus, in view of the law laid down in Natraj Construction Company (*supra*); Grasim Industries Limited (*supra*); Sagar Construction (*supra*); and Shanti Prasad Goenka (*supra*) there is no doubt to hold that invoking arbitration clause after 120 days would not waive the right of the petition to approach this Court under Section 11 of the Arbitration and Conciliation Act, hence petition is allowed.

12. In the circumstances, Ms. Justice Mukta Gupta (Retd.) (Mob.No.9650788600) is hereby appointed as an arbitrator to adjudicate the disputes between the parties.

13. The rights and contentions of the parties are left open. The proceedings be conducted under the aegis of the Delhi International Arbitration Centre (DIAC) and fee be governed by 4th Schedule of the Arbitration and Conciliation Act.

14. The petition stands disposed of in above terms. Pending application, if any, also stands disposed of.

YOGESH KHANNA, J.

AUGUST 16, 2023

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