

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

% **Date of order : 27th March, 2023**

+ ARB.P. 1454/2022
SWIFT SECURITAS (P) LTD Petitioner
Through: Mr. Deepak Khadaria, Advocate

versus

M/S DELHI MSW SOLUTIONS LTD. Respondent
Through: Mr. Matrugupta Mishra and Ms.
Ishita Thakur, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The present petition has been filed on behalf of the petitioner under section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") seeking appointment of arbitrator for adjudication of disputes between the parties with respect to the Security Contract executed on 10th September, 2012.
2. Learned counsel appearing on behalf of the petitioner submitted that the petitioner is a company registered under the Companies Act, 1956 and is engaged in the business of providing security services.
3. It is submitted on behalf of the petitioner that the respondent, a company registered under the Companies Act, 1956 had availed the services of the petitioner for providing security services and thereby

reduced their terms in writing vide Security Agreement dated 10th September, 2012.

4. Learned counsel appearing on behalf of the petitioner submitted that in the year 2016, issues emerged between the parties, and the petitioner issued a notice dated August 2016, which is attached as Document No. 8 to the petition, for the adjudication of those disputes. It is further submitted that respondent failed to give any response to the said notice and thereby the petitioner was constrained to file an arbitration petition bearing no. 561/2017 for appointment of an arbitrator in order to adjudicate the dispute between the parties before this Court.

5. It is submitted on behalf of the petitioner that the aforesaid petition was withdrawn vide order dated 6th March, 2018 in order to avail the appropriate legal remedy before the appropriate forum. It is further submitted that the petitioner, thereafter, filed a civil suit before the District Judge of the North District at the Rohini Courts in Delhi, bearing CS No. 924/2018 for the recovery of Rs.72,79,527.60/- from the respondent herein, together with future interest at 18% per annum. Learned counsel representing the petitioner further argues that in that suit, CS No. 924/2018, the respondent herein filed an application under Section 8 of the Act read with Section 151 of the Code of Civil Procedure, 1908, arguing that the suit was not maintainable based on Clause No. 15 of the agreement in relation to the arbitration.

6. Learned counsel appearing on behalf of the petitioner submitted that on the first occasion, in the earlier petition under Section 11 of the Act, the respondent took the position that there was no arbitration

clause in the agreement governing the parties' disputes, and in the civil suit bearing CS No. 924/2018, he took the position that since the arbitration clause was present in the agreement, the petitioner should be directed to invoke it.

7. Learned counsel appearing on behalf of the petitioner submitted that the learned additional District Judge-03, Rohini Courts, vide order dated 13th July, 2022 allowed the application filed by the respondent herein under section 8 of the Act and dismissed the suit of the petitioner herein with the following observation:

"6. Moreover, the contention of the Ld. Counsel for the defendants that the present suit should be bifurcated and the agreements/work orders which contain an arbitration clause should be segregated from those which do not contain an arbitration agreement, is not tenable. Such a bifurcation can lead to multiplicity of proceedings as well as conflicting judgments. Also, the plaintiff in his plaint clearly stated that the defendants used to take consolidated ledger and the plaintiff was maintaining a running account in their books in the name of the defendants. Plaintiff has also stated in his plaint that only for sake of convenience and internal accounting of defendants accounts for different project sites were given to the defendants.

7. Furthermore, this court is of the considered view that the Security Agreement dated 10.09.2012 is the main agreement from which the relationship between the parties emerged. In clause 3 of this agreement, the scope of work has been stated to as under:

"the 1st party shall provide employees for security services to be deployed at the offices/business places of the 2nd party on terms as specified. "

Therefore, on interpretation of the agreement for Security Contract, it appears that the Security Contract had parent terms and conditions that were supposed to be applicable in all the subsequent work orders for deployment of security.”

8. In view of the foregoing submissions, it has been submitted on behalf of the petitioner that the petitioner left with no alternate remedy is constrained to invoke the jurisdiction of this Court by virtue of Section 11 of the Act for appointment of an independent arbitrator for redressal of disputes between the parties.

9. *Per Contra*, learned counsel appearing on behalf of the respondent vehemently opposed the averments made in the instant petition and submitted that the parties never had the instant to be governed by the agreement dated 10th September, 2012. It is further submitted that the subsequent Work Order and renewal agreements were not executed with an aim to renew the said Security Agreement. Furthermore, the Security Agreement as relied upon by the petitioner expired on 9th September, 2013 and was never renewed by any subsequent agreement or work order.

10. It has been submitted on behalf of the respondent that the work already commenced as per the Work Order issued by the respondent during the period of 7th March, 2012 to 10th September, 2012. It is further submitted that in accordance of the terms and conditions of the said orders, the petitioner duly deployed its personnel at various establishments of the respondent and bills thereof were raised by the petitioner prior to the execution of the Security Agreement.

11. Learned counsel appearing on behalf of the respondent submitted that the arbitration clause provided under Security Agreement fails to meet the requisites as provided under the Section 7 of the Act.

12. It is submitted on behalf of the respondent that Section 7 of the Act requires, for an arbitration clause that is not a term relating to the “carrying out” of the contract, a clear or specific indication that the main contract in its entirety, including the arbitration agreement, was intended to be made applicable to the sub-contract between the parties. In order to support the said contention, the learned counsel appearing on behalf of the respondent seeks to place reliance on the judgement of Hon’ble Supreme Court titled as *M.R. Engineers & Contractors (P) Ltd. v. SomDatt Builders Ltd.*; (2009) 7 SCC 696.

13. It has been submitted on behalf of the respondent that due to the inadequacy of the reference to the arbitration provision in the Agreement dated 10th September, 2012 in future work orders/renewals, it cannot be argued that the arbitration clause binds the parties hereunder. It is further submitted that should the petitioner's argument be accepted, it would be inconsistent to the design and policy of Section 11(6) of the Act when read in conjunction with the scope and jurisdiction of this Court. Moreover, parties who desire to have an agreement with arbitration and those who do not must be dealt with and understood individually, otherwise, the parties’ intentions would be undermined.

14. It has been submitted on behalf of the petitioner that the instant petition filed by the petitioner is pre-mature in nature, since the petitioner

has failed to procedure as envisaged under the agreement in order to invoke the arbitration clause.

15. Heard the learned counsel for the parties and perused the record.

16. This Court while adjudicating upon the instant petition and the disputes arising therefrom, finds it appropriate to frame the following issues:

a) Interpretation of the Agreement dated 10th September, 2012 executed between the parties and essentials under Section 7 of the Agreement

b) Whether the present petition filed on behalf of the petitioner is pre-mature.

Interpretation of the Agreement dated 10th September, 2012 executed between the parties and essentials under Section 7 of the Act.

17. In order to adjudicate upon the instant issue, it would be evident to peruse the arbitration clause provided under the said agreement. The same s reproduced hereunder:

"15. ARBITRATION:

Any dispute arising out of this agreement or that which may arise in future, shall be solved by taking recourse to mutual settlement or arbitration between First Party and the second party. The matter shall be referred for arbitration to a committee of three joint arbitrators one of whom will be nominated by the First Party; another by second party and the third will be nominated jointly by the two arbitrators nominated by both the parties. The arbitration proceeding will be as per the provision of The Indian Arbitration Act."

18. The perusal of the abovementioned clause makes it clear that in case of any dispute between the parties, the same shall be referred to arbitration by appointing a Sole Arbitrator. Furthermore, in light of “Doctrine of Separability” adjudication with respect to survival of arbitration clause cannot be disputed.

19. Section 16 of the Act provides that an arbitration clause is an independent agreement and is not subject to survival or termination of a main agreement. The said provision is reproduced hereunder:

“16. Competence of arbitral tribunal to rule on its jurisdiction.—

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.”

20. The law surrounding the severability of an arbitration agreement has been decided time and again by the Hon'ble Supreme Court and by this Court. According to this doctrine, the arbitration clause should be seen as a separate agreement and shall survive the termination, breach, and invalidity of the main contract, remaining distinct from it.

21. Thus, the contention of the respondent that the Security Agreement has been subsumed by the work orders executed between the parties and was never renewed post its expiry i.e. on 9th September, 2013 cannot be of much help in order to dismiss the petition filed on behalf of the petitioner.

Whether the present petition filed on behalf of the petitioner is premature.

22. This Court while adjudicating the above issue has already perused the arbitration clause as provided under the Security Agreement and is of view that the same cannot come to the rescue of the respondent as the same is directory in nature and not mandatory.

23. The same has been settled by the Hon'ble Supreme Court in its judgements titled as *Visa International Ltd. Continental Resources (USA) Ltd;* (2009) 2 SCC 55 and *Demerara Distilleries (P) Ltd. v. Demerara Distillers Ltd.;* (2015) 13 SCC 610 whereby it has been held that when there is no scope for an amicable resolution and the obligation of mutual settlement is merely a formality and therefore, the compliance of the same becomes unnecessary.

24. In view of the foregoing discussions, this Court is inclined to allow the prayer of the petitioner and consequently appoint a Sole Arbitrator for adjudication of disputes between the parties arising *qua* Security Agreement dated 10th September, 2012. Hence, the following order:

ORDER

- (i) Ms. Radhika Bishwajit Dubey, Advocate is appointed as a sole arbitrator to adjudicate the disputes between the parties which have arisen under the Security Agreement dated 10th September, 2012;
- (ii) The learned sole arbitrator, before entering the arbitration reference, shall ensure the compliance of Section 12(1) of the Arbitration and Conciliation Act, 1996;
- (iii) The learned sole arbitrator shall be paid fees as prescribed under the Delhi International Arbitration Centre (DIAC) (Administrative Cost and Arbitrators Fees) Rules, 2018 as amended vide notification dated 15th November, 2022;

- (iv) At the first instance, the parties shall appear before the learned sole arbitrator within 10 days from today on a date which may be mutually fixed by the learned sole arbitrator;
- (v) All contentions of the parties are expressly kept open.

25. A copy of the same be supplied to the appointed arbitrator on address mentioned below:

Ms. Radhika Bishwajit Dubey, Advocate
F-18, 3rd floor, Geetanjali Enclave, New Delhi 110017
Ph. No.+91 98280-31813/63910-06169
E-mail ID - radhika.arora21@gmail.com

26. With the aforesaid observations, the present petition is accordingly disposed of.

27. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

MARCH 27, 2023
gs/ug

Click here to check corrigendum, if any