



2025:DHC:3531



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Date of decision 05th May, 2025*

+ ARB.P. 2018/2024

M/S S AND S CONSTRUCTION CO.

.....Petitioner

Through: Mr. Kunwar Chandresh, Mr. Munis
Nasir, Ms. Poonam Prasad and Mr. Divyansh
Singh, Advocates.

versus

UNION OF INDIA

.....Respondent

Through: Mr. Bhagvan Swarup Shukla, CGSC
with Mr. Sarvan Kumar, Advocate.**CORAM:****HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J. (Oral)**

1. This petition is filed on behalf of the Petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('1996 Act') seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.
2. Factual matrix to the extent necessary and as averred in the petition is that Respondent invited tender for construction of ITBP Road to Indo-China Border from Niti to Geldung in the State of Uttarakhand. Work of construction was awarded to the Petitioner by the Respondent vide Letter of Acceptance dated 18.06.2012. The tender amount for the work was Rs.23,22,83,091/- and stipulated date of start was 28.06.2012, while stipulated date of completion was 27.03.2013. Petitioner avers that it started the work as per the terms and conditions, however, the project was delayed



for reasons not attributable to the Petitioner.

3. Petitioner further avers that on account of prolongation of the project and increase in rates of wages of skilled workers, Petitioner suffered huge losses and wrote to the Respondent vide letter dated 29.07.2023 for payment and dispute resolution under Clause 25 of GCC. Reminders were sent thereafter and finally the Respondent constituted Dispute Redressal Committee ('DRC'), which fixed a meeting for 26.03.2024, however, no concrete decision was taken on the claims of the Petitioner and thus, Petitioner invoked the Arbitration Clause vide notice dated 02.08.2024 and sought appointment of a Sole Arbitrator from a list of six Arbitrators.

4. It is stated that in response to the invocation notice, Respondent did not appoint the Arbitrator and instead wrote back vide letter dated 02.09.2024 that the DRC had given its decision on 18.04.2024, however, since no request was made by the Petitioner within 30 days for appointment of the Arbitrator, Petitioner lost its right to seek arbitration. Aggrieved with this, Petitioner approached this Court for appointment of the Sole Arbitrator.

5. Mr. Bhagwan Swarup Shukla, learned Central Government Standing Counsel appearing on behalf of the Respondent opposes the petition on the ground that under Clause 25 of GCC, which is a clause for '*Settlement of Disputes & Arbitration*', a mechanism is stipulated for reference of disputes within the time periods as mentioned. In case of any dispute pertaining to specifications etc., arising out of the Contract, the contractor is required to promptly within 15 days request the Superintending Engineer (S.E.) for written instructions or decision and the S.E. is bound to give the instructions/decision within 01 month. If the S.E. fails to act or contractor is dissatisfied with the instructions/decision, contractor may within 15 days of



the receipt of the decision, appeal to Chief Engineer, who after giving an opportunity of hearing, shall give his decision within 30 days from receipt of the appeal and if the contractor is dissatisfied with the decision of the Chief Engineer, he may within 30 days appeal before the DRC. It is further provided that DRC shall give its decision within 90 days from receipt of the appeal and in case of inaction in disposing the appeal or if contractor is dissatisfied, then he may give notice to the Chief Engineer for appointment of the Arbitrator within 30 days from receipt of the decision of DRC. It is urged that in the present case, DRC rendered its decision on 18.04.2024 but the request for appointment of the Arbitrator was received from the Petitioner vide letter dated 02.08.2024, which was beyond the period of 30 days and hence, this petition cannot be allowed.

6. *Per contra*, learned counsel for the Petitioner submits that any agreement, which extinguishes the rights and remedies of a party on expiry of a specified period, is void and in the teeth of Section 28(b) of the Contract Act, 1872 ('1872 Act') and in support of this plea, refers to Section 28(b) as also a judgment of this Court in ***G.S. Express Pvt. Ltd. v. NTPC Ltd., 2023 SCC OnLine Del 4925.***

7. Heard learned counsels for the parties.

8. Respondent does not dispute the existence of an Arbitration Agreement between the parties and in fact, relies on Clause 25 of GCC, as modified, which is the Arbitration Clause for settlement of disputes. The singular objection to the appointment of the Arbitrator is that Petitioner did not invoke the Arbitration Agreement within a period of 30 days from the receipt of the decision of DRC as envisaged in the Clause, which according to learned counsel for the Respondent extinguishes the right of the Petitioner



to claim its outstanding dues and remedy to take recourse to arbitration proceedings.

9. The question that arises for consideration before this Court is whether the period for invoking arbitration can be restricted to a period less than provided under the Limitation Act, 1963. This question need not detain this Court as this issue is no longer *res integra*. In ***Grasim Industries Limited v. State of Kerala, (2018) 14 SCC 265***, dealing with a similar issue where the Respondent declined to refer the matter to arbitration on the ground that Appellant had not invoked arbitration within the time stipulated in the Arbitration Agreement. Referring to Section 28(b) of 1872 Act, the Supreme Court held that the said provision unequivocally provides that an agreement, which extinguishes the right of a party on expiry of the specified period, would be void and therefore, even if a restricted period for raising an arbitral dispute is provided for, the same would be treated as void. To the same effect is the decision of this Court in ***National Highways Authority of India v. Mecon – Gea Energy Systems India Ltd. JV, 2013 SCC OnLine Del 1273*** and relevant passages are as follows:-

“41. A perusal of the amended Section 28 of the Contract Act, 1957 extracted above would show that both kinds of agreements i.e. agreements which restrict the period of limitation within which claims could be referred, as also agreements which extinguish the right of a party to prefer a claim or discharges any party from any liability under a contract on expiry of a specified period, are void to that extent.

*42. Before the amendment of Section 28 in 1997, the agreements reducing the period of limitation were distinguished from those which did not limit the time within which a party might enforce his rights, but which provided for a release or forfeiture of rights, if no suit was brought within the period stipulated in the agreement; and the latter class of agreements, being outside the scope of the section, were held to be binding between the parties. Thus, in *National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co. (AIR 1997 SC 2049)*, the Supreme Court drew a clear distinction between an agreement which curtails the period of limitation and an agreement*



which provides for forfeiture or waiver of the right itself, if no action is commenced within the period stipulated by the agreement. The first was held to be void as offending Section 28 but, the later was held not falling within the mischief of Section 28. Thus, it was held that curtailment of the period of limitation was not permissible in view of Section 28 but extinction of the right itself, unless exercised within the specified time, was permissible and can be enforced.

43. After the 1997 amendment to Section 28 of the Indian Contract Act, 1872, not only the curtailment of the period of limitation is void, but also the extinction of right, if sought to be brought by the agreement within a specific period, which period is less than the period of limitation prescribed for the suit under the Contract in question, is also rendered void. In other words, after the amendment to Section 28 of the Indian Contract Act, 1872 by Act 1 of 1997, the distinction between curtailment of the period of limitation and extinction of the right itself, after the specified period, no longer exists.”

10. The same view was taken by this Court in ***Shanti Prakash Goenka v. Mahanagar Telephone Nigam Ltd., 2016 SCC OnLine Del 5256***, while dealing with an Arbitration Clause providing for period of 90 days for invocation of the Arbitration Clause. The only objection of the Respondent was the invocation by the Petitioner beyond the stipulated period and negating this contention, Court allowed the petition under Section 11(5) of 1996 Act and appointed the Arbitrator. Relevant passages are as follows:-

“3. The only objection raised by the respondent is that the invocation of the arbitration clause is beyond the period of limitation of 90 days. The learned counsel for the respondent has pointed out that the final bill was prepared on 15.03.2013 and the petitioner invoked the arbitration clause on 04.04.2015. She also drew the attention of the Court to the arbitration clause, which specifically provides that if the demand for arbitration in respect of any claim is not made within 90 days of receiving the intimation from the MTNL that the bill is ready for payment, the demand would be deemed [sic demand] to have been waived and barred.

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.

5. The learned counsel for the petitioner has countered the aforesaid submissions and submits that the issue whether the period of limitation for invoking the arbitration clause can be restricted is no longer res- integra



as same is covered by several decisions of this Court including *Hindustan Construction Company v. DDA* : 1999 (1) Arb. LR 272; *Pandit Construction Company v. Delhi Development Authority* : 2007 (3) Arb LR 205 (Delhi); and *Chander Kant & Co. v. The Vice Chairman, DDA* : Arb. Pet. No. 246 of 2005, decided on 26.05.2009.

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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.

8. In my view, the decision in *Chander Kant & Co. (supra)*, squarely covers the objection raised by the respondent in the present petition. Accordingly, the penultimate sub paragraph of the Arbitration clause which provides that “if the any contractor(s) does/do not make any demand for arbitration in respect of any claim (s) in writing within 90 days of receiving the intimation from the MTNL, that the bill is ready for payment, the claim of the contractor (s) will be demand to have been waived and absolutely barred and the MTNL shall be discharged and released of all liabilities under the contract in respect of these claims” is void.

9. In view of the above, the petition is allowed. It is directed that a sole arbitrator be appointed under the Rules of the Delhi International Arbitration Centre (DIAC). The representatives of the parties shall appear before the co-ordinator, DIAC on 04.10.2016 at 11:00 AM. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules.”

11. In this context, I may also refer to a recent judgment in ***G.S. Express Pvt. Ltd., (supra)***, where relying on the aforesaid judgments, this Court appointed the Arbitrator holding that Clause 7.3.1 of the Contract to the extent it limited the period for invoking arbitration to 06 months was unconscionable and void in light of Section 28(b) of 1872 Act. In light of



these judgments, this Court is unable to agree with learned counsel for the Respondent that Petitioner is precluded from invoking the Arbitration Clause only because it failed to seek invocation within a period of 30 days from the date of receipt of the decision of DRC. Accordingly, I hold that the penultimate sub-paragraph of Clause 25 which reads, *'if the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final, binding and conclusive and not referable to adjudication by the arbitrator'*, will not extinguish the right of the Petitioner to approach this Court under Section 11 of 1996 Act for appointment of an Arbitrator.

12. Accordingly, this petition is allowed, appointing Mr. Justice J R Midha, former Judge of this Court (Mobile No. 9717495003) as a Sole Arbitrator to adjudicate the disputes between the parties. Fee of the learned Arbitrator will be as per Fourth Schedule of 1996 Act.

13. Learned Arbitrator shall give disclosure under Section 12 of the 1996 Act before entering upon reference.

14. It is made clear that this Court has not expressed any opinion on the merits of the case and all rights and contentions of the respective parties are left open.

15. Petition is disposed of in the aforesaid terms.

JYOTI SINGH, J

MAY 5, 2025/s.Sharma