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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **ARB.P. 426/2014**

VIJAY KUMAR KAPOOR ..... Petitioner
Through: Mr. Akhilesh Kumar Pandey and Mr. Pankaj Kumar, Advocates.

versus

HELLO MINERAL WATER PVT LTD. ..... Respondent
Through: Mr. Deepak Kohli and Mr. Praveen, Advocates.

AND

52.
\+ **O.M.P. (I) 491/2015 & IA 18011/2015**

VIJAY KUMAR KAPOOR ..... Petitioner
Through: Mr. Akhilesh Kumar Pandey and Mr. Pankaj Kumar, Advocates.

versus

HELLO MINERAL WATER PVT LTD. ..... Respondent
Through: Mr. Deepak Kohli and Mr. Praveen, Advocates.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
% **06.10.2016**

1. Mediation appears to have not succeeded.

2. Arb.P. 426/2014 is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act') filed by Vijay Kumar Kapoor seeking the appointment of an Arbitrator to adjudicate the disputes between the parties pursuant to an agreement dated 1st July, 2002 which contains an arbitration clause. OMP (I) 491 of 2015 is a petition under Section 9 of the Act seeking interim relief.

3. In terms of the said agreement, the Petitioner was appointed 'C & F Agent' to receive the stocks of the Respondent's packaged drinking water under the brand name 'Hello'. The Petitioner in terms of the said agreement took on lease and maintained an office for stocking and selling of the products. The said agreement, admittedly, contained an arbitration clause.

4. It appears that that agreement was renewed on 1st February, 2007 and this renewed agreement also contained an arbitration clause.

5. Learned counsel for the Respondent has drawn attention of the Court to a letter dated 9th October, 2007 jointly signed by both parties in which *inter alia* it is stated that the agreement dated 1st February, 2007 "shall be deemed to have been cancelled." It is, accordingly, submitted that since the fresh agreement does not contain any arbitration clause, the question of referring of disputes of the parties to arbitration does not arise.

6. Secondly, it is pointed out that the claim by the Petitioner is itself *prima facie* time barred. The last of the payments made by the Respondents to the Petitioner in terms of the agreement was on 1st September, 2009.

7. Learned counsel for the Petitioner contends that the letter dated 9th October, 2007 jointly signed by the parties was in the form of a contingency contract. According to him, only if the Respondent fulfilled its obligations in terms of the said agreement could it be said that the earlier agreement dated 1st February 2007 stood cancelled. According to him, unless there is an express cancellation of the earlier agreement, the said agreement along its arbitration clause would subsist.

8. In order to appreciate the above submissions, it is necessary to refer to the letter dated 9th October, 2007 copy of which is placed on record by the Petitioner himself. The said letter reads as under:

> The Merchants
> 10062 Zamir Street
> Nowab Ganj
> Delhi-06
>
> Sub: Refund of Money-Agreement Dated 1"reb, 2007
> Sir,
> This is in reference to the discussion, which the undersigned had with you on 4/10/07 on the subject lighted above.
>
> That as agreed upon the company assure you that any amount over and above of Rs700 000/- (Rs Seven Lacs only) will be refunded to you in equal monthly installments of Rs 400 000/-(Rs Four Lacs only) The company undertake to refund Rs 4,00.000/- (Rs. Four Lacs) every month till your entire amount, including of commission/minimum guarantee calculated @ of 2% per month on reducing balance over and above of Rs.7,00,000/-(Rs Seven Lacs) is refunded to your company.

That it was also agreed upon that the company will try to hand over the area to you on or before 15th " November, 2007.ln case, due to some unavoidable circumstances company fails to hand over the area, the company will continue to pay Rs 4,00,000/- (Rs Four Lacs) monthly installments till the entire amount received by the company, including of commission/minimum guarantee calculated @of 2% per month on reducing balance is paid to you. The agreements Dated 1st Feb 2007 shall be deemed have been cancelled.

That the commission/minimum guarantee stated above in both the paragraphs will be calculated/paid on the reducing balance of the total amount which have been paid by the Merchant to the Hello Minerals Water Pvt. Ltd.

It has also been agreed by the Company that the Company on or before 20th march will pay the entire amount stated as above, 2008.

That the above arrangement of monthly Installments of Rs4,00,000/-(Rs Four Lacs Only) will start from October 2007.

It is agreed between the Company and the Merchant, that if any amount stands unpaid, as on 20"' march, 2008,the company agree to pay the commission/minimum guarantee calculated @3% per month on any of such balance unpaid amount and the said commission/minimum guarantee of 3% per month will be paid w.e.f. 21/3/08 on the unpaid amount only."

9. A plain reading of the above letter jointly signed by both the parties, which fact is not denied by the Petitioner, indicates that the parties have agreed on some payments of the monies to the Petitioner in instalments.

However, the Court is not persuaded to accept the submission of the Petitioner that the sentence which categorically states that the agreement dated 1st February, 2007 "shall be deemed to have been cancelled" is contingent upon the Respondent fulfilling its obligations under the agreement. It does appear that the parties consciously agreed upon the earlier agreement dated 1st February, 2007 being cancelled and being replaced by the fresh agreement as spelt out in the letter. No further contrary intention of the parties is evident from a reading of the said letter.

10. Consequently, the Court is not persuaded to agree with the submission of learned counsel for the Petitioner that the earlier agreement containing the arbitration clause therein would survive notwithstanding the subsequent agreement dated 9th October, 2007.

11. Consequently, the Court declines the prayer of the Petitioner for appointment of an arbitrator.

12. In the circumstances the question of an interim order being passed under Section 9 of the Act does not arise. The interim order dated 30th September, 2015 is vacated.

13. Both petitions are dismissed. The application is disposed of.

S. MURALIDHAR, J

OCTOBER 06, 2016/dn