

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

Reserved on: 6th August, 2021
Pronounced on: 21st October, 2021

+ **ARB. P. 573/2020**

M/S POOJA INFOTECH PVT. LTD. & ORS. Petitioners

Through: Mr. Sanjay Goswami, Advocate.

versus

M/S PRABHUPREM INFOTECH PVT. LTD. & ORS.

..... Respondents

Through: Mr. Sanat Kumar, Senior Advocate
with Mr. Sanjay Sharma Darmora,
Advocate for Respondent No. 1-4.
Mr. Pawan Kumar Mittal, Advocate
for Respondent No. 5.
Mr. Akhil Sachar, Advocate for R-6.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J.

1. The present petition under Section 11(5) of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the 'Act'*] seeks appointment of a Sole Arbitrator to adjudicate the disputes that are stated to have arisen under a Settlement Agreement dated 27th December, 2015, containing an arbitration agreement in Clause 11, which is reproduced below:

“11. That the Indian Arbitration and Conciliation Act of 1996 shall apply to the arbitration or to the arbitration proceedings or to the arbitration award. The Arbitrator shall be appointed mutually by the FIRST PARTIES and the SECOND PARTIES. The seat of the Arbitration shall be at New Delhi and the Arbitration Proceedings shall be conducted in English. For all purposes, the Jurisdiction of court shall be at New Delhi.”

BRIEF FACTS

2. The relevant facts of the case are as follows:

The Parties:

- 2.1. Petitioners No. 2 and 3 are directors of Petitioner No. 1 company. Respondent No. 5 is wife of Petitioner No. 2 and Respondent No. 6 is brother of Petitioner No. 3. The Petitioners No. 2-3 and Respondents No. 5-6 [*hereinafter collectively referred to as the ‘Sellers’*] hold the complete shareholding in Petitioner No. 1 company. No relief is sought by the Petitioners against Respondents 5 and 6.
- 2.2. The remaining respondents are Respondents No. 1-4 [*hereinafter collectively referred to as the ‘Contesting Respondents’*]. Respondent No. 3 is a present/ serving director of Respondent No. 1 company. Respondents No. 2 and 4 are erstwhile directors of Respondent No. 1 company. [*Respondents No. 1, 2 and 4 are hereinafter collectively referred to as the ‘Buyers’*].

The Transaction:

- 2.3. The Petitioner No. 1 was allotted and leased a plot of land from the Greater Noida Industrial Development Authority admeasuring about 1,01,114.27 sq. meters bearing Plot No. 19, Sector K.P.-V, Greater

Noida (West), Gautam Budh Nagar, Uttar Pradesh [*hereinafter referred to as the 'Project Land'*] for development of IT and IT-enabled services.

- 2.4. The Buyers and Sellers entered into a Memorandum of Understanding dated 31st July, 2014 for transferring Sellers' shareholding in Petitioner No. 1 company to the Buyers, for a consideration of Rs. 84.43 crores [*hereinafter referred to as 'MoU'*].
- 2.5. Under the terms of the MoU, initial payments were made by the Buyers in favour of the Sellers. Thereafter, the Buyers defaulted, and cheques issued by them were dishonoured. Sellers issued legal notices to the Buyers for breaches of the terms of the MoU and sought specific performance thereof. In some cases, the Sellers even proceeded under Section 138 of the Negotiable Instrument Act, 1881.
- 2.6. On 27th December, 2015, a Settlement Agreement was entered into between all the Petitioners and Respondents (except Respondent No. 3) wherein it was agreed that the MoU stood terminated and cancelled and the parties would be restored to pre-MoU status [*hereinafter referred to as the 'Settlement'*]. In terms thereof, the Buyers claimed a refund of Rs. 21 crores from the Sellers, and in return offered re-possession of the project land.
- 2.7. However, when the books of Petitioner No. 1 were audited in October-December 2016, it was noticed that the Sellers (through Petitioner No. 1 company, its sister concern, and the personal accounts of the Sellers) had only received a sum total of Rs. 16.90 crores from the Buyers with respect to the MoU. The Petitioners also

contend that sums of Rs. 7.6 crores and blank post-dated cheques were taken by the Buyers from the Sellers under false pretences and extortion threats.

- 2.8. Subsequently, the Petitioners *vide* notice invoking arbitration dated 18th October, 2019, called upon the contesting Respondents to pay compensation to the tune of Rs. 25 crores, or in alternative, settle disputes in terms of the Clause 11 of the Settlement *i.e.*, through arbitration mechanism. They provided a panel of arbitrators comprising of four retired district judges for the contesting Respondents to select from. Upon receiving no response to the same, on 3rd March, 2020, the Petitioners have filed the present petition seeking appointment of a Sole Arbitrator.

CONTENTIONS OF THE PARTIES

3. Mr. Sanat Kumar, Senior Counsel for the Respondents, led the arguments on behalf of the Buyers and at the outset, strongly objected to the maintainability of the present petition on the ground that the claims raised by the Petitioners are non-arbitrable as well as time-barred, and thus, cannot be referred to arbitration. His submissions are summarised as follows:

- 3.1. The petition is grossly barred by time. Since 31st July, 2014 (*being* the date of MoU), there has been no acknowledgment of liability by the contesting Respondents. Therefore, the notice invoking arbitration issued on 18th October, 2019, after almost four years from the Settlement suffers from laches. Petitioners have wrongly based their case on the plea that, as the last cheque issued in favour of the Buyers

under the Settlement was dated 28th February, 2017, and notice of invocation of arbitration was sent on 18th October, 2019, their claims would be within the statutory period of limitation. This plea is erroneous and misconceived – inasmuch as Petitioner No. 1's cheque does not extend the period of limitation due to absence of acknowledgment by the contesting Respondents, as is required in terms of Section 18 of the Limitation Act, 1963 for extension of the period of limitation. Reliance is placed upon ***Bharat Sanchar Nigam Ltd. v. Nortel Networks India Pvt. Ltd.***,¹ and the decision of the Delhi High Court in ***Satander Kumar v. MCD & Ors.***,² to contend that the Courts can, at the referral stage, interfere in cases where it is manifest that the claims are *ex facie* barred by time and the Applicant seeks to resurrect a time-barred claim. Further, the invocation notice was issued by the Petitioners on 28th October 2019 i.e. after a period of almost 4 years from the settlement dated 20th December, 2015, which is the last writing/ acknowledgment between the parties. Thus, the alleged claims of the Petitioners are highly barred by time and cannot be referred to arbitration.

- 3.2. Under Section 18 of Limitation Act, the period of limitation can be extended by an acknowledgment of liability by the party against whom such right is claimed. As the alleged right is claimed by the Petitioners against the Respondents No. 1 to 4, the acknowledgment should have been on the part of Respondents No. 1 to 4 and not by the Petitioners themselves. Thus, the argument of the Petitioner is totally

¹ (2021) 5 SCC 738.

² 2010(5) RAJ 369 (Del).

misconceived.

- 3.3. Moreover, the Petitioners have not alleged a single word in the entire petition indicating the date of Respondents 1 to 4's breach.
- 3.4. The alleged claims of the Petitioners sought to be referred to arbitration are non-arbitrable, as:
 - a. The said claims from the MoU. Not a single claim has been made under the Settlement. For such claims, sellers should resort to the remedy as provided in the MoU, and not the Settlement. However, the MoU does not have an arbitration clause. Therefore, the alleged claims cannot be referred to arbitration under a different contract, i.e., the Settlement. Moreover, even the Settlement clearly mentions that the previous MoU stood terminated.
 - b. Reliance on the Settlement for reference of disputes to arbitration is also misplaced, as it is the case of the Petitioners themselves that the Settlement is not binding on them on account of being allegedly signed under police threat/ duress/ coercion. The Petitioners cannot be permitted to approbate and reprobate.
 - c. It is also the Petitioners' own case that they have already rescinded and repudiated the Settlement, which is alleged to be not binding on the Petitioners. If this is true, they cannot rely on the arbitration clause contained in said Settlement.
- 3.5. Reliance placed by the Petitioners on the MoU for raising any claims against the contesting Respondents is barred in view of novation of the contract under Section 62 of the Indian Contract Act, 1872.

3.6. The present proceedings have only been initiated to stall the claims of the Respondents No. 1-4 as made by them in various criminal complaints. The Petitioners have now come up with the plea that they have suffered alleged losses, and the payment received by them from Respondents No. 1-4 have already been forfeited by them under MOU. The present proceedings have been initiated by the Petitioners so as to deny the claims of the Respondents No. 1.

4. Mr. Sanjay Goswami, counsel for the Petitioners, while relying upon the Settlement, controverted the objections of the Respondents, as follows:

4.1. The petition is within limitation. For the purpose of raising disputes, the cause of action accrued in favour of Sellers under the Settlement on 1st March, 2017, when a copy of the Settlement was belatedly handed over to the Petitioners for the first time. Consequently, since amicable settlement between the parties failed, the Petitioners issued the Notice dated 18th October, 2019 raising disputes and claims under the Settlement for breach of contract and failure on part of the contesting Respondent to honour their obligations in terms of the Settlement.

4.2. The jurisdiction of the Court in Section 11 of Act is limited to examining the existence of an arbitration agreement. Any other preliminary issue(s) such as the question of limitation are to be left to be adjudicated by the arbitrator under Section 16 of the Act that enshrines the principle of *kompetenz-kompetenz*. In support of this contention, he relies upon the judgment of *Uttarakhand Purv Sainik*

*Kalyan Nigam Ltd. v. Northern Coal Fields.*³ He further relies upon the decisions in *Bharat Sanchar Nigam Ltd. (supra)*, *Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corporation Ltd.*,⁴ *Schlumberger Asia Services Ltd. v. Oil and Natural Gas Corporation Ltd.*,⁵ *Indian Oil Corporation Ltd. v. SPS Engineering Ltd.*,⁶ *Parsvnath Developers Ltd. & Anr. v. Rail Land Development Authority*,⁷ and *Royal Orchid Hotels Ltd. v. Rock Reality Pvt. Ltd.*⁸

- 4.3. Regardless, the Petitioners are not bound by the Settlement because:
- Sellers were subjected to extortionist methods/ coercion to unwillingly sign the Settlement.
 - The Settlement was then intentionally not made available to the Petitioners for a prolonged period. In fact, the Settlement along with its Annexures was only made available on 1st March, 2017, when the Petitioners were summoned in the criminal case filed for dishonour of cheques issued under the Settlement.
 - That apart, the amount of refund claimed by the Buyers was never received by the Petitioners, and accordingly, is not refundable.
 - Moreover, the Petitioners are not bound by the terms of the Settlement on account of failure of the Buyers to honour their obligations under the same as well as the MoU.

³ (2020) 2 SCC 455.

⁴ (2006) 5 SCC 275.

⁵ (2013) 7 SCC 562.

⁶ (2011) 3 SCC 507.

⁷ 2018 SCC OnLine Del 12399.

⁸ CMP 288/2018 (Karnataka HC)

ANALYSIS AND FINDINGS

5. The existence of arbitration agreement contained in the Settlement is not in controversy. The contesting Respondents' objections are two-fold. First, they contend that claims urged by the Sellers are barred by limitation, and hence, should not be referred to arbitration. Second, it is argued that the claims sought to be referred to arbitration, arise under the MoU and not under the Settlement. Since the MoU does not contain any arbitration clause, the petition is not maintainable.

Whether court should refuse to refer the disputes to arbitration on account of non-arbitrability of disputes?

6. In the opinion of the court, the objection of the contesting Respondents with respect to arbitrability of claims is an aspect that has to be agitated before the Arbitral Tribunal. Further, whether the disputes arise out of the MoU dated 31st July, 2014 or out of the Settlement Agreement dated 27th December, 2015, is a question which requires a factual determination and cannot be examined in the present proceedings.

7. *Prima facie*, the contesting Respondents may be correct in contending that in light of execution of the Settlement, the MoU stood cancelled and ceased to exist, and therefore, no claim can arise from a cancelled agreement. However, whether the claims arise from the MoU or the Settlement, is an aspect that has to be evaluated on the basis of the claim that the Sellers will eventually raise. At this stage, the Court only has to examine

if a dispute has arisen from the agreement which contains an Arbitration Clause. The stand of the parties clearly brings out disputes relating to the Settlement. It is an admitted position that payments have been partially made under the Settlement, by way of cheques. It can also not be denied that the contesting Respondents have not received entire payment under the MoU as they have admittedly initiated criminal proceedings under Negotiable Instrument Act, 1881 on account of dishonour of cheques. Yet, curiously, the contesting Respondents insist that they are not interested in arbitration and are satisfied with the proceedings that they have initiated. Sellers contend that the Settlement was executed under coercion and thus, the payments thereunder are not due. Sellers also allege that certain terms of Settlement have been breached, from which they have suffered damages (including loss of profit) and on this issue, they seek reference of disputes to arbitration. Thus, the factual dispute – whether the settlement was executed under duress or coercion; whether payments under the Settlement were due or not; whether claims against the contesting Respondents are barred under Section 62 of the Indian Contract Act, 1872 – are all aspects that would require parties to lead evidence, followed by a detailed scrutiny on part of the arbitrator on each issue.

8. Thus, the court does not find merit in the arguments advanced by the contesting Respondents on these issues.

Whether court should refuse to refer the disputes to arbitration on account of being barred by limitation?

9. The next objection is premised on delay. Unarguably, limitation is a mixed question of fact and law. The Supreme Court in the case of *ITW Signod India Ltd. v. Collector of Central Excise*,⁹ has held that the question of limitation involves the question of jurisdiction. In *M/s Indian Farmers Fertilizers Cooperative Ltd. v. Bhadra Products*,¹⁰ the Supreme Court held that the issue of limitation, being a jurisdictional issue, should be left to be decided by the Arbitral Tribunal under Section 16 of the Act. This is based on the principle of “*kompetenz-kompetenz*” which favours minimum judicial intervention at the pre-reference stage.

10. Further, recently, the Supreme Court in *BSNL v. Nortel Networks* (*supra*), observed that only in very limited category of cases, where there is not even a vestige of doubt that the claim is *ex facie* time barred, or that the dispute is non-arbitrable, should a Court decline to make reference to an Arbitrator. However, at the same time, the Supreme Court also added a cautionary note that if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the Tribunal. The conclusion noted in the aforementioned judgment, which spells out the opinion of the Court, is extracted hereinbelow:

“40. Conclusion

Accordingly, we hold that:

- (i) *The period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. The period of limitation will begin to run from the date when there is failure to appoint the arbitrator; It has been suggested that the Parliament may consider amending*

⁹ (2004) 3 SCC 48.

¹⁰ (2018) 2 SCC 534.

- Section 11 of the 1996 Act to provide a period of limitation for filing an application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings;*
- (ii) *In rare and exceptional cases, where the claims are ex facie time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.”*

11. Clarity on the second aspect is found in the preceding paragraph of the judgment, which states as follows:

“39. (...)

The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that: “where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it.” There must be a clear notice invoking arbitration setting out the “particular dispute” (including claims / amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail.

In the present case, the notice invoking arbitration was issued 5 ½ years after rejection of the claims on 04.08.2014. Consequently, the notice invoking arbitration is ex facie time barred, and the disputes between the parties cannot be referred to arbitration in the facts of this case.”

12. Keeping in view the aforementioned principle in matters relating to objection of limitation, we have to determine whether the instant case falls in that category of exceptional cases or not.

13. The Settlement was executed on 27th December, 2015. The notice of invocation under Section 21 of the Act was issued on 18th October 2019. The contesting Respondents have laid considerable stress that the invocation is beyond the period contemplated under Article 137 of the Limitation Act, 1963. The Sellers have however provided an explanation for the same. They

have argued that they were compelled to sign the Settlement under duress and extortion from the Buyers, who also had the aid of the police. The blank security cheques issued by the Sellers to the Buyers under the Settlement were obtained under false pretexts and compelling circumstances. These cheques were subject to fulfilment of obligations by the Buyers, as set out in the Settlement, and there was no immediate liability on the part of the Sellers to make the payment to the Buyers by such cheques. The Petitioners have also asserted that they repeatedly asked the Buyers for copies of the Settlement and details of payment – which they failed to provide. Later, in October-December, 2016, when accounts were audited and reconciled, it was noticed that the Buyers had received a payment of Rs. 7.6 crores against post-dated cheques which were obtained under the guise of Settlement. Later, in March 2017, in a hearing of the criminal complaint under Section 138 of the Negotiable Instrument Act, in respect of one of the cheques issued under the Settlement, the Petitioners, for the first time, received a copy of the Settlement and thereafter, arbitration was invoked in terms thereof.

14. It is also noted by this Court that the parties herein have ongoing criminal litigations against each other. Respondent No. 1 has filed a criminal complaint against the Petitioner as well as Respondents No. 5-6 with the Uttar Pradesh police. The Petitioners had also filed a complaint before the Economic Offences Wing, Delhi Police against the Buyers, though the said complaints are now stated to have been closed. Thus, there is no doubt that, as to the question of arising of disputes between them, the parties herein are undoubtedly at loggerheads. In the notice invoking arbitration dated 18th October, 2019, the explanation given by the Petitioners is that they did not

have any occasion to invoke arbitration prior to such date, since they received a copy of the Settlement Agreement only in the cheque-bouncing proceedings initiated by the contesting Respondents. From the said date, when they gained knowledge, the invocation is within time. Whether this stand of the Petitioners is true or not, is a question of fact, which would require the parties to lead evidence. Thus, the question of limitation is indeed a question of both fact and law. Therefore, the genuineness of the parties' stand is a matter of trial, and the Court finds the question of limitation in the instant case to be disputed one. Therefore, the Court does not find the instant case to be falling in the exceptional category of cases set out in the **BSNL** judgement (*supra*), where, on a *prima facie* basis, the Court can conclude that the petition is *ex facie* barred by limitation. The Court cannot delve into this issue in the present proceedings under Section 11 (6A) of the Act.

15. Thus, in the opinion of the Court, the petition deserves to be allowed.

16. Accordingly, Hon'ble Mr. Justice J.R. Midha, (Retd.) Former Judge of this Court [Contact No.: 9717495003] is appointed as the Sole Arbitrator to adjudicate the disputes between the parties in relation to the MoU dated 31st July, 2014 and the Settlement Agreement dated 27th December, 2015.

17. The parties are directed to appear before the learned Arbitrator, as and when notified. This is subject to the learned Arbitrator making necessary disclosures under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

18. The learned Arbitrator will be entitled to charge his fees in terms of the provisions of the Fourth Schedule appended to the Act.

19. It is clarified that the Court has not examined any of the claims of the parties and all the rights and contentions of the parties on merits are left open. Both the parties shall be free to raise their claims/ counter claims before the learned Arbitrator in accordance with law.

20. In view of the above, the present petition is allowed and stands disposed of.

OCTOBER 21, 2021
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SANJEEV NARULA, J



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