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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 24th August, 2022

+ ARB.P. 1086/2021
 JAIDEEP SINGH Petitioner
 Through: Mr. Mohinder Kumar Madan,
 Advocate.
 versus
 GOVERNMENT OF NCT OF DELHI & ORS. Respondents
 Through: Mr. Dhruv Rohatgi, Advocate for
 R-3.

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

(Judgment released on 26.08.2022)

ANUP JAIRAM BHAMBHANI, J.

By way of the present petition under section 11 of the Arbitration & Conciliation Act 1996 ('A&C Act' for short), the petitioner seeks appointment of an Arbitrator in respect of the disputes that are stated to have arisen with the respondents from a contract for deployment of workers/nursing orderlies/attendant services at the Jag Parvesh Chandra Hospital, Shastri Park, Delhi arising from tender dated 28.09.2013.

2. Pursuant to the said tender, respondent No.3 is stated to have issued an offer letter dated 21.05.2014 awarding the work to the petitioner, which culminated in signing of an agreement dated 18.06.2014 between the petitioner and respondent No.3. It is the petitioner's case that a copy of the said agreement was not provided to him.



3. The essence of the disputes is non-payment by respondent No.3 of dues, which the petitioner claims were owed to him, for the services rendered under the aforesaid agreement, despite demands raised by letters dated 28.08.2014, 01.09.2014, 04.09.2014, 20.09.2014, 29.09.2014, 13.10.2014 and 17.11.2014 as well as by e-mails dated 04.11.2014 and 12.11.2014 sent by the petitioner for the purpose. It is the petitioner's case that by reason of defaults in payment, the petitioner was constrained to terminate the contract *vide* letter dated 15.09.2014 w.e.f. 15.10.2014.
4. It is the petitioner's case that, after much persuasion and follow-up, the last payment was received by him from respondent No.3 on 22.05.2015.
5. It is also the petitioner's case that his claim against respondent No.3 includes refund of performance security deposit of about Rs. 9 lacs, which was to remain in force upto 60 days after completion of the contract; and which has been withheld by respondent No.3 beyond the said 60-day period; and therefore, the cause of action for the claim for refund of performance security deposit would arise first after the said period.
6. In the circumstances, it is argued that the question whether the claims are time-barred is at best a mixed question of fact and law, which must be left to the Arbitrator to decide.
7. The petitioner is stated to have raised its demands and invoked arbitration *vide* notice dated 04.09.2017 in terms of clause 23 of the General Conditions of Contract ('GCCs' for short) governing the transaction.



8. Notice in this petition was issued on 11.11.2021; consequent whereupon the contesting respondent No.3 has filed its reply dated 28.06.2022.
9. The principal objections raised in the reply are:
 - (a) That the petition under section 11 of the A&C Act has been filed beyond the period of limitation prescribed in law and is therefore not maintainable;
 - (b) That as of the date of filing of the petition, there are no 'live claims' since the claims sought to be made are time-barred, *inter-alia* for the reason that the cause of action for making the claims must be deemed to have arisen at the latest when the petitioner terminated the contract *vide* letter dated 15.09.2014 w.e.f. 15.10.2014, meaning thereby that invocation of arbitration *vide* notice dated 04.09.2017 (sic) is beyond the period of limitation;
 - (c) That even assuming that the last payment was made by respondent No.3 to the petitioner on 22.05.2015, the claims made would still be barred by limitation;
 - (d) That the present petition filed on 08.11.2021 for alleged claims which pertain to the year 2014 is not maintainable.
10. At the outset, the disputes resolution clause comprised in clause 23 of the GCCs may be noticed as under:

“23. DISPUTE RESOLUTION:-

(a) Any dispute and/or difference arising out of or relating to this contract will be resolved through joint discussion of the authorized representatives of the concerned parties. However,



if the disputes are not resolved by joint discussions, then the matter will be referred for adjudication to a sole Arbitrator to be appointed by the Lt. Governor, Delhi.

(b) The award of the sole Arbitrator shall be final and binding on all the parties. The arbitration proceedings shall be governed by Indian Arbitration and Conciliation Act 1996, as amended from time to time.

(c) The cost of Arbitration shall be borne by the respective parties in equal proportions. During the pendency of the arbitration proceeding and if the period of contract is still valid, neither party shall be entitled to suspend the work/service to which the dispute relates on account of the arbitration and payment to the Contractor shall continue to be made in terms of the contract. Arbitration proceedings will be held in Delhi only.”

11. It is accordingly seen that clause 23 contemplates reference of disputes between the parties to the adjudication of a sole arbitrator, though to be appointed by the Lieutenant Governor, Delhi; and that the arbitration proceedings have been agreed to be “*held in Delhi only*” in accordance with the A&C Act.
12. From a *prima-facie* perusal of the documents on record and without dwelling into the merits of the disputes, the following is apparent :
 - (a) Having invoked arbitration *vide* notice dated 04.09.2017 evidently the 03-year limitation period provided under Article 137 of the Limitation Act, 1963 for filing the present petition would run-out on 03.09.2020; however, *vide* order dated 10.01.2022 made by the Hon’ble Supreme Court in



Suo Motu W.P.(C) No. 03/2020 limitation was held to be in abeyance for the period between 15.03.2020 to 28.02.2022; and since the last day of the limitation period for filing the present petition fell within that period, and the present petition was filed on 08.11.2021, it cannot be said that the present petition is time-barred;

- (b) Without pre-judging the issue of whether all or any of the claims are time-barred, what is evident is that respondent No. 3 has admitted (even if in the alternative) that the last payment was made by it to the petitioner on 22.05.2015; in which case, the invocation of arbitration *vide* notice dated 04.09.2017 was also made within a 03-year period, and therefore it cannot *ex-facie* be said that the claims are time-barred. This would be so, even if, instead of going from the date of the receipt of the last payment, one was to proceed from the date of termination of the agreement by the petitioner which happened *vide* letter dated 15.09.2014 (w.e.f 15.10.2014); in which case invocation notice dated 04.09.2017 would still be within the 03 year limitation period.
- (c) As a matter of fact, in response to the aforesaid demand-cum-invocation notice dated 04.09.2017, respondent No. 3 issued a reply dated 20.09.2017 disputing the demands made.

13. In the above view of the matter, it cannot be said that the present petition is time-barred or that claims are *ex-facie* time-barred.



14. A brief reference to the settled legal position as to reference to arbitration when claims are alleged to be time-barred, would be beneficial at this point. On this issue, the relevant portions of the judgment of Hon'ble Supreme Court in **BSNL v. Nortel Networks (India) (P) Ltd^I** are extracted below:

“15. It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days from issuance of the notice invoking arbitration. In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.

“16. The period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognised even under Section 20 of the Arbitration Act, 1940. Reference may be made to the judgment of this Court in J.C. Budhraja v. Orissa Mining Corpn. Ltd. [J.C. Budhraja v. Orissa Mining Corpn. Ltd., (2008) 2 SCC 444 : (2008) 1 SCC (Civ) 582] wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator.

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^I (2021) 5 SCC 738



“40. The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the Arbitral Tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some precondition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.”

* * * * *

*“47. It is only in the 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, that the court may decline to make the reference. However, 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.*

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“53. Accordingly, we hold that:

53.1. 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 Parliament may consider amending 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.

53.2. 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.”

(emphasis supplied)

15. Furthermore, in a recent judgment in *Intercontinental Hotels Group (India) Pvt. Ltd. & Anr. vs. Waterline Hotels Pvt. Ltd.*², while discussing the scope of court intervention at the stage of reference, the Hon’ble Supreme Court has held as under:

² 2022 SCC OnLine SC 83



*“18. At the outset, we need to state that this Court's jurisdiction to adjudicate issues at the pre-appointment stage has been the subject matter of numerous cases before this Court as well as High Courts. The initial interpretation provided by this Court to examine issues extensively, was recognized as being against the pro-arbitration stance envisaged by the 1996 Act. Case by case, Courts restricted themselves in occupying the space provided for the arbitrators, in line with party autonomy that has been reiterated by this Court in Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1, which clearly expounds that Courts had very limited jurisdiction under Section 11(6) of the Act. Courts are to take a ‘prima facie’ view, as explained therein, on issues relating to existence of the arbitration agreement. Usually, issues of arbitrability/validity are matters to be adjudicated upon by arbitrators. **The only narrow exception carved out was that Courts could adjudicate to ‘cut the deadwood’.** Ultimately the Court held that the watch word for the Courts is ‘when in doubt, do refer’...”*

16. In light of the position of law expatiated in the aforesaid verdicts and having given a *prima-facie* consideration to the objections raised, this court is not persuaded to accept the contention of respondent No. 3 that the present petition is time-barred. This court is also not persuaded to agree with the submission that the claims sought to be raised by the petitioner are *ex-facie* time barred and therefore ‘deadwood’.
17. It is also seen that there is a valid and subsisting arbitration agreement between the parties; and that this court has territorial jurisdiction to entertain and decide the present petition.
18. Accordingly, the present petition is allowed and Ms. Sowjhanya Shankaran, Advocate (Cellphone No. : +91 9945469905) is



appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.

19. The learned Sole Arbitrator may proceed with the arbitral proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.
20. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.
21. Parties shall share the arbitrator's fee and arbitral costs, equally.
22. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.
23. Parties are directed to approach the learned Sole Arbitrator appointed within 10 days.
24. The petition stands disposed of in the above terms.
25. Other pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J

AUGUST 24, 2022

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