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IN THE HIGH COURT OF DELHI AT NEW DELHI**Date of decision: 26th August 2022**

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ARB.P. 1174/2021

JOHNSON CONTROLS INDIA PRIVATE LIMITED Petitioner

Through: Mr. Ashish Kothari & Ms. Shivangi
Singh, Advocates.

versus

DLF SOUTHERN TOWNS PVT LTD

..... Respondent

Through: Ms. Simran Brar, Mr. Swastik Dalai
& Mr. Annamaya Nanda, Advocates.**CORAM:****HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI****J U D G M E N T****(Judgment released on 02.09.2022)****ANUP JAIRAM BHAMBHANI, J.**

By way of the present petition under section 11(5) of the Arbitration and Conciliation Act ('A&C Act' for short), the petitioner seeks appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondent from Agreement dated 14.03.2013 ('Agreement' for short) entered into between the parties. The disputes relate to the alleged failure on part of the respondent to pay monies due against two invoices dated 25.09.2017 raised by the petitioner.

2. Notice on this petition was issued on 03.12.2021; whereupon the respondent has filed its reply dated 03.03.2022.
3. Mr. Ashish Kothari, learned counsel for the petitioner has drawn the attention of this court to clause 101.0 of the Agreement which



comprises the arbitration agreement; and contemplates reference of disputes between them to arbitration in accordance with the A&C Act.

4. Counsel has also invited attention to clause 101.3 of the Agreement which subjects the disputes between the parties to the jurisdiction of the courts of law at New Delhi.
5. As per the record, the petitioner raised claims against the respondent *vide* demand notice dated 06.07.2020 and invoked arbitration *vide* notice dated 12.12.2020; to which however, the respondent sent no reply.
6. In its reply filed to the present petition, the respondent has principally raised the following objections to the appointment of an arbitrator:
 - (a) That the petition under section 11(5), as also the claims, are barred by limitation. To support this contention, the respondent has set-out a tabulated summary of the relevant dates and events in its reply, which reads as under:

S. NO.	DATE	EVENTS
1.	14.03.2013	<i>Agreement for supply of security systems was entered between both the parties. The Payment schedule under the Agreement was provided under Clause 7 of Special Conditions of Contract.</i>
2.	31.12.2013	<i>The completion date of the works under the Agreement was 31.12.2013.</i>
3.	25.09.2017	<i>Two invoices amounting to Rs. 25,62,330/- were raised by the Petitioner. (almost 4 years after the completion date of the project)</i>
4.	11.05.2021	<i>The Petitioner filed an application under S.11 (5) of the Arbitration & Conciliation Act before the Delhi High Court. Certain defects were raised by the Registry.</i>



5.	16.11.2021	<i>The Petitioner refiled the said petition with condonation of delay</i>
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- (b) That the Agreement contemplated that the work was to be completed by the petitioner by 31.12.2013 and also set-down terms of payments in clause 07 of the Special Conditions of the Contract governing the Agreement. It is accordingly the contention, that if any amount was claimed to be due or payable, the petitioner ought to have invoked legal remedy therefor within 03 years, either from the last date when payment became due to it, or from the date of completion of the project. It is argued that the invoices in respect of which disputes are sought to be raised by the petitioner are dated 25.09.2017; wherefrom it is evident that the invoices themselves are dated almost 04 years after completion of the project on 31.12.2013; whereby the “*invoices themselves are barred by limitation*”.
- (c) That since the invoices dated 25.09.2017 themselves are barred by limitation, the demand notice dated 06.07.2020, the notice invoking arbitration dated 12.12.2020, as also the present petition under section 11 of the A&C Act are also barred by limitation and not maintainable.
- (d) That the petition deserves to be rejected, relying upon the following extract from the judgment of the Hon’ble Supreme Court in ***BSNL v. Nortel Networks (India) (P) Ltd¹*** :

¹ (2021) 5 SCC 738



"At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute. "

7. Responding to the objections raised, in rejoinder dated 17.06.2022, the petitioner has urged that issuance of invoices, filing of the petition and raising of the claims have all been done within the prescribed period of limitation. The petitioner seeks to make good these points in the following way:
- (a) That even though the Agreement recited that the work thereunder would be completed by 31.12.2013, the scope and time for performance of the work was extended by mutual agreement of the parties as reflected *inter-alia* in letter dated 10.12.2014, whereby the petitioner requested the respondent to extend the time for completion of the work upto 31.03.2015; which request was recommended and forwarded for approval to the respondent's management; which issued an amendment to the Agreement *vide* its letter dated 17.12.2014, thereby extending the time for completion of the work upto 31.3.2015. Furthermore, *vide* letter dated 30.06.2017, the petitioner requested the respondent to further extend the period for completion of the work upto 22.12.2016. The petitioner also points to an annotation at the bottom of letter dated 30.06.2017, which notes "*EoT recommended upto 22/12/2016 for billing purpose*" (EoT being a reference to Extension of time)".
- (b) That since the parties maintained a 'running account', a business relationship subsisted between them even after the date of



- completion of work as per the Agreement; and that therefore, the petitioner was within its rights to raise the invoices on 25.09.2017;
- (c) That when the respondent failed to discharge the invoices, the petitioner issued demand notice dated 06.07.2020; which was within 3 years from the date when the payment became due under invoices dated 25.09.2017;
- (d) That the invocation of arbitration *vide* notice dated 12.12.2020 is also not barred by limitation, and therefore, the filing of the petition, the invocation of arbitration and the claims sought to be referred to arbitration, are all within time. Though this submission is made, the petitioner does not explain how the invocation is within 03 years of the raising of the invoices.
- (e) That the decision of the Hon'ble Supreme Court in ***Uttarakhand Purv Sainik Kalyan Nigam Limited vs. Northern Coal Fields Limited***² clearly lays-down that the question of limitation is essentially a question of jurisdiction, which is to be decided by the arbitrator in terms of section 16 of the A&C Act, and not by the court at the pre-reference stage.
8. Upon a consideration of the averments contained in the petition, the submissions made and the contentions raised by the parties as aforesaid, the following inferences are drawn:
- (a) While it is true that the agreement dated 14.03.2013 as originally signed, contemplated that the work thereunder would be completed by 31.12.2013; the petitioner has placed on record

² 2019 SCC OnLine SC 1518



- letters dated 10.12.2014 and 30.06.2017, whereby the petitioner had requested for extension of the date for completion of work, firstly upto 31.03.2015 and then upto 22.12.2016;
- (b) The petitioner has also placed on record respondent's letter dated 17.12.2014 which refers to a certain "*2nd Amendment of aforesaid Contract due to revision in scope of work and over stay*"; and also states that "*All other Terms & Conditions of aforesaid Contract will remain unaltered*";
- (c) Furthermore, on petitioner's letter dated 30.06.2017, there also appears the following notation: "*EoT recommended upto 22/12/2016 for billing purpose*".
- (d) Though it cannot be said, at least at this stage, if on a conjoint reading of the aforesaid communications, the respondent granted to the petitioner extension of time for completion of the contract or for billing purposes, it also cannot be concluded for sure that extension of time was *not* granted. As a result, this court cannot proceed on the assumption that the invoices dated 25.09.2017 were not raised in relation to a "running account" or that the invoices are time-barred;
- (e) Insofar as invocation of arbitration is concerned, the record shows that the petitioner invoked arbitration *vide* letter dated 12.12.2020; and subsequently filed the present petition on 16.11.2021. *If, as the petitioner contends*, the respondent had indeed granted extension of time for completion of the work or for billing upto 22.12.2016, the demand notice issued by the petitioner on



06.07.2020 was within 03 years of raising of the invoices on 25.09.2017.

- (f) However, legal action for claiming the dues can be said to have been initiated only on the date that arbitration was invoked, which in the present case was done *vide* notice dated 12.12.2020, which falls beyond the 03-year period of limitation, taken from the date on which the invoices were raised i.e. 25.09.2017. But on this count, the petitioner would be saved by order dated 10.01.2022 made by the Hon'ble Supreme Court in *Suo Motu* W.P.(C) No. 03/2020, which held limitation in abeyance for the period between 15.03.2020 and 28.02.2022, since limitation for invoking arbitration ran-out between the dates stipulated by the Hon'ble Supreme Court.
- (g) Lastly, the present petition was filed on 16.11.2021, which is within the permissible period of limitation for filing of a petition under section 11 of the A&C Act, as stipulated by the Hon'ble Supreme Court in *BSNL* (supra) which also clarifies other matters and reads as under:

“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. Budhraj v. Orissa Mining Corpn. Ltd. [J.C. Budhraj 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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“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.”

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*“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)

9. This court hastens to add that the aforesaid inferences as to extension of time and limitation as regards the petitioner’s claims are only *prima-facie*, for the limited purpose of the present petition. The true purport, construction and interpretation of the communications exchanged between the parties, whereby the petitioner had sought extension of time for completion of the contract, and the respondent is claimed to have amended the contract, are matters which require evidence to be led and must necessarily be left to be adjudicated by the arbitrator to be appointed in the matter.
10. In the above view of the matter, this court is of the opinion that the present petition is not time-barred; and nor do the claims appear *ex-facie* to be beyond the period of limitation; nor does the subject matter of the disputes appear to be ‘deadwood’.
11. This court is also satisfied 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.
12. Accordingly, the present petition is allowed and Ms. Warisha Farasat (Cellphone No. : +91 9953825580) is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.



13. 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.
14. 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.
15. Parties shall share the arbitrator's fee and arbitral costs, equally.
16. All rights and contentions of the parties in relation to the claims/counter-claims are left open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.
17. Parties are directed to approach the learned Sole Arbitrator appointed within 10 days.
18. The petition stands disposed of in the above terms.
19. Other pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J.

AUGUST 26, 2022/uj