



\$~1

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

+ **ARB.P. 98/2024**

M/S. OPTIMIZE IT SYSTEMS PRIVATE LIMITED.....Petitioner

Through: **Mr. Vinayak Mehrotra, Ms. Sonali Jain, Advs.**

versus

M/S. MMTC LIMITEDRespondent

Through: **Mr. Praveen Kumar Jain, Ms. Rashmi Kumari, Mr. Mukesh Kumar Gupta, Advs.**

**CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH**

ORDER

16.08.2024

%

1. This is a petition filed under section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.
2. The facts are that the respondent had issued a work order for supply, installation, development, customization, configuration and implementation and maintenance of CRM Solution (Microsoft Dynamics) on 16.11.2017 to the petitioner for a value of Rs 24,39,287/-.
3. Since the petitioner performed its obligations as per the terms of the work order, the petitioner raised an invoice dated 19.03.2018 for about Rs. 20,52,359/- for the work executed by the petitioner. The said invoice was rejected by the respondent on 24.04.2018 and as per the respondent, the revised invoice was never submitted.



4. Thereafter, the respondent issued a notice of termination to the petitioner on 05.09.2022 followed by issuing a letter of termination dated 19.10.2022 and refusing to release any payment to the petitioner.

5. Since certain disputes arose between the parties, the petitioner invoked arbitration *vide* legal notice dated 11.10.2023. Hence the present petition has been filed.

6. The work order dated 16.11.2017 contains an arbitration clause being clause 16 (b) which reads as under:

“16.0 Dispute Resolution:

.....

(b) Arbitration:

Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity of the breach thereof shall be settled by arbitration by a sole arbitrator to be nominated by Chairman and Managing Director(CMD) of MMTC. The provisions of Arbitration and Conciliation Act -1996 shall apply to such arbitration proceedings and the award made in pursuance thereof shall be binding on the parties. The venue of arbitration shall be Delhi. The language of the arbitration shall be English.”

7. Mr. Jain, learned counsel for the respondent takes an objection that the petitioner should have invoked arbitration under Section 21 of the Arbitration and Conciliation Act, 1996 within 3 years from the date of the accrual of the cause of action.

8. He further states that in the present case, the last invoice was raised on 19.03.2018 and the same was rejected by the respondent on 24.04.2018 and hence the cause of action, if any, accrued in favour of the petitioner on 24.04.2018.



9. He further states that since, the petitioner has invoked arbitration *vide* legal notice dated 11.10.2023, the petition is barred by limitation as the cause of action only arose on 24.04.2018.

10. In this regard, learned counsel for the respondent places reliance on the judgment of the Hon'ble Supreme Court in “***Bharat Sanchar Nigam Limited & Anr. vs. Nortel Networks India Private Limited***” (2021) 5 SCC 738 and more particularly paras 45, 45.1 and 51 (operative portion of which) reads as under:

“45. In a recent judgment delivered by a three-Judge Bench in Vidya Drolia v. Durga Trading Corpn., on the scope of power under Sections 8 and 11, it has been held that the Court must undertake a primary first review to weed out “manifestly ex facie non-existent and invalid arbitration agreements, or non-arbitrable disputes”. The prima facie review at the reference stage is to cut the deadwood, where the dismissal is barefaced and pellucid, and when on the facts and law, the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration agreement exists, or that the subject-matter is arbitrable, that reference may be refused.

45.1 In para 144, the Court observed that the judgment in Mayavati Trading had rightly held that the judgment in Patel Engg. Had been legislatively overruled. Para 144 reads as: (Vidya Drolia case, SCC PP. 114-15)

.....
While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. 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. Para 148 of the judgment reads as follows:

.....



51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or more settlement discussions, where a final bill is rejected by making deductions or otherwise. Section 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.”

11. I have heard learned counsels for the parties.

12. I am unable to agree with the submissions of the respondent and in my view, any dispute between the parties arises out of various cause of actions and each cause of action is collectively a bundle of facts.

13. In the present case, the invoice raised by the petitioner came to be rejected by the respondent on 24.04.2018 and in my view, this is only one aspect or component of the said bundle of facts which constitute the cause of action.

14. The petitioner, in the present case also has disputes pertaining to the termination notice and termination letter issued by the respondent dated 05.09.2022 and 19.10.2022. If that is to be construed while calculating the period of limitation which to my mind needs to be taken in account, the notice dated 11.10.2023 invoking arbitration is within the period of limitation.

15. I am further fortified in my view by the judgment of the Hon’ble Supreme Court in “**SBI General Insurance Co. Ltd. vs. Krish Spinning**” (2024) SCC Online SC 1754 and more particularly para 133 which reads as



under:

“133. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the Act, 1996, the referral court should limit its enquiry to examining whether Section 11 (6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in Arif Azim (supra). As a natural corollary, it is further clarified that the referral courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in In Re: Interplay (supra).”

16. A perusal of the said judgment shows that a referral court is only to examine that a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed within 3 years of the notice invoking arbitration which in the present case has been done.

17. In my view, a part cause of action arose when the respondent issued the termination notice and letter dated 05.09.2022 and 19.10.2022 and therefore, the notice issued by the petitioner is well within the period of 3 years.

18. For the said reasons, the petition is allowed and disposed of with the following directions:

- i) Mr. Gaurav Barati, Adv (Mob. No.9810526981) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
- ii) The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.
- iii) The learned Arbitrator is requested to furnish a declaration in terms of



Section 12 of the Act prior to entering into the reference.

- iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims/counter-claims and merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
- v) The parties shall approach the learned Arbitrator within two weeks from today.

JASMEET SINGH, J

AUGUST 16, 2024/DM

Click here to check corrigendum, if any