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

\+ ARB.P. 129/2024

M/S DAMAC INFRA (LLP) ..... Petitioner

Through: Mr Sanjeev Sahay, Adv. (through VC) with Mr Archit Rajput, Mr Shagun Saproo, Mr Karandeep Singh and Mr Bhavya Anand, Advs.

versus

M/S PLENUM INFRASTRUCTURE PVT. LTD. ..... Respondent

Through: Mr Mukesh Rana, Ms Mamta and Ms Banshika, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

O R D E R

% **07.03.2024**

1. This is a petition seeking appointment of an Arbitrator in terms of the arbitration agreement contained in Clause 20 of the MoU dated 28.04.2018 (hereinafter, "the MoU"), which reads as under:

> *"20. That any and all claims, disputes, questions or controversies involving the Parties and arising out or in connection with or relating to this MOU, shall be resolved by arbitration in accordance to the Arbitration and Conciliation Act, 1996 or amended act applicable and the rules made there under or any amendments made thereof. For the purpose of such arbitration, the dispute shall be referred to a sole arbitrator as appointed by both the parties by their mutual consent. Henceforth the decision of the arbitrator shall be final and binding on both the parties. The arbitration proceedings shall be conducted in*

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English and place of arbitration shall be New Delhi. The arbitral award shall be final and binding on both the parties."

2. It is stated in the MoU that the respondent was a business partner of M/s. Classic Infraventure LLP, who was successfully allotted a tender by the Government of Uttar Pradesh for Mining of Sand. On the basis of that representation, the petitioner invested a sum of Rs. 2,90,00,000/- in the respondent's company. The consideration was that the petitioner would be assured 10% of total quantity extracted from the mining site annually, or 80,000 Cubic Mtrs. of the sand annually, whichever is higher, during the entire tenure of 5 years.

3. Mr Rana, learned counsel for the respondent at this stage states that this 10% was from the 15% of the share of the respondent which was contingent on the respondent getting the same from M/s. Classic Infraventure LLP.

4. The important clauses of the MoU are as under:

"WHEREAS the party of the first part has represented and informed to the party of the Second part that they are the business partners of the company under the name and style of M/s Classic Infrastraventure LLP, who are the successful bidder in e-tendering participation of the Govt. of Uttar Pradesh under the monitoring of Nodal Agency, MSTC and has submitted a copy of the letter bearing no. 267/30-Khanij/2017-18) dated 13.02.2018 purported to have been issued from the office of the Distt. Magistrate (Mining Deptt.) Fatehpur informing therein that the Govt. Of Uttar Pradesh has allotted a tender for the Mining of Sand in their favour (hereinafter called as "Allottee")

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and the Deptt. Of Geology & Mines, Uttar Pradesh has successfully declared as Lessee for the Lease of Minor Mineral Blocks in the State of Uttar Pradesh (hereinafter referred to as "Project"). In lieu of this, M/s Classic Infraventure LLP (Allottee) has secured sand block, Adhawal, Distt. Fatehpur (U.P.) from the Deptt. Of Geology, Uttar Pradesh.

.....

5. That the party of the first part has further represented that they are authorized to sell sand from the said project against their rights in the said project vide their understanding with the allottee company, all the legal titles in the Mining of Sand at Fatehpur, Adawal, Uttar Pradesh and being original Allottee of the tenders the Allottee is being authorized by the Govt. of Uttar Pradesh not only digging the sand but also authorized to sell in the open market as per the rates prescribed. The party of the first part has further assured the party of the second part that they had also completed all the legal formalities as are mandatory in the execution of the mining contract with the Allottee, not only this the party of the first part has also assured the party of the second part that the Allottee has deposited all the requisite fees with the MSTC/Govt. of Uttar Pradesh and nothing is due. In nut shell the party of the first part being the authorized representative of the original Allottee and having absolute rights in the mining of sand at Fatehpur, Adawal, Uttar Pradesh.

6. That the party of the second part has also placed their concern about the safety of their investment, with both the parties has

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specifically agreed and accepted for which the party of the first part has assured that the 80,000 Cubic Mtr. Or 10% of the total quantity extracted from the mining site annually, maximum of 80,000 Cubic Mtrs. Of sand shall be given to the party of the second part annually distributed amongst all month when mining is authorized.

....

9. That this MOU has a tenure of at least five years, to be calculated from the date of execution of MOU which may further be renewed with the mutual consent of both the parties with the written MOU. It has further been agreed that the entire tenure of five years shall be a lock-in wherein no party shall be allowed to terminate or early determine this MOU unless and until in the force majeure condition as has been descripted in the under mentioned clauses of this MOU. It has further been clarified that the entire tenure of five years shall be the lock-in period and none of the party will be allowed to terminate or determine this MOU in any respect and means, however both parties shall have right to mutually make changes in these terms and conditions of this MOU in future.

....

11. If any party to this MOU defaults in any of the promises/commitments/understanding, the other party will serve upon them a seven days written notice for the rectification of default.

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15. That both the parties have categorically agreed that if all or any part of the allotted area as has been descripted in the allotment letter bearing no. (2017 -18) dated to the allotted shall be destroyed or damaged due to the storm, flood, tempest, act of god, act of terrorism, war, court order or any other irresistible force or the specified area are rendered inaccessible or unfit for the said business of the party of the first and second part as the case may be for any of the foregoing reasons or with any reasons beyond the control of both the parties to this MOU, then all the obligation as has been accepted and agreed upon this MOU shall be suspended till such time the specified area have been rendered fit for the purposes contemplated under this MOU."

5. Since there were defaults in compliance with the MoU, the petitioner invoked arbitration *vide* legal notice dated 22.03.2023.

6. Mr Rana, learned counsel appearing for the respondent has raised four fold submissions: (i) The claim of the petitioner is barred by limitation and hence cannot be entertained; (ii) The issue raised in the present petition is non-arbitrable; (iii) The contract was a contingent contract on the happening of extraction of 80,000 cubic mtrs. of sand from the river bed; (iv) The money which is being sought to be recovered has not been claimed in the petitioner's legal notice under Section 21 of the Arbitration and Conciliation Act, 1996.

7. It is argued by Mr Rana that in the present case the disputes arose in July, 2018 when the respondent did not comply with its obligations on account of force majeure clauses. Hence, the legal notice issued on 23.03.2023 is beyond the period of limitation. He states that the legal notice

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and the petition itself states that the petition has been filed after a lapse of 4½ years. He relies upon the judgment of the Hon'ble Supreme Court in ***B and T AG v. Ministry of Defence,*** 2023 SCC OnLine SC 657, which also discusses ***Bharat Sanchar Nigam Limited v. Nortel Networks India Private Limited***, (2021) 5 SCC 738. The relevant portion of ***B and T AG*** (supra) reads as under:

> *"47. In Bharat Sanchar Nigam Limited v. Nortel Networks India Private Limited, reported in (2021) 5 SCC 738, this Court undertook a comprehensive analysis of the relevant provisions and held that in cases where claims are ex facie time barred, the Court may refuse to make reference under Section 11 of the Act 1996….*
>
> *….*
>
> *72. Whether any particular facts constitute a cause of action has to be determined with reference to the facts of each case and with reference to, the substance, rather than the form of the action. If an infringement of a right happens at a particular time, the whole cause of action will be said to have arisen then and there. In such a case, it is not open to a party to sit tight and not to file an application for settlement of dispute of his right, which had been infringed, within the time provided by the Limitation Act, and, allow his right to be extinguished by lapse of time, and thereafter, to wait for another cause of action and then file an application under Section 11 of the Act 1996 for establishment of his right which was not then alive, and, which had been long extinguished because, in such a case, such an application would mean an application for revival of a right, which had long been extinguished under the Act 1963 and is, therefore, dead*

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for all purposes. Such proceedings would not be maintainable and would obviously be met by the plea of limitation under Article 137 of the Act 1963."

8. He further states that the compliance of the obligation of the respondent was based upon M/s. Classic Infraventure LLP being able to extract sand from the riverbed. In the present case, M/s. Classic Infraventure LLP could not extract 8 lakh cubic mtrs. of sand from the river bed and on that issue there is a petition pending in the High Court of Judicature at Allahabad. Since the quantity itself was not available, there are no arbitral disputes between the parties.

9. In addition, it is stated that the contract itself was contingent on M/s. Classic Infraventure LLP being able to extract 8 lakh cubic mtrs. of sand and since that even did not happen, the contract itself became non-enforceable.

10. Lastly, it is stated that in the notice invoking arbitration the petitioner has not quantified the recovery of Rs. 2.9 crores and hence the same cannot now be included in the arbitration claim. To buttress that argument, the learned counsel for the respondent relies upon the judgment of a coordinate bench of this Court in ***Extramarks Education India Private Limited v. Shri Ram School and Another***, 2022 SCC OnLine Del 3123 and more particularly paragraphs 17 and 18 which read as under:

> *"17. As observed above, the claim in money is the only claim that was raised in invocation notice dated 28.07.2021; and the argument that the petitioner was also entitled to get back the hardware and other equipments lying with the respondents, is to be considered only to be rejected, since reply dated 31.08.2021 issued by the respondents records that such hardware was*

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picked-up by the petitioner, which the petitioner does not dispute. Even more importantly, the law is clear that an invocation notice must set-out clearly the claims that a party wants referred to arbitration; and in the present case, no claim for recovery of hardware was at all contained in invocation notice dated 28.07.2021.

18. In the above view of the matter, the period of limitation applicable to the petitioner's claim is as follows : having terminated the contract with the respondents vide notice dated 04.01.2017, and the respondents having failed to pay the amounts claimed to be due, the petitioner ought to have issued the notice invoking arbitration within 03 years of that date, viz. by or before 03.01.2020. However, the petitioner issued the notice invoking arbitration only on 28.07.2021, which was evidently beyond the limitation prescribed in law."

11. I have heard learned counsel for the parties.

12. In the present case, the petitioner issued a legal notice on 07.02.2022 to the Director of the respondent-company seeking refund of the amount due with interest. The said notice was duly replied to by the respondent on 11.03.2022, categorically stating in paragraphs 6 and 7 that the MoU between the parties subsisted and entailed a lock-in period and hence the question of alleged termination did not arise.

13. Hence, as per the respondent's own understanding on 11.03.2022, the MoU between the parties was subsisting and hence, the issue of enforcing obligations arising out of the MoU was subsisting and alive.

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14. The judgment of the Hon'ble Supreme Court in ***Bharat Sanchar Nigam Limited*** (supra) is distinguishable as in that case, BSNL had rejected the claims of Nortel on 04.08.2014. The petitioner thereafter on 29.04.2020 i.e. beyond the period of three years issued the notice invoking arbitration. Hence, the Hon'ble Supreme Court was of the view that since the notice invoking arbitration was issued 5½ years after rejection of the claims on 04.08.2014, and there were no subsisting disputes between the parties, the claims were barred by limitation.

15. Similarly, ***B and T AG*** (supra) is also distinguishable as in that case, disputes arose in the year 2014, and the respondent therein informed the petitioner in 2016 itself that the justifications put forth by the petitioner therein were duly considered and a final decision was taken for encashment of the liquidated damages. The petitioner had invoked arbitration in 2019, and the Hon'ble Supreme Court was of the view that since the cause of action arose in 2014, and a final decision was made by the respondent therein in 2016, the claims of the petitioner therein were barred by limitation.

16. In the present case, as per the respondent's own understanding, the MoU is still subsisting and hence claims arising out of the said MoU cannot be stated to be time barred.

17. As regards the issue of contingency of contract and the claims being non-arbitrable, the Court at the stage of referring the parties to the arbitration is only required to see the subsistence of an arbitration clause. Once there is an arbitration clause, the issue whether the contract was contingent and/or whether the claims are arbitrable or not should be decided by the arbitral tribunal.

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18. The petitioner is claiming that the petitioner has suffered financial losses on account of non-compliance of the obligations by the respondent. The same, *prima facie,* seems to be arbitrable.

19. On 07.02.2022, the petitioner sought refund of Rs. 2.70 crores. The said notice was replied on 11.03.2022 stating that the MoU is subsisting and has been reproduced above. Thereafter, the petitioner sent default notice dated 06.02.2023 calling upon the respondent to perform its obligation of supplying 4 lakh cubic mtrs. of sand. The respondent sent its reply to the default notice *vide* letter dated 04.03.2023.

20. A perusal of the legal notice dated 22.03.2023 under Section 21 of the Arbitration and Conciliation Act, 1996 shows that even though it is mentioned in paragraph 19 that the respondent is unwilling to supply/assign 4 lakh cubic mtrs. of sand as per the MoU which has resulted in huge financial losses to the petitioner, to say that the petitioner has only sought supply of 4 lakh cubic mts. of sand will be a misnomer. Paragraph 19 reads as under:

> *"19. The aforesaid acts and events therefore make it abundantly clear that you, the addressee are unwilling to supply/assign 4,00,000 Cubic Mtrs. of sand as per the Memorandum of Understanding dated 28th April, 2018 leaving our client in agony and distress and to incur huge financial losses."*

21. Hence the term "financial loss" includes the monetary claims of the petitioner. For the said reasons, the petition is allowed. Since there are ongoing disputes between the parties, the following directions are issued:-

vii) Ms. Gurmeet Bindra, Advocate (Mob. No. 9810155549) is appointed as a Sole Arbitrator to adjudicate the disputes between

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the parties.

viii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.

ix) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

x) 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 on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.

xi) The parties shall approach the learned Arbitrator within two weeks from today.

22. The petition is allowed and disposed of in the aforesaid terms.

JASMEET SINGH, J

MARCH 7, 2024
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Click here to check corrigendum, if any

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