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

+ **ARB.P. 1074/2022**

M/S INDIAN OIL CORPORATION LTD

..... Petitioner

Through: Mr. Kunal Kalra, Advocate.

versus

M/S SHALIMAR BAGH GAS AGENCY AND ORS.

..... Respondents

Through: Mr. Ayush Mittal, Advocate for R-2
with Ms. Aruna Nanda (respondent
No.2.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

05.02.2024

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By way of the present petition under section 11(5) of the Arbitration & Conciliation Act 1996 ('A&C Act'), the petitioner seeks appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondents from Distributorship Agreement dated 15.02.2007.

2. Mr. Kunal Kalra, learned counsel for the petitioner has drawn the attention of this court to clause 37(a) which comprises the arbitration agreement between the parties; and contemplates reference of disputes between them to arbitration in accordance with the A&C Act. However, the agreement is silent as to the seat/venue of the arbitration proceedings.



3. For completeness, it may be recorded that a separate territorial jurisdiction provision is also contained in clause 37(b), which subjects the contract between the parties to the jurisdiction of courts of law at Delhi.
4. Though the arbitration agreement also contemplates that the sole arbitrator would be appointed by the Director (Marketing) of the petitioner corporation, that provision of the arbitration agreement is, in any case, untenable in law in view of the decision of the Supreme Court in *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd.*¹
5. As per the record, the petitioner invoked arbitration *vide* Notice dated 08.02.2022; to which the respondent has sent reply dated 29.03.2022.
6. Notice on this petition was issued on 12.09.2022; consequent to which reply dated 31.10.2023 has been filed on behalf of respondent No. 2, who is one of the partners of respondent No. 1/M/s Shalimar Bagh Gas Agency, the other partner being respondent No. 3.
7. Respondent No. 2 has also joined the hearing *via* video-conferencing alongwith his counsel.
8. As recorded in order dated 25.08.2023, respondent No. 3 was represented by counsel on that date, and had submitted that he had no objection to the appointment of an independent sole arbitrator in the matter.
9. After hearing learned counsel appearing for respondent No. 2 and after perusing the reply filed, it is seen that the only objection raised

¹ (2020) 20 SCC 760



on behalf of respondent No. 2 is that the *claims sought to be raised by the petitioner are time-barred*.

10. At this point it may be observed, that both in the petition as well as in invocation notice dated 08.02.2022, the petitioner makes reference to a certain clause 61(a) as being the arbitration agreement between the parties. However, there appears to be no clause 61 in the Distributorship Agreement; and the arbitration agreement is in fact comprised in clause 37(a) thereof. It is noticed however, that neither in reply dated 29.03.2022 issued to the invocation notice nor even in reply dated 31.10.2023 filed to the present petition, has the respondent taken any objection as to the number of the arbitration clause cited.
11. Learned counsel appearing for respondent No. 2 submits, that the *claims* arise from a Show Cause Notice dated 24.08.2016 issued by the Delhi Development Authority, which, after exchange of correspondence between the parties, led to the petitioner issuing to respondents Nos. 2 & 3 a demand notice dated 12.10.2018. Counsel submits however, that the present petition seeking to invoke arbitration is premised on notice dated 08.02.2022, whereby the claims sought to be referred to arbitration are *ex-facie* time-barred, since the demand notice was issued on 12.10.2018.
12. In the reply filed by respondent No. 2, the said respondent has also set-out the entire history of the transactions between the parties, commencing 19.09.1985 upto 22.04.2023, spanning some 37 pages.
13. A perusal of the reply shows that the objections raised by the respondent relate to the merits of the disputes between the parties.



14. Insofar as the time that has lapsed between the issuance of demand notice dated 12.10.2018 and invocation notice dated 08.02.2022, Mr. Kalra explains, that the period of limitation for the petitioner's claims ended during the period relating to which the Supreme Court had issued a general order excluding that period for counting limitation. Counsel has drawn attention of this court to order dated 10.01.2022 made by the Supreme Court in *In Re: Cognizance for Extension of Limitation*², whereby the Supreme Court has directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded in computing the period of limitation for various actions; further directing that where the limitation for filing a case has expired during the said period, parties shall be entitled to file their claims within 90 days commencing 01.03.2022. In the present case, it is pointed-out that the invocation notice was in any case issued on 08.02.2022.
15. Be that as it may, this court is of the view, that the objection as to the *claims* being time-barred, would require closer consideration on merits by the learned Sole Arbitrator, since it appears to be a mixed question of fact and law.
16. A brief reference on this aspect may be made to the decision of the Supreme Court in *Vidya Drolia vs. Durga Trading Corporation*³ :

*“148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. **Limitation***

² (2022) 3 SCC 117

³ (2021) 2 SCC 1



law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. ”

(emphasis supplied)

17. Upon a conspectus of the averments contained in the petition and the submissions made, this court is satisfied that there is a valid and subsisting arbitration agreement between the parties; that this court has territorial jurisdiction to entertain and decide the present petition; and also that the disputes that are stated to have arisen between the parties as set-out *inter-alia* in invocation notice dated 08.02.2022 do not appear *ex-facie* to be non-arbitrable.
18. Accordingly, the present petition is allowed and **Mr. RHA Sikander, Advocate (Cellphone No.: +91 9810471891)** is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.
19. The learned 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 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 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, including the respondents' objection that the claims are time-barred, are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.
23. Parties are directed to approach the learned Arbitrator appointed within 02 weeks.
24. A copy of this order be communicated by the Registry to the learned Sole Arbitrator.
25. The petition stands disposed-of in the above terms.
26. Other pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

FEBRUARY 5, 2024

V.Rawat