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

Date of Decision: 05th January, 2024

+ **ARB.P. 1167/2022**

SMT JATINDER KAUR AND ORS

..... Petitioners

Through: Mr. Arjun Malik & Ms. Aaro
Malik, Advs. (M. 9810017346)

versus

LATE SH JAGJIT SINGH AND ORS

..... Respondents

Through: Mr. Bhagat Singh, Advocate for LR
of Mr. Jagjit Singh.

37 WITH

+ **O.M.P.(I) 10/2022**

SMT JATINDER KAUR AND ORS.

..... Petitioners

Through: Mr. Arjun Malik & Ms. Aaro
Malik, Advs. (M. 9810017346)

versus

LATE SH JAGJIT SINGH & ORS.

..... Respondents

Through: Mr. Bhagat Singh, Advocate for LR
of Mr. Jagjit Singh.

38 AND

+ **O.M.P.(T) 3/2023**

SMT. JATINDER KAUR & ORS.

..... Petitioners

Through: Mr. Arjun Malik & Ms. Aaro
Malik, Advs. (M. 9810017346)

versus

LATE SH. JAGJIT SINGH THROUGH
ITS LEGAL HEIRS & ORS.

..... Respondents

Through: Mr. Bhagat Singh, Advocate for LR
of Mr. Jagjit Singh.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

PRATHIBA M. SINGH, J.

1. This hearing has been done through hybrid mode.
2. These are three petitions which arise out of an agreement to sell dated



4th July, 2010 entered into on behalf of Smt. Jatinder Kaur, Sh. Samarjeet Singh and Sh. Bhupinder Singh on one hand and Sh. Jagjit Singh on the other hand. The parties were together in a business called 'Lahore Timber House' in Kirti Nagar, Delhi. The agreement to sell relates to a plot of land no. 1/57, WHS, Kirti Nagar, Timber Block, New Delhi as also the rights and interests in the business 'Lahore Timber House' and contains an arbitration clause which reads as under:

“12. In the event of any dispute or difference about interpretation of this agreement and/or implementation of this agreement, and/or in performance of this agreement or breach of agreement by either of the parties or dispute of any nature whatsoever, same shall be adjudicated upon by sole arbitration of either Secretary or Vice President of Delhi High Court Bar Association and award made by said Arbitrator shall be final and binding on parties and the venue of arbitration shall be in New Delhi only.”

3. Disputes had arisen and the Petitioners had invoked the Arbitration Clause under the said agreement to sell in Arbitration Petition being **ARB. P. 49/2020** titled **Jatinder Kaur & Ors. v. Jagjit Singh** in which vide order dated 12th February, 2021, a ld. Single Judge of this Court passed the following order:

“2. The learned counsel appearing for the respondent does not dispute as to the existence of the Agreement to Sell or the Arbitration Clause. He fairly states that in view of the above, an Arbitrator is required to be appointed as the petitioners have invoked the arbitration clause. He, however, states that there is a serious possibility of an amicable resolution of disputes and requests that the parties be referred for mediation.

3. The said suggestion is agreed to by the learned



counsel for the petitioners.

4. In view of the above, the parties are referred to the Delhi High Court Mediation and Conciliation Centre (DHCMCC). DHCMCC shall appoint a Mediator. The first mediation hearing (either physically or virtually) shall be held on 19.02.2021.

5. The parties shall endeavour to resolve the disputes amicably and, in any event, within a period of six weeks after the first hearing, that is on or before 02.04.2021.

6. This Court considers it apposite to allow the present application to appoint an Arbitrator.

7. Accordingly, Mr. Babu Lal, ADJ, (Retd.) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties. This is subject to the learned Arbitrator making the necessary disclosure under Section 12(1) of the Arbitration and Conciliation Act, 1996 (A&C Act) and not being ineligible under Section 12(5) of A&C Act.

8. It is clarified that the learned Arbitrator shall not take any steps towards the arbitration proceedings till 02.04.2021. This is to enable the parties to amicably resolve the disputes. In the event, the parties are able to resolve their disputes, they shall inform the learned Arbitrator about the same and no further steps would be required to be taken in the arbitration. However, if the parties are unable to amicably resolve their disputes, the learned Arbitrator shall proceed further from 03.04.2021. The parties are at liberty to approach the learned Arbitrator for further proceedings.”

4. As per the above order, the arbitration was to commence after settlement was explored between the parties till April 2021. However, it is the admitted position that settlement did not take place. Therefore, in terms of the above order dated 12th February, 2021 arbitration proceedings were to commence between the parties.



5. As per the Respondent, the Arbitrator had entered reference in June, 2021. However, there is no written order passed by the Id. Arbitrator.
6. The contention of the Petitioner is that the Respondent - Sh. Jagjit Singh unfortunately passed away on 20th July, 2021 during the COVID-19 pandemic. Thereafter, on 3rd March, 2022, unfortunately, the Id. Sole Arbitrator appointed by the Court also passed away.
7. Consequently, an application **I.A. 8638/2022** was moved by the Petitioners in **ARB. P. 49/2020** seeking appointment of a fresh Arbitrator. The said application in **ARB. P. 49/2020** was listed before the Court on 27th May, 2023 and also on 31st May, 2023. Order dated 31st May, 2023, is set out below:

“I.A. 8638/2022

1. Mr. Bhagat Singh, who is an advocate by profession, is the son of the original respondent in this petition. He submits that the respondent has passed away on 20.07.2021.

2. The petitioner will supply a copy of the application to Mr. Bhagat Singh, who is requested to furnish a list of legal heirs of the deceased respondent to learned counsel for the petitioner, to enable him to take appropriate steps.

3. List on 27.07.2022”

8. The said application was however dismissed as withdrawn vide order dated 27th July 2022, in the following terms:

“I.A. 8638/2022(Application on behalf of the petitioner seeking appointment of substitute arbitrator)

1. Mr. Bhagat Singh, who is the son of the deceased respondent raises an objection that the substitution of the arbitrator appointed by the order of this Court dated 12.02.2021 cannot be done by way of an application in a disposed of petition under Section 11



of the Arbitration and Conciliation Act, 1996. He has handed over a list of the legal heirs of the deceased respondent to Mr. Arjun Malik, learned counsel for the petitioners.

2. Mr. Malik seeks permission to withdraw this application with liberty to file appropriate proceedings on the same cause of action.”

As can be seen from the above order, the list of LR's was handed over to the Petitioner on the said date i.e., on 27th July, 2022.

9. Subsequently, the Petitioner has filed the present three petitions i.e. **ARB. P. 1167/2022** seeking appointment of an Arbitrator, **O.M.P.(I) 10/2022** under Section 9 of the Act and **O.M.P.(T) 3/2023** under Section 14 and 15 of the Arbitration and Conciliation Act, 1996.

10. The prayer in these petitions is broadly two fold:

- i) That the earlier Arbitrator having passed away, the mandate ought to be terminated and a fresh Arbitrator ought to be appointed;
- ii) An interim prayer seeking an injunction against creation of any third-party interest in the property.

11. Ld. Counsel for the Petitioner submits that the Petitioner has made repeated attempts to get a fresh Arbitrator appointed; however, to no avail. Ld. Counsel for the Respondent has two submissions - first, that the arbitration proceedings itself abated in view of the fact that the earlier Ld. Arbitrator had entered reference in June, 2021 and the Respondent had passed away on 20th July, 2021, yet no steps were taken till July, 2022. His second submission is that the abatement is a matter of right and therefore the petitions are technically flawed.

12. On a query from the Court as to whether there is any earlier order passed by the Arbitrator, Ld. Counsel submits that there are certain SMSes



which have been exchanged between the Id. Arbitrator and the parties.

13. The Court had heard Id. Counsels at length and perused the record.

14. The position that emerges from the above is that the COVID-19 lockdown started in March, 2020. As per the decision of the Supreme Court in *In Re Cognizance for Extension of Limitation, (2022) 3 SCC 117*, the period between 15th March 2020 and 28th February 2022 is not to be counted for the purposes of calculating limitation. The relevant extract of the said decision is set out below:

“I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.”

15. In the present case, the Respondent had passed away on 20th July 2021 and the arbitrator passed away on 3rd March, 2022. For the present purposes and in view of the events that have transpired, even if some informal communication had taken place between the parties and the Arbitrator, the same cannot be treated as formal reference having been



entered into, as there is no written order which has been passed. In any event, Id. Counsel for the Respondent submits that the order was to be communicated in writing but the Id. Arbitrator himself passed away in March, 2022.

16. Under such circumstances, it is not possible for this Court to accept that the Id. Arbitrator had entered reference. Be that as it may, in terms of the order passed by the Supreme Court in, the period till 30th May, 2022 would not be counted for the purpose of calculating limitation.

17. In the present case, the Court is also adjudicating an application under Section 11 of the Act. The Supreme Court in its decision ***Bharat Sanchar Nigam Ltd (BSNL) and Anr v. Nortel Networks India Pvt Ltd, (2021) 5 SCC 738*** decided the question of what the limitation period for filing an application for appointment of an arbitrator would be. In answering this question, the Supreme Court noted that the Act does not explicitly specify a limitation period for filing an application for the appointment of an Arbitrator. In the absence of such a specific timeframe within the Act, the Supreme Court held that the appropriate course of action is to apply the residual provision found in Article 137 of the schedule of the Limitation Act, 1963. According to this provision, a general limitation period of three years is prescribed for legal actions where no specific duration is mentioned. Therefore, based on this interpretation, the Supreme Court concluded that applications for appointing an Arbitrator must be filed within a three-year period, starting from the date when the right to apply accrues. The relevant extract of the said decision is extracted as under:

“15. The reasoning in all these judgments seems to be that since an application under Section 11 is to be filed



in a court of law, and since no specific Article of the Limitation Act, 1963 applies, the residual Article would become applicable. The effect being that the period of limitation to file an application under Section 11 is 3 years' from the date of refusal to appoint the arbitrator, or on expiry of 30 days', whichever is earlier.

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17. Given the vacuum in the law to provide a period of limitation under Section 11 of the Arbitration and Conciliation 1996, the Courts have taken recourse to the position that the limitation period would be governed by Article 137, which provides a period of 3 years from the date when the right to apply accrues. However, this is an unduly long period for filing an application u/S. 11, since it would defeat the very object of the Act, which provides for expeditious resolution of commercial disputes within a time bound period. The 1996 Act has been amended twice over in 2015 and 2019, to provide for further time limits to ensure that the arbitration proceedings are conducted and concluded expeditiously. Section 29A mandates that the arbitral tribunal will conclude the proceedings within a period of 18 months. In view of the legislative intent, the period of 3 years for filing an application under Section 11 would run contrary to the scheme of the Act. It would be necessary for Parliament to effect an amendment to Section 11, prescribing a specific period of limitation within which a party may move the court for making an application for appointment of the arbitration under Section 11 of the 1996 Act."

18. As per the above interpretation in ***Bharat Sanchar Nigam Ltd (supra)*** the three-year limitation period for seeking the appointment of a fresh arbitrator becomes relevant and operational from the date when the right to apply for a new appointment accrues. In the facts of the present case, the



demise of the previously appointed Sole Arbitrator constitutes the event triggering the start of the limitation period. Thus, the application for the appointment of a substitute Sole Arbitrator, being well within this three-year window, is timely and adheres to the legal framework as established by the Supreme Court. Further, in any event, considering that the initial arbitrator was appointed by Court under Section 11(6) of the Act, after taking into consideration the existence of the arbitration clause in the agreement between the parties, axiomatically the appointment of a substitute arbitrator shall also be undertaken in terms of Section 11(6) of the Act. Consequently, this Court is of the opinion that the petition cannot be said to be beyond limitation. Moreover, since the proceedings had not even commenced and the demise of Arbitrator took place, the issue of abatement would not arise.

19. The Petitioner had in July, 2022 filed an application in the earlier arbitration petition being **ARB P. 49/2020** seeking the appointment of a substitute Arbitrator. The Petitioner has thereafter filed two more petitions i.e., under Section 11 and under Section 14/15 of the Act. It cannot be said that the Petitioner has not acted with alacrity. Thus, between 30th May, 2022 and 27th July, 2022, abatement *prima facie* could not have taken place and in any event this issue of abatement can even be raised before the Id. Arbitrator, if so advised.

20. The Court has perused the order dated 12th February, 2021. The agreement to sell is not disputed. The existence of the arbitration clause is not disputed. The Respondent having already passed away, his legal heirs have been impleaded as Respondents in the present petitions. Accordingly, considering the fact that the Respondents are in possession of the subject property, the cause of action survives. Therefore, this Court is of the opinion



that a Sole Arbitrator would be liable to be appointed in the matter.

21. None has appeared for the other Respondents. Mr. Bhagat Singh appearing for himself and Mrs. Manmeet Kaur, his mother. He further submits that he does not represent the other Respondents/siblings. Considering the fact that these petitions have been pending for so long and the Respondents are closely related and are aware of the present proceedings, the Court deems it appropriate to appoint a Sole Arbitrator to adjudicate upon the disputes which have arisen out of the agreement to sell.

22. Accordingly, Justice ***R.S. Endlaw (Retd) (9717495002)*** is appointed as the Id. Sole Arbitrator to adjudicate the disputes arising out of the family members in terms of the agreement to sell dated 4th July, 2010. The fee of the Id. Arbitrator shall be as per Schedule IV of the Arbitration and Conciliation Act, 1996.

23. Insofar as the Section 9 petition is concerned, the Petitioner submits that he would move an appropriate application under Section 17 of the Act before the Id. Sole Arbitrator. It is however made clear that until such an application is moved, there shall be no third-party interest created in the subject property viz., plot of land no. 1/57, WHS, Kirti Nagar, Timber Block, New Delhi. This order shall be subject to further orders passed by the Id. Arbitrator.

24. All petitions are accordingly disposed of in these terms. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

JANURARY 05, 2024

Rahul/am

[Corrected and released on 10th January, 2024]