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

Date of decision: 11th NOVEMBER, 2024

IN THE MATTER OF:

+ **ARB.P. 1457/2024**

JKR TECHNO ENGINEERS PVT LTDPetitioner

Through: Mr. Anuj Kumar Sinha, Advocate

versus

JMD LIMITEDRespondent

Through: Mr. Arjun Sawhney, Mr. Rohan
Bhambri and Mr Arnav Gosain,
Advocates

+ **ARB.P. 1459/2024**

JKR TECHNO ENGINEERS PVT LTDPetitioner

Through: Mr. Anuj Kumar Sinha, Advocate

versus

JMD LIMITEDRespondent

Through: Mr. Arjun Sawhney, Mr. Rohan
Bhambri and Mr Arnav Gosain,
Advocates

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. The present Petitions under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('A&C Act') have been filed by the Petitioner seeking appointment of an independent sole arbitrator to adjudicate upon the



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disputes which have arisen between the parties from work order dated 03.09.2014.

2. Shorn of unnecessary details, the facts leading to the filing of the present petitions are that:-

a. It is stated that the work order bearing No.JMD/SUBURIO-67/FW/JKR/LOI/01, dated 03.09.2014 was issued by the Respondent in favour of the Petitioner herein for design, manufacture, supply, installation, testing, commissioning and handing over of Fire-Fighting system at JMD SUBURIO, Sector-67, Sohna Road, Gurgaon, Haryana, for total consideration of Rs.1,69,51,000/-.

b. Clause 36 of the said Work Order contains an Arbitration Clause which reads as under:-

“36. Arbitration:

The Contractor shall try to settle all matters pertaining to contract first with the engineer-in-charge. The decision of engineer shall be final and conclusive and shall be without appeal. If still some dispute between contractor and engineer/employer in connection with contract (During progress of work or within defects liability period) is not resolved it shall be referred by the contractor to MD. JMD Ltd by giving full details of matter under dispute and the reasons. The employer within a period of 30 days from the date of receipt of such reference from the contractor shall give him in writing his decision. If the contractor is dissatisfied with the decision of employer he can refer the matter for Arbitration by serving a written notice on the MD. JMD Ltd through engineer within a period of 15 days from employer's decision. The notice shall be self-explanatory. The employer then shall appoint sole arbitrator who will give the award which will be final &



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binding on both the parties and will not appeal in court of law. English language shall be used in arbitration proceedings."

• *Settlement of disputes and Arbitration:*

That, all or any disputes, controversy, claim or differences of any kind whatsoever between the parties to this Contract relating to or arising out of or concerning or touching this contract including their respective rights and obligations contained herein or the breach, termination, or relating to interpretation and validity of any provision herein. Such differences, disputes shall be first settled amicably by mutual discussion and negotiations failing which the same shall be settled through Arbitration. The Arbitration shall be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The Arbitration proceedings shall be held at New Delhi and shall be conducted by a Sole Arbitrator to be appointed by the Managing Director of MIS JMD Ltd on written request from either party or whose decision shall be final and binding upon the parties. The contractor hereby confirms that he lit shall have no objection to the appointment of the sole Arbitrator even if the person so appointed as a sole Arbitrator is an employee or Advocate of the owner or is otherwise connected to the Owner and the contractor confirms that notwithstanding such a relationship/connection, the contractor shall have no doubts as to be independence or impartiality of the said sole Arbitrator. The language to be used in the Arbitration proceeding shall be English and decision of the Sole Arbitrator including but not limited to award shall be final and binding on the parties the Arbitrator shall decide his fees and the cost of the Arbitration proceedings shall be borne equally by both the parties. ”

c. It is the case of the Petitioner that the Petitioner started the work



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and the work progresses substantially, however, the payments were not being released by the Respondent. It is stated that by 2018, the Petitioner completed most of the work but the bills were not being certified and were delayed without any reason. It is stated that after 2019, the Petitioner was under huge mental pressure of saving his residential property from attachment by the Kotak Mahindra Bank under SARFAESI Act and thus had been continuously writing the Respondent to release the payment and certify the final bill. It is further stated that after continuous insistence, the Respondent finally carried out the final measurement of the work done by the Petitioner on 09.01.2019 and accordingly price of the work done was also verified and calculated by the Respondent. Thereafter, *vide* letter dated 28.03.2019, Petitioner has agreed to rectify the snag point after receiving the payment but Respondent has failed to release the payment despite many request and reminders. The Respondent thereafter terminated the contract *vide* email dated 17.06.2019.

- d. It is stated that the Petitioner filed an application under Section 12(A) of the Commercial Court Act for pre-litigation mediation as mandated under the A&C Act. It is stated that a Non-Starter Report dated 01.09.2021 was prepared.
- e. Thereafter, the Petitioner filed a suit, being CS (COMM) 57/2024, for recovery of Rs.78,08,525/- before the Commercial Court. It is stated that in the said Suit, the Respondent herein filed an application under Section 8 of the Arbitration Act on the ground that there is an Arbitration Agreement in the work order dated



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03.09.2014 and matter be referred to arbitration. *Vide* order dated 26.04.2024, Ld. District Judge, Commercial Court, allowed the application of the Respondent filed under Section 8 of the Arbitration Act and referred the matter for arbitration and directed the parties to proceed further for appointment of an Arbitrator in accordance with the contract, failing which, the parties had to approach this Court for appointment of an Arbitrator.

f. It is stated that the Petitioner herein invoked the Arbitration Clause by sending a notice under Section 21 of the A&C Act to the Respondent herein on 07.05.2024. Since the Respondent has failed to reply to the said notice despite receiving the same, the present petition has been filed by the Petitioner for appointment of an Arbitrator.

3. Notice in the present Petitions was issued on 19.09.2024.

4. The Respondent has appeared and filed his reply. In the reply it is stated that the claim of the Petitioner is barred by limitation and therefore, no useful purpose would be achieved by referring the parties to arbitration. The learned Counsel for Respondent places reliance on the judgment of the Apex Court in Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd., (2020) 14 SCC 643 & BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738, to demonstrate as to how the claim of the Petitioner is barred by limitation. The learned Counsel for the Respondent also places reliance on the judgment of the Apex Court in SBI General Insurance Co. Ltd vs Krish Spinning, 2024 SCC OnLine SC 1754, & Arif Azim Co. Ltd. vs Aptech Ltd., (2024) 5 SCC 313, to contend that if the claim is *ex facie* barred by limitation, the Court must not refer the matter to Arbitration.



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5. Heard the parties and perused the material on record.
6. The facts of the case reveal that the contract had been terminated by the Respondent *vide* email dated 17.06.2019. Thereafter, the Petitioner filed an application under Section 12(a) of the Commercial Court Act, 2015 on 16.03.2021 for pre-litigation mediation which was disposed of by a Non-Starter Report dated 01.09.2021 on the ground that despite issuance of notice, the Respondent herein has not appeared. The Petitioner thereafter filed a suit for recovery of Rs.78,08,525/- *vide* CS (COMM) 57/2024 in which an application under Section 8 of the Arbitration Act was filed by the Respondent on the ground that there is an arbitration agreement in work order dated 03.09.2014 and prayed that the suit is not maintainable and same be referred to Arbitration. The Ld. District Judge, Commercial Court *vide* order dated 26.04.2024, allowed the said application of the Respondent and referred the matter for arbitration. Thereafter, the Petitioner herein invoked the Arbitration Clause by sending a notice under Section 21 of the A&C Act to the Respondent herein on 07.05.2024. Since the Respondent has failed to reply the notice despite receiving the same, the present petition has been filed by the Petitioner for appointment of an Arbitrator.
7. After getting the suit disposed of under Section 8 of the A&C Act, it does not lie in the mouth of the Respondent to now come to this Court and state that the claim is barred by limitation. The Petitioner had initiated proceedings under the Commercial Courts Act by filing an application under Section 12(a) of the Commercial Court Act on 16.03.2021 and had asked for pre-litigation mediation. Section 14 of the Limitation Act, 1963 provides of exclusion of time spent on *bona fide* Court proceedings without jurisdiction. The Petitioner had approached the Commercial Court which is the



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Competent Court to entertain the disputes under the Commercial Court Act. Before filing the written statement, the Respondent herein had raised an objection for referring the matter to Arbitration. It, therefore, cannot be said that the claim of the Petitioner is barred by limitation.

8. The judgment of Arif Azim Co. Ltd. vs Aptech Ltd (*supra*) and SBI General Insurance Co. Ltd (*supra*) will not apply in the facts of this case.

9. The Apex Court in SBI General Insurance Co. Ltd vs Krish Spinning, **2024 SCC OnLine SC 1754**, has observed as under:-

“On the second issue it was observed by us in paragraph 67 that the referral courts, while exercising their powers under Section 11 of the Act, 1996, are under a duty to “prima-facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time consuming and costly arbitration process.”

10. In view of the fact that the Petitioner had availed its remedy under the Commercial Courts Act in the year 2019 itself which was within limitation. The pre-mediation litigation ended as a Non-Starter because of the non-appearance of the Respondent, resulting in filing of a suit by the Petitioner herein and the Suit was rejected as the Respondent herein filed an application under Section 8 of the A&C Act on the ground of existence of an Arbitration clause. This Court is of the opinion that it cannot be said that the claim of the Petitioner is *ex facie* a dead claim.

11. In view of the above, this Court is inclined to appoint an Arbitrator to adjudicate upon the disputes between the Parties.

12. Accordingly, Mr. Shashank Garg, Adv. (Mobile No. 9811526671) is appointed as a Sole Arbitrator to adjudicate upon the disputes between the



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parties.

13. The arbitration would take place under the aegis of the Delhi International Arbitration Centre (DIAC) and would abide by its rules and regulations. The learned arbitrator shall be entitled to fees as per the Schedule of Fees maintained by the DIAC.

14. The learned arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

15. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

16. Needless to say, nothing in this order shall be construed as an expression of this Court on the merits of the contentions of the parties including the question of limitation. This Court is inclined to refer the dispute to the Arbitration only on the ground that the claim of the Petitioner is not ex facie time barred. It is open for the Arbitrator to apply his mind as to whether the benefit of Section 14 of the Limitation Act can be extended to the Petitioner herein or not in the facts and circumstances of this case.

17. Resultantly, the petitions are disposed of, along with pending application(s), if any.

18. It is always open for the Respondent to raise the objection of limitation before the Ld. Arbitrator and the Ld. Arbitrator is requested to consider the issue of limitation in accordance with law.

SUBRAMONIUM PRASAD, J

NOVEMBER 11, 2024

RJ