



\$~1

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 6th February, 2024
+ **ARB.P. 1143/2023**

INFORMATION TV PRIVATE LIMITED Petitioner
Through: Mr. Siddharth Bambha, and Ms.
Sucharu Garg, Advs (M.
9650131453)

versus

JITENDRA DAHYABHAI PATEL Respondent
Through: Mr Aditya Ajaykumar Choksi, Mr
Arpit Gupta, Advs. (M.
7567360018)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (*hereinafter*, '1996 Act') has been filed by the Petitioner-Information TV Pvt. Ltd. seeking appointment of an arbitrator in terms of Clause 6 of the Memorandum of Understanding (*hereinafter*, 'MoU') dated 1st May, 2018. Clause 6 of the MoU reads as under:-

"6. That MOU shall be construed in accordance with the laws in force in India and in the eventuality that any dispute or difference should arise on any matter relating to or arising out of the present MOU the same shall be settled by Arbitration and shall be referred to the Sole Arbitrator who shall be appointed by both parties mutually and whose decision shall be final and binding upon the parties. The Sole Arbitrator shall conduct the arbitration proceedings at New Delhi/Delhi. It is also agreed between the parties



that arbitration proceeding would be conducted in English only and in no other language. Only appropriate Court at Delhi shall have jurisdiction to entertain the disputes that may arise out of this MOU. No other courts shall have jurisdiction.”

3. The crux of the dispute is that the Petitioner and the Respondent-Jitendra Dahyabhai Patel, had agreed, vide the said MoU, for the Respondent to operate a television channel named 'India News Gujarat'. As per the MoU, the Respondent was to invest approximately Rs.14 crores into a new company that was to be incorporated. Disputes arose in respect of the said MoU.

4. The Petitioner, thus, invoked Section 9 of the 1996 Act and vide order dated 6th April, 2021, the Court in ***O.M.P.(I) (COMM) 376/2020*** titled '***Information TV Private Limited v. Jitendra Dahyabhai Patel***' passed the following order:-

“1. The petitioner has filed the present petition, inter alia, praying as under:

"a) Pass an ex-parte ad-interim injunction, restraining the Respondent or anyone claiming under him from interfering in the day-to-day functioning or the Petitioner claiming any right under the MoU dated 01.05.2018; and

b) Pass an ex-parte ad-interim injunction, restraining the Respondent or anyone claiming under him from acting as a director, taking any decision, representing himself, taking any steps or in any manner claiming himself to be associated or connected with 'India News Gujarat' or the Petitioner or any of its associates/ subsidiaries/ affiliates, etc.;

c) Confirm the above noted orders after hearing the Respondent; "

2. The present petition was listed for the first time



before this Court on 23.11.2020. On that date, the Court had noted the prayers made in the present petition. The notice in the petition was accepted by the learned counsel for the respondent and he had made a statement that the respondent would not interfere with the "day to day functioning of the petitioner company in operating the news channel 'India News Gujarat'".

3. After some arguments, the learned counsel appearing for the parties submit that the present petition be disposed of by binding the respondent to the said statement till the conclusion of the arbitral proceedings.

4. In view of the aforesaid consensus, the present petition is disposed of in the aforesaid terms.

5. It is, however, clarified that this would not preclude the parties from approaching the Arbitral Tribunal either for vacation or variation of this order or for seeking further reliefs as they may be advised, as and when the Arbitral Tribunal is constituted.

6. It is clarified that this is without prejudice to all rights and contention of the parties. Nothing stated herein shall preclude the parties from canvassing the respective cases before the Arbitral Tribunal."

5. The Respondent's case is that despite this order having been passed way back in 2021, the Petitioner has chosen to invoke arbitration only now *i.e.* in September, 2023. Such a petition, according to him, is barred under Section 9(2) of the 1996 Act. He relied upon the decision of the Id. Division bench in *Ezen Aviation v. Big Charter Pvt. Ltd. (2021:DHC:4152-DB)* wherein the Court observed as follows:

*"8. Therefore, for a period of **almost** nineteen months from the first hearing of the petition under*



Section 9 of the Act filed by the respondent; eighteen months from the first interim order dated 08.06.2020; and fourteen months from the second interim order dated 23.10.2020 passed by the learned Single Judge, the respondent is yet to take steps to have its claims adjudicated through arbitration.

9. Section 9(2) of the Act requires that where a Court passes an order for any interim measure or protection, the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such time as the Court may determine. This subSection was introduced by the Arbitration and Conciliation (Amendment Act), 2015. In Sundaram Finance Ltd. (Supra), the Supreme Court, while holding that an application under Section 9 of the Act may be filed before the commencement of the arbitral proceedings, observed that the party invoking such jurisdiction must satisfy the Court that it intends to take the disputes to arbitration. While passing such an order and in order to ensure that effective steps are taken for commencement of arbitral proceedings, the Court can pass a conditional order to put the applicant to such terms, as it may deem fit with a view to see that effective steps have been taken by the applicant for commencing the arbitral proceedings.

10. In the present case, we find that not only the statutory period as provided in Section 9(2) of the Act, but a period much beyond it has expired. The claim filed by the respondent has been deemed to be withdrawn for its failure to deposit the fee before the SIAC way back in April 2021. The mere fact that the respondent has now written some request to the SIAC for re-agitating its claim, in our view, is not sufficient, at least at this stage, to allow the Impugned order dated



23.10.2020 passed by this Court to continue.

11. Accordingly, the present appeals are allowed...”

6. The submission of Id. Counsel for the Respondent is that the invocation of the arbitration in terms of Section 21 of the 1996 Act had taken place on 15th March, 2021. However, a reply was sent by the Respondent on 4th April, 2021 wherein it took the following position:-

“25. That in terms of the aforementioned facts and circumstances including but not limited to breach and unilateral cancellation of MoU dated 01.05.2018, wrongful and unlawful forfeiture of amount paid by my Client, ousting of a Director of Company appointed by way of Board Resolution dated 11.12.2018 and cancellation of share warrants, it is clear that there is a dispute between the parties but not those which is raised in Your Notice arising out of the Memorandum of Understanding dated 01.05.2018. Therefore, by present Reply Your Client is requested to kindly accord suitable time and place for the discussion of Appointment of Sole Arbitrator to be mutually decided so that Arbitral Tribunal can be constituted as earliest.”

7. Despite the Respondent having agreed to discussions for the appointment of a Id. Sole Arbitrator, the Petitioner suggested three names by letter dated 5th April, 2021, and took no further steps. Thus, in terms of the time limit under Section 9(2) of the 1996 Act, the Respondent contends that the Petition under Section 11(6) of the 1996 Act is now barred by limitation.

8. On the last date, i.e., 29th January, 2024, the Id. Counsel for the Petitioner sought time to address arguments. Today, he relied on the decision of the Supreme Court in *Sundaram Finance Ltd. v. NEPC India*



Ltd., (1999) 2 SCC 479, to argue that the standard established in the said judgment requires an intention to arbitrate and effective steps to be taken to commence arbitral proceedings.

9. According to the Petitioner, it has met both conditions, as the notice invoking arbitration under Section 21 of the 1996 Act was issued on 17th March, 2021, within 90 days following the order dated 11th February, 2021. Moreover, the letter dated 5th April, 2021, was not responded to by the Respondent. Further, he submits that criminal proceedings were initiated by the Petitioner against the Respondent, where a closure report was filed on 8th February, 2023. Consequently, the Petitioner has now filed the present petition under Section 11 of the 1996 Act.

10. The Respondent's case is that out of Rs.14 crores, more than Rs.10 crores has been invested by the Respondent, and no services have been provided by the Petitioner in terms of the MoU. In fact, the Respondent is entitled to recover the said amounts from the Petitioner. He, however, submits that the time for filing the Section 11(6) petition in terms of Section 9(2) of the 1996 Act, and the Id. Division Bench's judgment in *Ezen Aviation Pty Limited & Anr. v. Big Charter Private Limited (2021: DHC: 4152-DB)* should be 90 days from the date when the interim order is passed in the Section 9 petition. Otherwise, there is a clear intention not to arbitrate disputes.

11. Heard. the question as to when arbitral proceedings have to be commenced after filing a Section 9 petition is no longer *res integra* and has been decided way back in 1999 by the Supreme Court in *Sundaram Finance Ltd. (supra)* where the Supreme Court observed as under:



“19. When a party applies under Section 9 of the 1996 Act, it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the Arbitral Tribunal. Section 9 further contemplates. Arbitration proceedings taking place between the parties. Mr. Subramaniam is, therefore, right in submitting that when an application under Section 9 is filed before the commencement of the arbitral proceeding if at the time when the application under Section 9 is filed, the proceedings have not commenced under Section 21 of the 1996 Act. In order to give full effect to the words “before or during arbitral proceedings” occurring in Section 9, it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before and application under Section 9 can be filed. **The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to an Arbitral Tribunal. But a situation may so demand that a party may chose to apply under Section 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. If an application is so made, the court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied, the court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the court while exercising jurisdiction under Section 9 can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings.** What is apparent, however, is that the court is not debarred from dealing with an



application under Section 9 merely because no notice has been issued under Section 21 of the 1996 Act.”

12. In terms of the said judgment, there are two components that need to be looked at, **firstly**, that there has to be an intention to arbitrate the disputes and **secondly**, effective steps have to be taken to commence the arbitral proceedings.

13. In the present case, in the Section 9 petition filed by the Petitioner on 11th February, 2021, the Court had passed the following order:

*“1. The learned counsel appearing for the petitioner requests for an adjournment. 2. The learned counsel appearing for the respondent states that disputes have been pending between the parties since almost 23 months and the petitioner has taken no steps for invoking the arbitration. He also points out that the present petition was listed before this Court on 23.11.2020. However, even thereafter, the petitioner has not issued any notice invoking the arbitration clause. Thus, it is apparent that the petitioner is not interested in resolving the disputes through arbitration. 3. He further submits that the petitioner has invested ₹11,30,00,000/- (Rupees Eleven Crores Thirty Lacs only) for the purposes of running a Gujarati News Channel under a separate company (M/s Prevalent News Pvt Ltd). He states that the disputes are mainly in respect of that company. In violation of the Agreement between the parties, the petitioner has started a News Channel for ‘India News Gujarati’. He states that in terms of the agreement that the said Channel is required to be run by M/s Prevalent News Pvt Ltd. He submits that this dispute cannot be made the subject matter of an interim order. 4. At the request of the learned counsel appearing for the petitioner, list on 18.03.2021. **In the meanwhile, the petitioner shall take steps for invoking the***



arbitration clause and for constitution of the Arbitral Tribunal.”

14. In terms of the said order, on 17th March, 2021, a notice invoking arbitration was issued under Section 21 of the 1996 Act. Thus, the arbitral proceedings have commenced from the said date. In response to that letter, the Respondent agreed that the matter may be referred to a Sole Arbitrator. However, when the names were suggested by the Petitioner on 5th April, 2021, no reply was received. Considering above facts, the present petition was filed 25th September, 2023.

15. It is settled that the filing of a petition under Section 11(6) of the 1996 Act does not have a period of limitation and would be covered by the residual provision Article 137 of the Limitation Act, 1963, according to the decision of the Supreme Court in *Bharat Sanchar Nigam Limited v. Nortel Networks India Private Limited*, (2021) 5 SCC 738, as well as in *Secunderabad Cantonment Board v. B. Ramachandraiah and Sons*, (2021) 5 SCC 705. The relevant portions of these judgments are extracted below:

i) *Bharat Sanchar Nigam Limited (supra):*

“10. Since none of the Articles in the Schedule to the Limitation Act, 1963 provide a time period for filing an application for appointment of an arbitrator under Section 11, it would be covered by the residual provision Article 137 of the Limitation Act, 1963.

...

11. It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days’ from issuance of the notice invoking arbitration. In other words, an



application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s) / dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.

12. The period of limitation for filing a petition seeking appointment of an arbitrator/s cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognized even under Section 20 of the Arbitration Act 1940. Reference may be made to the judgment of this Court in *C. Budhraja v. Chairman, Orissa Mining Corporation Ltd.* [(2008) 2 SCC 444] wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator...

13. Various High Courts have taken the view that Article 137 of the Limitation Act would be applicable to an application under Section 11 of the Arbitration Act. The question of the applicability of Article 137 to applications under Section 11 of the 1996 Act came up for consideration before the Bombay High Court in *Leaf Biotech v. Municipal Corporation Nashik*⁵ wherein it was held that the period of limitation for an application u/S. 11 would be governed by Article 137 of the Limitation Act.”

ii) ***Secunderabad Cantonment Board (supra)***

“20. Applying the aforesaid judgments to the facts of this case, so far as the applicability of Article



137 of the Limitation Act to the applications under Section 11 of the Arbitration Act is concerned, it is clear that the demand for arbitration in the present case was made by the letter dated 07.11.2006. This demand was reiterated by a letter dated 13.01.2007, which letter itself informed the Appellant that appointment of an arbitrator would have to be made within 30 days. At the very latest, therefore, on the facts of this case, time began to run on and from 12.02.2007. The Appellant's laconic letter dated 23.01.2007, which stated that the matter was under consideration, was within the 30-day period. On and from 12.02.2007, when no arbitrator was appointed, the cause of action for appointment of an arbitrator accrued to the Respondent and time began running from that day. Obviously, once time has started running, any final rejection by the Appellant by its letter dated 10.11.2010 would not give any fresh start to a limitation period which has already begun running, following the mandate of Section 9 of the Limitation Act. This being the case, the High Court was clearly in error in stating that since the applications under Section 11 of the Arbitration Act were filed on 06.11.2013, they were within the limitation period of three years starting from 10.11.2020. On this count, the applications under Section 11 of the Arbitration Act, themselves being hopelessly time barred, no arbitrator could have been appointed by the High Court.

16. Moreover, even in *Ezen Aviation Pty Limited (supra)*, the observation of the Id. Division Bench is that in view of the delay in commencement of arbitral proceedings, an order under Section 9 of the 1996 Act, would continue, though, the Section 21 notice was issued.

17. In the present petition, notice invoking arbitration was sent on 15th March, 2021, and the same was replied to by the Respondent on 4th April,



2021. In the meantime, a petition under Section 9 of the 1996 Act was filed on 21st November, 2020, which was disposed of vide order dated 6th April, 2021. The present petition was filed on 25th September, 2023. In terms of the decision in ***Bharat Sanchar Nigam Limited (supra)***, the limitation for filing a petition under Section 11 of the 1996 Act would arise upon the failure to make the appointment of the Arbitrator within a period of 30 days' from issuance of the notice invoking arbitration. In other words, a petition under Section 11 of the 1996 Act may be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the 1996 Act] is made, and there is failure to make the appointment. Thus, in the facts of the present case, since the petition has been filed within three years of the notice invoking arbitration and date of failure for appointing an arbitrator, the petition is within limitation period.

18. In view of the above position, the following directions are issued:

- i) The disputes between the parties arising out of MoU dated 1st May, 2018 are referred to arbitration by a Sole Arbitrator. ***Mr. Sandeep Mahapatra, Advocate (Address: F-112 City Apartment, Vasundhra Enclave, Delhi-110096, Mob No.9811472444, email: sdeepmahapatra1advocate@gmail.com)*** is appointed as the Sole Arbitrator to adjudicate the disputes. The arbitration shall take place under the aegis of the DIAC. The fee of the Sole Arbitrator would be as per the IV Schedule of the 1996 Act, as modified by the DIAC Rules.
- ii) At this stage, due to the delay and the manner in which the Section 11(6) petition has been filed by the Petitioner, post the closure



of the criminal proceedings, with the consent of parties, it is directed that the Petitioner shall bear the entire cost of the arbitral proceedings, subject to the final award to be passed by the Id. Arbitrator. In the final award, Id. Arbitrator is free to apportioned the cost in the manner as it deems appropriate;

iii) In regard to the order passed under Section 9 of the 1996 Act, since it remains in effect until the conclusion of arbitral proceedings, and considering the substantial delay in invoking the arbitration clause between 2020 and 2021 up to the filing of the Section 11(6) petition, the Id. Arbitrator shall decide. Should the Petitioner seek any continuation of the said order, they must approach the Id. Arbitrator. Any such application under Section 17 of the 1996 Act would be considered on its own merits.

iv) The closure report in relation to any criminal proceedings or any observations made in the Section 9 petition or in the present petition shall not have any bearing on the final adjudication by the Id. Arbitrator.

19. The Respondent is free to file its counterclaim also before the Id. Arbitrator.

20. List before the DIAC on 18th March, 2024.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 06, 2024

Rahul/dn