$~4

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

\+ ARB.P. 657/2023, I.A. 12180/2023

T.V. TODAY NETWORK LTD. ..... Petitioner

Through: Mr. Sharukh Ejaz, Mr. Nilotpal Bansal, Mr. Farheen Penwale, Advs.

versus

HOME AND SOUL PVT. LTD. ..... Respondent

Through: Mr. Alok K. Aggarwal, Ms. Anushka Sharma, Mr. Raj Duggal, Advs.

**CORAM:**
**HON'BLE MR. JUSTICE DINESH KUMAR SHARMA**

**O R D E R**

**% 16.02.2024**

1. By way of the present petition filed under Section 11(6)(C) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the *'A&C Act'*), the petitioner seeks appointment of an Arbitral Tribunal comprising of a sole arbitrator, to adjudicate the disputes between the parties.

2. Briefly stated, the facts of the present case are that the parties had entered into two Barter Agreements dated 07.06.2012 and 20.06.2013 for advertisement space worth Rs. 70,00,000/- (Rupees Seventy Lakhs Only) for a period of two years and Rs. 1,50,00,000/- (Rupees One Crore Fifty Lakhs Only) for a period of one year respectively, exclusive of service tax and other levies which were to be charged additionally.

3. As per the first barter agreement dated 07.06.2012, the respondent

agreed to provide property equivalent to the value of the Advertising Space provided by the petitioner at the rate of Rs. 7,500/- (Rupees Seven Thousand Five Hundred Only) per square foot and located at the technology park as "Spire Edge, Plot No. CP-04, Sector-8, IMT Manesar, Gurugram, Haryana".

4. The petitioner's plea is that in view of the respondent's request during the period between July 2012 to March 2013, the petitioner got published advertisements in petitioner's publication as per various Release Orders issued in this regard worth Rs. 69,93,821/- (Rupees Sixty Nine Lakhs Ninety Three Thousand Eight Hundred and Twenty One Only).

5. In pursuance to the second barter agreement dated 20.06.2013., the respondent agreed to provide property equivalent to the value of the Advertising Space provided by the petitioner i.e., Rs. 1,50,00,000/- (Rupees One Crore Fifty Lakhs Only) at the rate of Rs. 7,500/- (Rupees Seven Thousand Five Hundred Only) per square feet and located at the technology park as "Spire Edge, Plot No. CP-04, Sector-8, IMT Manesar, Gurugram, Haryana".

6. The respondent in pursuance to the second barter agreement got published advertisements in the petitioner's publications as per various Release Orders issued between July 2013 and December 2015 worth Rs. 1,51,84,500/- (Rupees One Crore Fifty One Lakhs Eighty Four Thousand Five Hundred Only).

7. Learned Counsel for the petitioner submits that at the end of the term of both barter agreements, the total consumption of advertisements by the respondent stood at Rs. 2,21,78,321/- (Rupees Two Crore Twenty One

Lakhs Seventy-Eight Thousand Three hundred and Twenty One Only).

8. Learned counsel for the petitioner further submits that both the barter agreements provide that disputes with respect to the agreements shall be resolved through arbitration as per provisions of the A&C Act. It further provides that the place of arbitration would be at New Delhi.

9. Disputes having arisen between the parties since the respondent failed to perform his part of obligations and the properties as provided in the barter agreements were not provided, the petitioner invoked arbitration vide notice dated 05.09.2022. However, the respondent vide their reply stated that the claim by the petitioner is *ex facie* time-barred and therefore the matter cannot be referred to the arbitration.

10. Learned counsel for the petitioner also submitted that the name proposed by the petitioner of the learned Arbitrator was also not agreed to by the learned counsel for the respondent.

11. Learned counsel for the respondent has filed a detailed reply. In short, the petition has been predominantly opposed on the following grounds:

    i. As per the barter agreement dated 07.06.2012 and 20.06.2013 the limitation period was of thirty days that is in case the respondent failed to provide the property within thirty days of the completion of the agreement. The petitioner shall be at liberty to pursue the legal modes.

    ii. The present claim by the petitioner is *ex facie* time-barred.

12. Learned counsel for the respondent submits that the first barter agreement 07.06.2012 was for two years and therefore the limitation expired in 2017 and the second barter agreement dated 20.06.2013 was for one year and therefore the limitation also stood exhausted in 2017.

13. Learned counsel for the respondent has submitted that the petitioner has argued their case contrary to their pleadings. Learned counsel has invited the attention to the averments made in the plaint. The attention has been invited to paragraphs Nos. 9, 13 & 14 of the plaint. Learned counsel submits that the comprehensive reading of all these paragraphs makes it clear that the due was crystallized in December 2015 as stated in the synopsis and therefore at the best limitation is only up to 2018.

14. Learned counsel has further submitted that even in the judgment of ***M/S B and TAG vs. Ministry of Defence (Supra)*** the High Court of Mumbai rejected the petition under Section 11 of the Arbitration and Conciliation Act holding it *ex facie* time-barred. Learned counsel for the respondent has also submitted that if the petitioner is relying on Article 54 of the Limitation Act in case the barter agreements are required to be stamped and in the present case the barter agreements are not stamped and therefore those cannot be taken into consideration.

15. The plea of the respondent is that the plea of the petitioner is apparently barred under Article 18 of the Limitation Act. The respondent has also taken a plea that the e-mail sent by the respondent as relied upon by the petitioner dated 30.10.2021 has no value in view of Section 18 of the Limitation Act. It has been submitted that if the debt has been acknowledged after three years it has no value in the eyes of the law.

16. Mr. Sharukh Ejaz, learned counsel for the petitioner submits that in fact after 2017 and 2018 the petitioner was in talks with the respondent and that the dispute arose only after 30.10.2021 when the respondent disputed the amount claimed by the petitioner and stated there is only a sum of Rs. 3,31,263/- is payable to the respondent. Learned counsel

also submits that only thereafter the arbitration was invoked vide notice dated 05.09.2022 which was duly received and replied by the respondent.

17. Learned counsel for the petitioner submits that this court while referring the matter to the arbitration cannot go into the question of limitation. Learned counsel submits that these questions have to be determined by the learned Arbitrator.

18. In support of his submissions learned counsel has relied upon ***NTPC Ltd. v. SPML Infra Ltd.*** **(**2023) SCC Online SC 389, ***M/S B and TAG vs. Ministry of Defence*** **(**2023) SCC Online SC 657, ***Welspun Enterprises Ltd. v. NCC Ltd.*** **(**2022) 295 DLT 286, ***Hari Shankar Singhania v. Gaur Hari Singhania*** [(2006) 4 SCC 658], ***Zillon In fractures Pvt v. Bharat Heavy Electricals Limited*** AIRONLINE 2023 CAL 264**,** ***Vidya Drolla v. Durga*** AIR 2019 SUPREME COURT 3498:: AIRONLINE 2019 SC 516 and ***M/s Duro Felguera, S.U. v. M/s Gangavaram Port Limited,*** AIR 2017 SUPREME COURT 5070:: (2017) ARBILR 1.

19. The jurisdiction under Section 11 of the Arbitration and Conciliation Act while making the reference is no longer *res integra*. The courts have time and again inter alia enumerated the jurisdiction of the Court under Section 11 of the Act that the same is limited to the extent that whether there is an arbitration agreement and an arbitrable dispute exists between the parties reliance can be placed upon ***M/S Duro Felguera, S.A. vs Gangavaram Port Limited*** (2017) 9 SCC 729.

20. It is correct if the claims are *ex-facie* or patently barred by limitation. It cannot be referred to arbitration. The courts are not expected to refer

the deadwood to arbitration as it would amount to a mere waste of time and the commercials on the part of the parties. However, at the same time, the court is conscious of the fact that the limitation is a mixed question of fact and form and that is required to be adjudicated on the basis of the facts and circumstances of each case.

21. In ***M/s. Uttarakhand Purv Sainik Kalyan Nigam Limited Versus Northern Coal Field Limited***, (2020) 2 SCC 455, the apex court *inter-alia* held as under:

> *"9.11. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. ……..*
> *9.12. In the present case, the issue of limitation was raised by the Respondent – Company to oppose the appointment of the arbitrator under Section 11 before the High Court.*
> *Limitation is a mixed question of fact and law. In ITW Signode India Ltd. v. Collector of Central Excise a three judge bench of this Court held that the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law.*
> *Reliance is also placed on the judgment of this Court in NTPC v. Siemens Atkein Gesell Schaft, wherein it was held that the arbitral tribunal would deal with limitation under Section 16 of the 1996 Act. If the tribunal finds that the claim is a dead one, or that the claim was barred by limitation, the adjudication of these issues would be on the merits of the claim. Under sub-section (5) of Section 16, the tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral proceedings would continue, and the tribunal would make the award. Under sub-section (6) a party aggrieved by such an arbitral award may challenge the award under Section 34……"*

22. Further in ***Bharat Sanchar Nigam Ltd. & Anr. v. M/S Nortel Networks India Pvt. Ltd.*** (2021) 2 SCR 644 *inter-alia* held as under:

> *"30.Issue of Limitation*
> *Limitation is normally a mixed question of fact and law, and would lie within the domain of the arbitral tribunal. There is, however, a distinction between jurisdictional and admissibility issues. An issue of 'jurisdiction' pertains to the power and authority of the arbitrators to hear and decide a case. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal. The judgment in Lesotho (supra) was followed by in BBA & Ors. v. BAZ & Anr., wherein the Court of Appeal held that statutory time bars go towards admissibility. The Court held that the "tribunal versus claim" test should be applied for purposes of distinguishing whether an issue goes towards jurisdiction or admissibility. The "tribunal versus claim" test asks whether the objection is targeted at the tribunal (in the sense that the claim should not be arbitrated due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself is defective and should not be raised at all).*
> *Applying the "tribunal versus claim" test, a plea of statutory time bar goes towards admissibility as it attacks the claim. It makes no difference whether the applicable statute of limitations is classified as substantive (extinguishing the claim) or procedural (barring the remedy) in the private international law sense.*
> *35. The issue of limitation which concerns the "admissibility" of the claim, must be decided by the arbitral tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties."*

23. In the present case, the parties entered into an agreement vide which the petitioner company aired/published the advertisement of the respondent. The respondent in lieu of that agreed to give two properties as mentioned above.
24. During the course of submissions it has been transpired that the respondent is a real estate agent. The properties which were to be transferred were not developed by the respondent. These properties were developed by A&B Buildware Private Limited.
25. The plea of the respondent was that the allotment papers of these documents were delivered to the petitioner way back in 2014. The plea is that as A&B Buildware Private Limited went into a lot of problems handing over and therefore, the possession of the same was beyond the reach of the respondent.
26. Thus as of date, the situation is that the advertisements have been published or aired by the petitioner. The respondent says that he has given the papers of the properties to the petitioner. It is not disputed that the petitioner has not got the physical possession of properties. The point is that whether on the basis of barter agreements, the claim stood barred by limitation after the expiry of three years of whether there was any acknowledgement during the period of the limitation or any factor which extended the limitation.
27. The court while deciding such petitions have also to take into account the intention of the legislature behind the enactments. The Arbitration and Conciliation Act has basically been enacted to encourage the settlement of disputes through alternative dispute remedies. The purpose of such an agreement is also to foster confidence amongst the

parties that they will stand by their agreements. The Reference Courts at this stage cannot enter hyper-technical questions or the integrities of the same. If on the face of it, there is an agreement which contains the arbitration clause and there is an arbitrable dispute, the matter is required to be referred to the arbitrator.

28. It is a settled law that limitation is a mixed question of facts and law and the same is required to be adjudicated by learned Arbitrator. However, the learned Arbitrator shall frame the preliminary question on the point of limitation and shall proceed ahead only after the preliminary issue is decided.

29. If the claim is found to be barred by the limitation then the arbitrator need not proceed further. If the claim is found to be within the time the dispute shall be adjudicated in accordance with law.

30. In the circumstances, I Consider the matter to be referred to the arbitral tribunal with the following directions:

    i. The disputes between the parties under the said agreement are referred to the arbitral tribunal.

    ii. Mr. S. P. Garg, Former Judge (Mobile No 9810384627), Delhi High Court is appointed as the Sole Arbitrator to adjudicate the claim and counterclaim.

    iii. 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 fee rules of the DIAC Schedule.

    iv. The learned Arbitrator is requested to furnish a declaration in

terms of Section 12 of the Act prior to entering into the reference.

v. 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.

vi. The parties shall approach the learned arbitrator within two weeks from today.

31. The petition is disposed of in the above terms.

**DINESH KUMAR SHARMA, J**

**FEBRUARY 16, 2024/AR/AK**