

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMMERCIAL ARBITRATION PETITION NO. 996 OF 2018
WITH
NOTICE OF MOTION (L) NO. 1980 OF 2018**

Tata Consultancy Services Ltd.

...Petitioner

Vs.

Inspira IT Products Pvt.Ltd.

...Respondent

Ms.Fereshte D. Sethna with Shreema Doshi and Divya Hirawat I/b. DMD
Advocates for Petitioner/Applicant.

Dr.Birendra Saraf with Rohan Sawant, Vishwabhusan Kamble and
Samsheer Garud I/b. Jaykar & Partners for Respondent.

CORAM : S.C. GUPTE, J.

DATE : 18 SEPTEMBER 2018

ORAL JUDGMENT :

This arbitration Petition, filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act"), challenges an order passed by a sole arbitrator on an application under Section 16 of the Act raising a preliminary issue of limitation. The learned Arbitrator held against the Petitioner (Respondent to the reference) on the issue of limitation. As explained by the Supreme Court in the case of **Indian Farmers Fertilizer Cooperative Limited vs. Bhadra Products**¹, the Arbitrator's order disposing of the issue of limitation finally is an interim award within the meaning of Section 2(1)(c) of the Act. The order has, accordingly, been challenged under Section 34 of the Act.

2 A few facts of the case reflecting on the relevant dates for the purpose of the issue before us may be noted as follows :

1 (2018) 2 SCC 534

The dispute between the parties arises on a purchase order placed by the Petitioner on the Respondent on 24 June 2013. The order was for supply of IT equipment. The delivery schedule in the purchase order required delivery of the equipment by 20 July 2013. It is the grievance of the Respondent (original Claimant in the reference) that though the Respondent was ready to supply the equipment, the Petitioner failed and omitted to accept delivery and as a result, the Respondent suffered damages. A demand notice in that behalf was addressed on 23 March 2016, followed by a winding up notice issued to the Petitioner on 30 March 2016. After receipt of a reply from the Petitioner, on 18 May 2016, a winding up petition was filed by the Respondent before this court. The petition was opposed by the Petitioner *inter alia* on the ground that there was no admitted or indisputable debt which could sustain a winding up petition. The Petitioner raised several disputes in respect of the debt. When the petition was at the stage of admission, the parties agreed to refer the underlying disputes to the arbitration of a sole arbitrator. Accordingly, by consent, the matter was referred to the learned arbitrator. All rights and contentions of the parties were kept open save and except the question of constitution of the arbitral tribunal. Before the arbitral tribunal, the Petitioner herein applied for an interim award on the issue of limitation. It was the Petitioner's case that as on the date of the reference, i.e. on 12 February 2018, which would be the relevant date of invocation within the meaning of Section 21 of the Act, the Respondent's claim was barred by the law of limitation, since more than three years had by then elapsed from the date of the accrual of the cause of action. On the other hand, it was the Respondent's case that the Respondent was entitled to exclusion of time during which it prosecuted the company winding up petition. It was

submitted that the winding up petition filed by the Respondent was a civil proceeding within the meaning of Section 14(1) of the Limitation Act, 1963; the same was prosecuted by the Respondent herein with due diligence in the court of first instance; and the said proceeding related to the same matter in issue as in the arbitration reference and was prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it. It was also the Respondent's case that the delivery date of 20 July 2013 was extended to 27 January 2016 and the reference was, accordingly, anyway within time. The extension was disputed by the Petitioner. The learned Arbitrator in her impugned interim award, relying on the Supreme Court judgments cited before her, accepted the Respondent's case that the period spent by the Respondent in pursuing its winding up petition before this court ought to be excluded under Section 14(1) of the Limitation Act, 1963.

3 Ms.Sethna, learned Counsel for the Petitioner, makes the following submissions :

(a) The company winding up petition is not a civil proceeding for recovery of money and hence time spent in prosecuting it cannot be excluded for computation of the period of limitation for the arbitration reference under Section 14(1) of the Limitation Act;

(b) The winding up petition could not, at any rate, be treated as having been prosecuted in good faith for recovery of the debt claimed as due by the Petitioner herein; and

(c) The winding up petition was not rejected by the court on the ground of

defect of jurisdiction or other cause of a like nature and hence, the requirement of Section 14(1) could not be said to have been satisfied.

4 Dr.Saraf, learned Counsel for the Respondent, on the other hand, submits as follows :

(a) The expression “civil proceeding” in Section 14 of the Limitation Act is used simply in contradistinction with 'criminal proceeding' and every proceeding before a court or a tribunal in respect of a civil right, if not criminal in nature, is a 'civil proceeding' within the meaning of Section 14;

(b) For the purpose of computation of limitation period for any suit (or arbitration reference) under Section 14(1), such civil proceeding must relate to the same matter in issue as in the suit; it need not be for the same relief unlike in the case of an application as provided in Section 14(2). The matter in issue in both the winding up petition and the arbitration reference herein is the same, namely, the debt owed by the Respondent to the Petitioner;

(c) The winding up petition had been prosecuted *bona fide* by the Respondent herein and the arbitrator's conclusion in that behalf cannot be assailed in the present petition; and

(d) The inability of the company court to entertain the winding up petition on account of existence of a *bona fide* dispute as to the debt is a 'cause of a like nature' within the meaning of that expression in Section 14(1) of the Limitation Act; and it is not necessary for the purpose of application of Section 14(1) to it that the civil proceeding, earlier filed by

the plaintiff (or the claimant in an arbitration reference), should have been actually rejected by the court or tribunal, as the case may be, for want of jurisdiction or other cause of a like nature.

5 Section 14 of the Limitation Act, 1963 provides for exclusion of time spent in prosecuting any civil proceeding *bona fide* in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. It is submitted that the company winding petition prosecuted by the Respondent was a civil proceeding within the meaning of Section 14; it was prosecuted in good faith and with due diligence; and that during the course of such prosecution, the Respondent agreed to refer the matter to arbitration by accepting the inability of the court to entertain the petition, such inability resulting from defect of jurisdiction or other cause of a like nature. It is not in dispute that the company winding up petition earlier filed by the Respondent herein was within limitation and that if the time spent for its prosecution were to be excluded whilst computing the period of limitation for the present arbitration reference, the reference would be within time. The controversy, thus, turns on the correct interpretation of Section 14 of the Limitation Act.

6 Section 14 is in the following terms :

14. Exclusion of time of proceeding *bona fide* in court without jurisdiction –

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other

cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation - For the purposes of this section, -

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

7 Since we are considering here the applicability of Section 14, we need to answer the following four issues : (i) Whether a company winding up petition is a civil proceeding? (ii) Whether the winding up petition in the present case related to the same matter in issue as the arbitration reference herein? (iii) Whether it was prosecuted with due diligence and in good faith? and (iv) Whether the court hearing it was unable to entertain it on account of defect of jurisdiction or other cause of

a like nature?

8 It is obvious, to my mind, that that the expression “civil proceeding” used in Section 14 is used in a broad sense as understood by civil law jurists, who categorize judicial proceedings into civil and criminal proceedings. On its general acceptation, the term “proceeding” means the form in which any action for enforcement or defence of any right is brought. “Civil” rights are those private rights which the municipal law enforces at the instance of individuals or corporations. Any form of action for enforcing or defending such private rights is a civil proceeding. The jurisdiction exercised by any court of law where such proceedings are brought is “civil jurisdiction”. On this reasoning, our courts have held proceedings in the High Courts under Article 226, execution proceedings, proceedings before revenue authorities, etc. as civil proceedings and the jurisdiction exercised by the court as civil jurisdiction.

9 The Supreme Court in **S.A.L. Narayan Row vs. Ishwarlal Bhagwandas**², after summarizing all the provisions in the constitution bearing upon appeals to the Supreme Court, held that the words “civil proceedings” in Article 132 was used in the widest sense; that in contradistinction to criminal proceedings they covered all proceedings which directly affected or concerned civil rights. This view was reiterated in **Ramesh vs. Seth Gendalal Motilal Patni**³ whilst construing the words “civil proceeding” in Article 133 which provides for appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters. Hidayatullah J. (as the learned Judge then was), speaking for the Bench,

2 (1966) 1 SCR 190 : AIR 1965 SC 1818 : (1965) 57 ITR 149

3 (1966) 3 SCR 198 : AIR 1966 SC 1445

held as follows :

"Article 133 must cover all civil proceedings because no exception is indicated. The question is whether the proceeding in the High Court can be described as civil proceedings. The High Court in the present case was invited to interfere by issuing writs of certiorari and prohibition against the reopening of the case in which the Claims Officer had discharged a debt due to the answering respondent. The revenue authorities in such matters act analogously to civil courts, have a duty to act judicially, and pronounce upon the rights of parties. In the present case the Claims Officer purported to exercise a jurisdiction under which he could order the discharge of a debt which means that the order affected the civil rights of the parties. The Commissioner's order reversing the order of the Claims Officer also affected the same civil rights of the parties. The proceedings before the revenue authorities thus were concerned with the civil rights of two contending parties. They were civil proceedings. The proceedings in the High Court must also be regarded as of the same nature. The term civil proceeding has been held in this Court to include, at least, all proceedings affecting civil rights, which are not criminal. The dichotomy between civil and criminal proceedings made by the Civil Law jurists is apparently followed in Articles 133 and 134 and any proceeding affecting civil i.e. private rights, which is not criminal in nature, is civil."

10 In **Jyoti Bhushan Gupta vs. Banaras Bank Ltd.**⁴, the Supreme Court considered the nature of jurisdiction exercised by the High Court under Section 187 of the Indian Companies Act, 1913. An order passed by Allahabad High Court under that section was sought to be executed and Article 182 of the Indian Limitation Act, 1908, which provided for a period of three years for execution of a decree or order of a civil court, was pressed into service claiming a time bar. Section 187 of the Indian

4 1962 Supp (1) SCR 73 : AIR1962 SC 403 : (1961) 31 Comp Cas 727

Companies Act, 1913 (which was in *pari materia* with Section 470 of the Companies Act, 1956) provided for the power of the court to make calls on contributories at any time after making a winding up order. The argument before the Supreme Court was that the authority exercised by the High Court in directing payment under Section 187 is neither ordinary nor original civil; it was a special power vested in the High Court exercisable in extra ordinary jurisdiction. The Supreme Court negated the contention holding the jurisdiction to be ordinary original civil jurisdiction. The court made the following observations :

“When in exercise of its authority conferred by a special statute the High Court in an application presented to it as a court of first instance declares liability to pay a debt, the jurisdiction exercised is original and civil and if the exercise of that jurisdiction does not depend upon any preliminary step invoking exercise of discretion of the High Court, the jurisdiction is ordinary.”

11 There is no reason to view the expression “civil proceeding” used in Section 14 of the Limitation Act, 1963 in any different light. There is nothing either in the language employed in Section 14 or the very object and purpose of Section 14, which requires us to take any narrower view of the expression “civil proceeding” used therein. In fact, as observed by the Supreme Court in **M.P. Steel Corporation vs. Commissioner of Central Excise**⁵, Section 14 deserves to be construed liberally so as to advance the cause of justice. After all, as the Supreme Court underlined in that case, the principle of Section 14 is that whenever a person *bona fide* prosecutes with due diligence another proceeding which proves to be abortive because it is without jurisdiction, or otherwise no decision could be rendered on merits,

5 (2015) 7 SCC 58

the time taken in such proceeding ought to be excluded as otherwise the person who approached the court in such proceeding would be penalized for no fault of his own. Any proceeding, thus, for enforcement of a civil right, which is not a criminal proceeding, must be treated as a “civil proceeding” within the meaning of Section 14.

12 There is nothing to suggest that a company winding up petition should not come within the expression “civil proceeding” as discussed above. The right of a creditor to apply for winding up of a company, if it is unable to pay his debt, is after all nothing but a private right given to him by a special statute. Non-payment of his legitimate debt amounts to nothing but infringement of his civil right, and he may in such a case choose to adopt any remedy which may be available to him in law and if the remedy he adopts or action which he brings in such a case is not criminal in nature, there is no reason why such remedy or action should not be treated as a civil proceeding within the meaning of Section 14 of the Limitation Act.

13 We must, whilst on this point, lastly note an authority of a Division Bench of this court in **Maharashtra State Framing Corporation Ltd. vs. Belapur Sugar and Allied Industries Ltd.**⁶, where the court actually proceeded to order exclusion of time taken in an abortive company winding up petition relying on Section 14, whilst calculating limitation for filing of a suit on the disputed debt.

14 Ms.Sethna, however, contends that a winding up petition is

6 2004(3) Mh.L.J.414

not a *bona fide* remedy for recovery of debt and inasmuch as the Respondent has filed a winding up petition, as opposed to a suit, for recovery of his debt, he cannot be said to have prosecuted the action in good faith. Learned Counsel relies on the case of **IBA Health (India) Private Ltd. vs. Info-Drive Systems SDN.BHD.**⁷ in this behalf. In the first place, there is no legal requirement that the proceeding must be for recovery of any debt, or, for that matter, for the same relief as claimed in the suit instituted or reference made subsequently. Secondly, and at any rate, a winding up petition is indeed one of the remedies for enforcing payment of a lawful debt. After all, what the petitioner does in such a case is to seek winding up so that the assets of the company can be administered and dividends can be declared towards payment of dues owed by the company to its creditors including the petitioner himself. It is in that sense a mode of equitable execution. The Supreme Court has recognized it as such in the case of **Harinagar Sugar Mills Co.Ltd. vs. M.W. Pradhan, Court Receiver, High Court, Bombay**⁸. The court cited with approval the observations in Palmer's Company Precedents (Part II), 1969 Ed., P.25 to the effect that winding up petition was a perfectly proper remedy for enforcing payment of a just debt, and held that filing a winding up petition was a mode of execution which the court gives to the creditor against a company unable to pay its debts. Our Court, following this view, unequivocally held in **Modern Dekor Painting Contracts Pvt.Ltd. vs. Jenson & Nicholson (India) Ltd.**⁹ that a winding up petition being a legitimate mode of recovery of a debt due and payable by the company at the date of the petition, no question of bar of limitation as at the date of the order in a winding up petition would ever arise. The dictum in the case

7 (2010) 10 SCC 553

8 AIR 1966 SC 1707

9 1984 BCI 101

of **IBA Health (India) Private Ltd.** (supra) to the effect that winding up is not a means of enforcing payment of a disputed debt is in an altogether different context. The winding up petition, in the present case, unless contrary is shown, can well be said to be a prosecution of a civil proceeding in good faith. Besides, whether or not the petition was prosecuted *bona fide* is a mixed issue of law and facts and the arbitrator's conclusion in that behalf (holding the prosecution to be *bona fide*) cannot be assailed within the parameters of Section 34 of the Act. It cannot either be termed as opposed to public policy or patently illegal. The petition was, thus, prosecuted in good faith. There is no submission in the present case that it was not prosecuted with due diligence.

15 Besides, the winding up petition in the present case related to the same matter in issue as the arbitration reference herein. The matter in issue here is the existence of the debt. The debt is asserted by the Respondent and denied by the Petitioner. That is a common issue in the petition and the reference. It does not matter that the reliefs sought in the two proceedings are different. We are essentially concerned whilst dealing with a suit (or reference to arbitration) under the rule of Section 14(1) of the Limitation Act with what the matter in issue in the two proceedings (i.e. the civil proceeding earlier instituted and the suit or reference filed later, as the case may be) is rather than what relief is sought in the two. Relief sought is material only whilst considering computation of limitation period for an application under Section 14(2).

16 That brings us to the last of Ms.Sethna's submissions, namely, that the petition could not be said as not entertained by the court by reason

of a defect of jurisdiction or a cause of a like nature. The argument is two-fold. Firstly, it is submitted that the petition was withdrawn by the Respondent itself and not dismissed by the court. Secondly, it is submitted that whenever a winding up petition is not entertained by the company court on account of a dispute as to the existence of the debt, it is not as though the court lacks jurisdiction to deal with the petition, but that the court does not deem the company to be unable to pay its debts. There is no merit in either of these contentions. Inability of the court to entertain the civil proceeding (instituted earlier) within the meaning of Section 14 is not a proven inability. In other words, it need not be so held by the court. It may well be accepted by the party prosecuting the proceeding, in which case, as happens many times in company winding up petitions, the claimant withdraws his proceeding and offers to go to the civil court or arbitral tribunal. Such withdrawal does signify that the court hearing the proceeding is unable to entertain it. So also, in case of a winding up petition, if the petition is dismissed by reason of the dispute raised as to the existence of the debt, on which the petition is founded, or withdrawn after accepting the respondent company's submissions in that behalf, the defect can very well be said to be of a like nature as defect of jurisdiction. The defect is not as to the merits of the claim, but the inability of the court to entertain it on account of some reason which is peculiar to the remedy adopted. That is nothing but a defect of a like nature as the defect of jurisdiction. Explanation (c) to Section 14 of the Limitation Act, which requires misjoinder of parties or causes of action to be treated as a cause of a like nature, supports this interpretation. What is important is that the proceeding is not entertained on account of some technical defect or difficulty and not on merits of the claim.

17 This interpretation advances the cause of justice sought to be served by a provision such as Section 14 and is in keeping with its purpose as noted by the Supreme Court in **M.P. Steel Corporation** (supra) relying on the case of **Union of India vs. West Coast Paper Mills Ltd.**¹⁰ The following observations in **West Coast Paper Mills'** case settle the point in favour of such interpretation.

“14. ... In the submission of the learned Senior Counsel, filing of civil writ petition claiming money relief cannot be said to be a proceeding instituted in good faith and secondly, dismissal of writ petition on the ground that it was not an appropriate remedy for seeking money relief cannot be said to be ‘defect of jurisdiction or other cause of a like nature’ within the meaning of Section 14 of the Limitation Act. It is true that the writ petition was not dismissed by the High Court on the ground of defect of jurisdiction. However, Section 14 of the Limitation Act is wide in its application, inasmuch as it is not confined in its applicability only to cases of defect of jurisdiction but it is applicable also to cases where the prior proceedings have failed on account of other causes of like nature. The expression ‘other cause of like nature’ came up for the consideration of this Court in *Roshanlal Kuthalia v. R.B. Mohan Singh Oberoi*¹¹ and it was held that Section 14 of the Limitation Act is wide enough to cover such cases where the defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance, legal or factual, which inhibits entertainment or consideration by the court of the dispute on the merits comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right.”

18 Ms.Sethna relies on judgments of a learned Single Judge of

10 (2004) 3 SCC 458

11 (1975) 4 SCC 628

our Court in the case of **Ajab Enterprises vs. Jayant Vegoiles and Chemicals Pvt.Ltd.**¹² and of Allahabad High Court in **Ram Bharosay Lal Gupta vs. Gaon Sabha Sareli Pukhta**¹³, which have apparently taken a contrary view. The learned Judge in **Ajab Enterprises** held that merely because the proceedings of winding up could not be granted for some reason or the other and the plaintiffs were directed to file a suit for recovery of the debts, it would not mean that the case would be covered by the provisions of Section 14 of the Limitation Act. The reason for so holding appears to be that where there are two remedies available to the plaintiffs - one of filing of a company petition seeking winding up of the company and the other of a suit for recovery of the amount due, the court refusing to entertain the winding up petition does not mean that the court refused to grant the application due to any defect similar to want of jurisdiction. In view of the law now stated by the Supreme Court in **West Coast Paper Mills'** case and followed in **M.P. Steel Corporation** (supra), the observations in **Ajab Enterprises** referred to above cannot be said to be good law. They run counter to, and cannot be reconciled with, the law stated by the Supreme Court and also the observations of the Division Bench of our Court in the later case of **Maharashtra State Farming Corporation** (supra). The Allahabad High Court view in **Ram Bharosay Lal Gupta** was on another point, where a prior suit, time taken in the prosecution of which was sought to be excluded under Section 14, was dismissed for non-rejoinder of necessary parties. The court held that such dismissal was not for any defect of jurisdiction or a cause of a like nature. The judgment has no direct bearing on our case.

12 1990 SCC OnLine Bom 28 : AIR 1991 Bom 35

13 1993 SCC OnLine All 187 : (1994) 24 ALR 102 : (1994) 2 AWC 863

19 For all these reasons, the Respondent was clearly entitled to exclusion of time and the learned arbitrator has rightly held so. At any rate, and in the minimum, this can certainly be termed as a possible conclusion, a conclusion which a fair and judiciously minded person may very well arrive at. No fault can be found with the same within the framework of the grounds of challenge available under Section 34 of the Act.

20 There is, accordingly, no merit in the arbitration petition and the same is dismissed. No order as to costs.

21 In view of the dismissal of the petition, the Notice of Motion does not survive and the same is also dismissed.

(S.C. GUPTE, J.)