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

% ***Judgment Pronounced on: 14.02.2019***

+ **O.M.P. 17/2017**

M/S PRET STUDY BY JANAK FASHION PVT LTD....Petitioner

Through **Ms.Kaadambari Singh Puri and
Ms.Aditi Sharma, Advs.**

Versus

NAMRATA GOYAL Respondent

Through **Mr.Mukesh Anand, Advs.**

+ **OMP (COMM) 271/2017**

NAMRATA GOYAL Petitioner

Through **Mr.Mukesh Anand, Advs.**

Versus

PRET STUDY BY JANAK FASHION PVT. LTD ...Respondent

Through **Ms.Kaadambari Singh Puri and
Ms.Aditi Sharma, Advs.**

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The above two petitions are filed under section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Arbitration Act'*) seeking to challenge the award dated 07.03.2017 passed by the learned arbitrator. OMP (COMM) 17/2017 is filed by M/s. Pret Study by Janak Fashion Pvt. Ltd. OMP (COMM) 271/2017 is filed by Ms.Namrata Goyal.

2. The case was originally filed by Mrs.Namrata Goyal (*hereinafter referred to as 'the claimant'*) against M/s Pret Study By Janak Fashion Pvt. Ltd. (*hereinafter referred to as 'the respondent'*). The case of the claimant is that the respondent company deals in Mens Designers Wears business having its Registered Office at N-9, South Extension, Part-1 New Delhi and Corporate Office at A-17, Info City, Sector-34, Gurgaon. The claimant is having its shop at Sadar Bazar, Nabha District, Patiala and is dealing in the sale of garments. Both the parties were desirous of having an outlet for providing apparels of the respondent. The parties entered into a Franchise Agreement dated 05.03.2007 and the claimant become the franchisee of the respondent.

3. The Franchise Agreement dated 05.03.2007 had various terms including that the franchisor (the respondent) shall give 22% commission on MRP or subject to minimum guarantee of Rs.65,000/- per month. The respondent was to pay 6% per annum interest on security of Rs.5 lakhs.

4. It is the case of the claimant that as per the agreement the claimant developed the infrastructure as per specifications given by the respondent and their architect. The claimant states to have incurred a lot of expenses in development of infrastructure. A grand inauguration and opening of the outlet was arranged. Lot of money was spent on the Grand Inauguration. A lot of money was also spent on publicity, hoardings etc.

5. The plea of the claimant is that the respondent supplied only 800 garments till opening of the showroom against an assurance of 2000 garments. Even in the peak season of winter the respondent failed to supply necessary garments to the claimant. The claimant claims that there was a

continuous problem in performance of the terms and conditions of the Franchise Agreement by the respondent.

6. The case of the respondent is that there was a serious breach of the terms of the contract by the claimant and hence the respondent vide letter dated 08.11.2007 terminated the Franchise Agreement in accordance with clause 15.1 of the Franchise Agreement. It is pleaded that the breach by the claimant included the fact that the showroom staff was not upto the mark, claimant had broken billing rules, the claimant failed to deposit sale receipts in the respondent's account. The sales figures of the claimant were extremely low indicating that the claimant was not interested in performing part of the bargain etc.

7. The claimant pleads that the respondent have illegally and malafidely cancelled the Franchise Agreement. On 14.02.2008 the claimant sent a demand/notice for release of Rs.35,76,406/- to the respondent. A legal notice was sent on 20.09.2008. The claimant thereafter filed a winding up petition under sections 433, 434 and 439 of the Companies Act, 1956. During pendency of the said winding up petition, vide order dated 27.01.2011 the matter was with the consent of the parties referred to the Arbitrator Sh.Prem Kumar, (Retd. District & Sessions Judge).

8. Before the learned Arbitrator, the claimant raised a claim for Rs.71,20,157/-

9. The respondent filed a counter claim for Rs.22,12,190/-. It was stated that the material worth this amount was supplied to claimant which was not returned back to the respondent. It is pleaded that the said goods/stock are still lying with the claimant since 2009.

10. In support of her claim, the claimant examined three witnesses, namely, Balbir Singh CW2, Rajeshwar Modi Accountant as CW3 and Rajesh Goyal, attorney of the claimant as CW4. The respondent examined its Manager Legal Mr.A.K.Chaturvedi as DW1.

11. While dealing with the claim of the claimant, the learned Arbitrator noted that the basic document by which the relationship between the parties is governed is the Franchise Agreement dated 05.03.2007. According to Clause 2.1 of the said agreement, the Franchisor, namely, the respondent would provide 22% commission on MRP subject to minimum guarantee of Rs.65,000/- per month. The claimant also gave a security of Rs.5 lakhs. The respondent agreed to pay 6% per annum interest on the said security. As far as the security amount is concerned, the learned Arbitrator noted that there is no specific denial in the reply-cum-counter-claim that the respondent has not received the sum of Rs.5 lakhs as refundable security. The Award also notes that on 27.01.2011 in Co. Pet. 370/2008, the Delhi High Court had while appointing the Sole Arbitrator directed the respondent to deposit the security amount of Rs. 5 lakhs with the Arbitrator pending adjudication of the disputes. The respondent has deposited Rs. 5 lakhs in UCO Bank, Connaught Place, New Delhi in favour of the Arbitrator. This amount with accumulated interest was directed to be paid to be petitioner.

On interest on the security deposit, the learned Arbitrator awarded 6% per annum interest from 15.03.2007 till 02.05.2011 i.e. Rs.1,27,200/-.

The claimant had also claimed amount on account of advertisement charges. The learned Arbitrator noted that part 9 of the Franchise Agreement dealt with the publicity expenses. Noting the terms of Clause 9.2 whereby the respondent was to bear all the expenses for publicity and the terms of

Clause 2.2, the learned Arbitrator awarded Rs.40,000/- towards costs of hoardings, Rs.48,000/- towards rent of hoardings, Rs. 19,800/- towards local cable charges i.e. Rs. 1,07,800/- in all.

The claim for furniture and infrastructure was denied in view of Clauses 3.11 and 11.5 of the Franchise Agreement.

For the expenses towards AC and computer, the learned Arbitrator noted Clause 2.2 of the Agreement which provides for software support. Noting that the computer that was bought remained in the custody of the claimant, an award of Rs. 21,000/- towards computer was passed.

The main claim pertained to minimum guarantee/commission. The claimant had claimed Rs.28,60,222/-. It is pleaded that the minimum guarantee from 24.04.2007 to 23.04.2011 i.e. for a period of four years comes to Rs.29,90,611/-. An amount of Rs.1,29,389/- had been received. Hence, a balance of Rs. 28,60,222/- was claimed by the claimant. The learned Arbitrator noted that the Franchise Agreement is determinable in nature. He also relied upon the judgment of the Supreme Court in the case of *Indian Oil Corporation Ltd. v. Amritsar Gas Services & Ors., 1991 SCC(1) 553*. The Award notes the reasons given by the respondent for termination of the contract. The learned Arbitrator also noted the judgment of the Supreme Court in *ONGC Ltd. v. Saw Pipes Ltd., AIR 2003 SC 2629* and concluded that it was for the claimant to prove that the legal injury resulted from breach of the contract and the claimant suffered losses. The Award notes that the claimant was required to prove actual loss or damage suffered by the claimant for the pre-mature termination of the contract. Considering the principle of mitigation of damages and also taking into account the fact that it may have taken the claimant a period of 2 to 3 months to get back on rails,

the learned Arbitrator awarded an amount of Rs. 1.50 lakhs as an appropriate amount towards loss of profit to the claimant due to pre-mature termination of the contract. This was over and above the minimum guarantee amount admitted by the respondent in his letter dated 21.12.2007 which comes to Rs.5,41,666/-.

Another issue was issue No. 3, as to whether the claim was barred by time. The learned Arbitrator noted that at what point of time the arbitration was sought and by which party is not clear in the order dated 27.01.2011. However, by the said order by mutual consent, the parties agreed to refer the disputes to arbitration. Noting that the Arbitrator was appointed on 27.01.2011 on mutual consent of both the parties, the learned Arbitrator concluded that the arbitration commenced within time.

The respondent had in its counter claim sought a sum of Rs. 22,12,190/- on account of goods illegally withheld by the claimant. It is stated that stock continued to lie with the claimant and has become outdated and are no longer saleable as fashion garments.

The learned Arbitrator noted that the stock was lying with the claimant since 2007. On 27.05.2011, the claimant filed an application before the Tribunal that the goods are still lying. Learned counsel for the respondent had made a statement that they would collect the goods within four weeks. The respondent did not implement the said order. The respondent filed an application for appointment of a local commissioner. The Local Commissioner was appointed to visit the site and to get the entire stock photographed and prepare an inventory. The value of the unsold stock was verified by the Local Commissioner as per their MRP which comes to Rs.13,70,030/-. Noting the conduct of respondent that the stock was lying

with the claimant for the last 10 years and the despite the orders of the learned Arbitrator, the goods were not lifted, the learned Arbitrator disallowed the counter-claim.

12. A total award was passed in favour of the claimant for Rs.14,47,666/- as follows:-

“

i)	Security Amount:	Rs.5,00,000/-
ii)	Interest on the security deposit Upto 02.05.2011:	Rs.1,27,200/-
iii)	Advertisement Charges:	Rs.1,07,800/-
iv)	Furniture & Infrastructure:	Nil
v)	Expenses towards AC & Computer:	Rs.21,000/-
vi)	Hotel Bills:	Nil
vii)	Minimum Gaurantee/Commission:	Rs.1,50,000/-
		Rs.5,41,666/-
viii)	Sales Tax Refund:	Nil
	Total	Rs.14,47,666/- ”

13. I have heard the learned counsel for the parties.

14. The learned counsel for the claimant has vehemently argued as follows:

- i) The contract was for a minimum period of 3 years and hence as the respondent had illegally terminated the contract, the respondent automatically become liable to pay the agreed minimum guarantee in terms of the clause 2.1 of the Franchise Agreement @ Rs.65,000/- per month. It is pleaded that reduction of this amount to Rs.6,91,666/-

based on plea that the claimant had an onus to mitigate the losses is misplaced.

- ii) Number of other heads including the expenses/costs incurred by the claimant of Rs.6,90,000/- towards furniture and infrastructure have been wrongly disallowed.

15. The learned counsel for the respondent has vehemently argued that the claim of the applicant was barred by limitation. This court had on 27.01.2011 referred the parties to the arbitration. The order specifically kept open all issues including the preliminary objections raised by the respondent regarding limitation. Hence, he pleads that the present claim was barred by limitation.

16. I may firstly note that the learned Arbitrator has passed his award based on the interpretation of the terms and conditions of the Franchise Agreement dated 05.03.2007 and the findings of facts recorded in respect of the claims/evidence placed on record by the parties. These findings as recorded by the learned Arbitrator are plausible. The parties have failed to point out any ground before this court to show that the interpretation of the Agreement dated 05.03.2007 as per award was erroneous or that the findings of fact recorded by the learned Arbitrator are erroneous and should be set aside by this court.

17. The learned arbitrator is the master of the quality and quantity of the evidence to be relied upon. The findings recorded are reasonable and cannot be faulted with. In this context reference may be had to the judgment of the Supreme Court in *Associate Builders vs. DDA (2015) 3SCC 49* where the Court held as follows:

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. a finding is based on no evidence, or
2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
3. ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In **H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons**, 1992 Supp (2) SCC 312 at p.317, it was held:

7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

.....”

Hence, this court cannot sit over appeal over the award of the learned arbitrator. There is no reason as to why this court should interfere in the finding of facts recorded by the learned arbitrator.

18. Similarly, the legal position with regard to interpretation of the contract is also quite clear. The same is within the domain of the arbitrator. In **McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors.**, (2006) 11 SCC 181, the Supreme Court held as follows:-

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant

factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd. v. ONGC* [(2003) 8 SCC 593] and *D.D. Sharma v. Union of India* [(2004) 5 SCC 325].)”

19. In my opinion, the interpretation of the Franchise Agreement dated 05.03.2007 recorded by the arbitrator is a plausible interpretation.
20. The next issue which is the main issue raised by the respondent is about Limitation. It has been pleaded that the present claim was completely barred by limitation.
21. The respondent in her reply/counter claim has pleaded limitation aspect as noted in the award as follows:

“110. According to the respondent company the claim of the Claimant is barred by limitation on the face of the Claim Petition. The cause of action for filing the present claim petition could at best be the termination of the contract by the Respondent/Counter Claimant vide letter dated 08.11.2007. Furthermore, vide e-mail dated 13.11.2007 it was once again informed to the claimant that its Franchise Agreement would stand terminated w.e.f. 15.11.2007. Even as per the admitted stand of the Claimant as represented through its proprietor as adopted in its letter dated 28.11.2007, claimant had not received Minimum Guarantee from 01.07.2007, i.e. for a period of 4 months till date of termination. Hence, the present Claim Petition is hopelessly barred by the law of limitation.”

Hence, as per the respondent, the contract was terminated on 08.11.2007. On 13.11.2007 the respondent again informed the claimant that its Franchisee Agreement would stand terminated w.e.f. 15.11.2007.

22. Section 21 of the Arbitration Act reads as follows:

“21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

23. Hence, limitation period would stop running when any of the parties invokes the arbitration clause. The Supreme Court in ***Milkfood Ltd. v. GMC Ice Cream (P) Ltd., 2004 (7) SCC 288*** has noted the observations of P.Chandrashekhra Rao, noted author, that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. The request should clearly indicate that the claimant seeks arbitration of the dispute.

24. In the present case, the claimant did not invoke the arbitration clause but chose to issue a notice under Sections 433, 434 and 439 of the Companies Act, 1956 on 20.09.2008. Relevant portion of the statutory demand notice/legal notice dated 20.09.2008 sent by the learned counsel for the claimant reads as follows:

“

That in the above given circumstances, the undersigned on behalf of my client request you through this legal demand notice for payment of Rs.35,76,406/- along with 1.5% per month interest to be compounded monthly to my client within period of 21 days from the date of receipt of this notice, failing which my client shall be constrained to effectively take up the

winding up petition against your company before Hon'ble High Court and shall be constrained to take action under criminal law of the land, and in such eventuality you shall be held responsible for the expenses incurred therein and consequences thereof.”

Hence, there is no reference to the arbitration clause or to any attempt to seek reference to arbitration. This notice is a statutory notice as per requirements of The Companies Act, 1956.

25. The winding up petition was filed in 2008. On 27.01.2011, with the consent of the parties, the court referred the parties to the Sole Arbitrator but all issues including the issue of limitation was kept open. Relevant portion of the order dated 27.01.2011 passed in Co.Pet. 370/2008 reads as follows:

“... The security deposit of Rs.5 lacs shall be deposited with the learned arbitrator pending adjudication of the disputes. Needless to say that this order is without prejudice to the rights and contentions of both the parties. At the cost of repetition, it is clarified that all objections to the petitioner's claim including preliminary objection relating to limitation are left open. Petitioner is also at liberty to file an application before the learned arbitrator seeking a direction to the respondent to collect the goods lying with the petitioner.”

The above order which is passed by the consent of the parties is the first request to refer the disputes to arbitration and hence, the relevant date for the purpose of section 21 of the Arbitration and Conciliation Act. The arbitral proceedings can be said to commence on the said date in terms of section 21 of the Arbitration Act.

26. The contract in this case was terminated by the respondent on 08.11.2007, w.e.f. 15.11.2007. Hence, under Article 55 of Schedule to the Limitation Act, the limitation would start from the date when the contract was broken i.e. 08.11.2007. The Arbitration clause was invoked on 27.01.2011 when this court by consent of parties referred the parties to arbitration. There is no other date on record to show invocation of the Arbitration Clause. In the ordinary course this would clearly render the claim of the claimant barred by limitation being well beyond the period of three years from 08.11.2007.

27. The question would arise as to whether the claimant can take advantage of Section 14 of the Limitation Act keeping in view the fact that the winding up petition was filed in 2008 or can it be said that the claim of the claimant got barred by limitation during pendency of the winding up proceedings. In this context reference may be had to the judgment of this court in *Diwan Chand Kapoor vs. The New Rialto Cinema Pvt. Ltd.*, 28 (1985) DLT 310 whether this court held as follows:-

“6. True, Section 441 embodies the principle of 'relation back', but I am unable to see how the theory of 'relation back', is of any assistance to the petitioners, who seek a winding up order or continuance of proceedings for winding up merely on the basis of a claim, which, after the petition was filed, has become barred by time. The filing of a petition for winding up cannot be equated with the institution of a Suit. Once a Suit has been filed within a period of limitation, there is no question of the claim being hit by the law of limitation. The action for which there is limitation has already been taken before the expiry of the period provided by the Limitation Act. The filing of a winding up petition is not analogous to filing a Suit. Section 14 of the Limitation Act would also be of no assistance to the petitioners because the petitions for winding up and the eventual suit for which the exclusion may

be claimed could not be said to "relate to the same matter in issue" The object of winding up petition is to have the Company wound up. Winding up petition is not a forum for the adjudication of disputes between the parties nor is it an ordinary mode of recovery of money. The only question with which the winding up court is concerned is if the Company is liable to be wound up. The other conditions of Section 14(1) with regard to "difficulty of jurisdiction" or "other cause of a like nature" would also not be satisfied. Section 14 would, Therefore, be inapplicable in deciding the question if the claim has become barred by time. There is no other provision in the Limitation Act which is of any assistance to the petitioners in the present situation. Section 458-A of the Companies Act provides for exclusion of certain time in computing periods of limitation where a winding up order has been made, but the benefit of the Section is confined to proceeding "in the name and on behalf of a company which is being wound up by the Court." It is not available against the Company being wound up. It is only available to the company which is being wound up. Moreover, it is not sufficient that the claim was within time when the petitions were filed because the liability of the Company to be wound up is to be considered by the Court when it makes the winding up order, even though the question whether a petition should be admitted or not has to be decided at an earlier stage. In the present cases, the claims became barred by time before either of the two stages because they became barred by time during the pendency of the proceedings on show cause notices. In any event, the defense of the Company that the claim became barred by time during the pendency of the petition would, on any reckoning, be bona fide, as well as, substantial so as to render the petitions liable to be dismissed on that ground alone."

28. Similarly, this court in the case of *Anil Pratap Singh Chauhan v. M/s Onida Savak Ltd.*, AIR 2003 Del 252 held as follows:

"14.The question, Therefore, to be considered is whether the period spent in pursuing the winding up petition is liable to be excluded or not?. The submissions made by the learned counsel

for the plaintiff have already been noted and his reliance has been on Chalisgaon Shri Laxmi Narayan Mills Co. Ltd. v. Armit Lal Kalidas Kanji (supra) and Pavan Om Parkash Kejriwal v. Partap Steel Rolling Mills (1935) Ltd. (supra). As I had heard Mr. R. P. Sharma, Counsel for the plaintiff at length, I considered it appropriate to take assistance from Mr. Manmohan, advocate, who was appointed amicus in the matter. Mr. Manmohan has rendered valuable assistance in this matter.

.....

16. Let us apply the legal principles enunciated in the foregoing authorities as also the pre-condition, set out before the benefit under Section 14 of the Limitation Act can be claimed. Even in the benefit having in good faith and diligently prosecuting the winding up petition is assumed in favor of the plaintiff, the remaining requirements of Section 14 are not satisfied. As held by the Supreme Court in Yeshwant Deorao v. Walchand Ramachand (supra), the relief sought in an insolvency or in the present case the winding up proceedings and that for a suit for recovery and the procedure are widely different. In Diwan Chand Kapoor v. The New Rialto Cinema Pvt. Ltd. (supra), the learned single Judge of this Court has succinctly brought out the difference in the nature of an action for winding up petition and that of eventual suits, which may be brought out the proceedings cannot be said to "relate to the same matter in issue." I am in respectful agreement with the view expressed in Diwan Chand Kapoor v. The New Rialto Cinema Pvt. Ltd. (supra). The object in a winding up petition is to have a company which is unable to meet its legitimate debts wound up, the same is neither a forum for adjudication of disputes between the parties nor is it the ordinary mode for recovery of money. This apart the three conditions of the earlier proceedings, having been failed on account of defect of jurisdiction or a cause of the like nature is not made in the instant case. A perusal of the order passed, dismissing the winding up petition clearly shows that the winding up petitions in all the cases have been dismissed upon the learned Judge finding that a bona fide defense had been set up by the respondents. The learned Company Judge found that there was a clear admission that between the two groups of companies on

either side there have adjustments of claims and counter claims were freely made. The plaintiff was only seeking that there would be no adjustment after 1-4-1995. The Company Judge also noted the submission of the respondent that the petition had been filed as a counter blast to certain suits that had been instituted by the defendant group of companies. There is no doubt upon a perusal of the order passed In winding up petition that the same were dismissed on merit and not on account of any defect in jurisdiction or a defect or objection of a like nature. This being the position the benefit of Section 14 of the Limitation Act cannot be availed of by the plaintiff. Before parting with the case, it would be appropriate to take note of the two decisions relied on by the learned counsel for the plaintiff. In *Chalisgaon Shri Laxmi Narayan Mills Co. Ltd. v. Armitlal Kalidas, Kanji (supra)*, the District Judge had rejected the claim of the liquidator on the ground that it could not be disposed of summarily in the proceeding by way of claim. It appears that the dismissal or rejection was not on merits rather it was on account of a cause of a like nature as defect of jurisdiction. In any case, it was not a dismissal on merits while the present case is wholly distinguishable. In a later decision of the Bombay High Court in *Rajan Products v. Jayant Vegoiles and Chemicals Pvt. Ltd.* reported at 1990 (CC2) GJX 0008 Bom, the Court declined to give benefit of Section 14 of the Limitation Act on the ground that the earlier proceedings for winding up of the company had been initiated relying on the judgment of the Supreme Court in *Yeshwant Deorao v. Walachand Ramchand*. The Court held that in the Company Petition the plaintiffs had asked for winding up of the company and, Therefore, the observations made in the said decision by the Supreme Court definitely would apply and, Therefore, the contention tried to be raised that the plaintiff tiffs are entitled to the exclusion of time under Section 14 of the Limitation Act cannot be considered as having substance. The Court further held that, "even if the plaintiff pursuing a remedy for winding up under the Company Law, they ought to have filed a suit for recovery of the amount due to them within the period of limitation."

29. Recently the Division Bench of this court in Co.App. 21/2018, titled ***Make India Smart Pvt. Ltd. v. M/s RST Semi Conductors Pvt. Ltd.*** by order dated 29.10.2018 relied upon the judgment of the Bombay High Court in *Rajan Products v. Jayant Vegoiles & Chemicals*, (1991) 72 Comp. Cases 181 and held that section 14 of the Limitation Act cannot be invoked to avoid limitation where the party was pursuing a remedy before the company court. Relevant paras of the judgment are as follows:

“15. However, the Court finds that there was no warrant in law for the learned Single Judge to have further ordered that in such civil proceedings, the Appellant would be precluded from opposing the invocation by the Respondent of Section 14 of the Limitation Act. The Bombay High Court in *Rajan Products v. Jayant Vegoiles and Chemicals* (1991) 72 Company Cases 181, held that Section 14 of the Limitation Act cannot be invoked to avoid limitation where the party was pursuing a remedy before the Company Court.

16. Be that as it may, the Court is of the view that no party can be deprived of a legal defence which it might otherwise have and it is for the Court concerned to deal with such defence in accordance with law.”

30. It follows from the legal and the factual position as stated above that the claims filed by both the sides before the learned arbitrator were barred by limitation. The learned arbitrator however noted that at what point of time, the arbitration was sought by which party is not clear from the order dated 27.01.2011, however, the order was passed by mutual consent of both the parties. The learned arbitrator concluded that the arbitration commenced within time. Clearly, the impugned award is erroneous on facts and law on the issue of limitation. A bare perusal of the order of this court dated

27.01.2011 would show that when the matter was referred to arbitration, all issues were kept open including the issue regarding limitation. Hence, there was no consent on the part of the respondent which would enable the extension of period of limitation as has been noted and concluded by the learned arbitrator.

31. It follows that the entire claim filed by the parties was barred by limitation before the learned Arbitrator. The question that may arise in this case is that the claimant had diligently pursued the winding up petition. By consent the parties agreed to go to Arbitration. Hence, the Company Petition was disposed off. Can the petitioner now be non-suited merely because he agreed to pursue the arbitration clause by the consent of the parties? In my opinion, this view would be misplaced inasmuch as when the matter was referred to arbitration on 27.01.2011, the respondent agreed to the reference but kept all issues open including the issue of limitation. Secondly, in any case, I am unable to convince myself in the facts of the case that a winding up petition itself would lie against the respondent other than for refund of the security.

32. I may however note that the learned Arbitrator has awarded a sum of Rs. 5 lakhs to the claimant for refund of security. The Award also notes that in the reply cum-counter-claim, the respondent has not specifically denied receipt of Rs.5 lakhs as refundable security. This is an admitted claim. The learned arbitrator in this regard in the award noted as follows:

“... The respondent had deposited the amount of Rs.5 Lakhs in UCO Bank, Connaught Place, New Delhi in the name of the arbitrator under Keber Yojna Deposit Scheme bearing CKY No.0413583 on 20.08.2011 @ 9.25% for 12 months. The claimant is allowed to take the original Fixed Deposit Receipt

from the Tribunal with no objection from the respondent company and get the amount credited to its account. The amount so received by the claimant would be adjusted against the amount in this award.”

33. By consent of both the parties the company court had directed the respondent to deposit a sum of Rs.5 lacs on account of the security deposit with the learned arbitrator pending adjudication of the disputes. This direction of the company court to the respondent to deposit Rs.5 lakhs with the learned arbitrator subject to the direction of the learned arbitrator attained finality, as it was not challenged.

34. The money having deposited with the learned arbitrator by consent of both the parties subject to further directions of the learned arbitrator, in my opinion, the directions given by the learned arbitrator to the extent of security deposit and interest would survive. This is so as the order has been passed by consent of both the parties and money has already gone out of the hands of the respondent by the order of the company court. Even otherwise there was no serious dispute that this amount was payable to the claimant.

35. Accordingly, I hold that other than the award/direction relating to the Fixed Deposit Receipt and interest awarded on this security deposit, rest of the claim on the face of it is barred by limitation. Hence, the award to that extent suffers from material illegality and is passed contrary to the provisions of law. The award to the extent it ignores the statutory legal provisions regarding limitation is contrary to the fundamental policy of law and is illegal and irregular.

36. Reference in this context may be had to the judgment the Supreme Court in *Associate Builders v. Delhi Development Authority*, (*supra*), noted as follows:

“In *DDA v. R.S. Sharma and Co.*, (2008) 13 SCC 80, the Court summarized the law thus:

“21. From the above decisions, the following principles emerge:

(a) An award, which is

- (i) contrary to substantive provisions of law; or
 - (ii) the provisions of the Arbitration and Conciliation Act, 1996; or
 - (iii) against the terms of the respective contract; or
 - (iv) patently illegal; or
 - (v) prejudicial to the rights of the parties;
- is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.”

37. The Award is accordingly set aside except the award of Rs. 5 lakhs granted towards security and a sum of Rs. 1,27,200/- being the interest on the security deposit and consequent directions.

38. In view of the above both the petitions stand disposed of.

(JAYANT NATH)
JUDGE

FEBRUARY 13, 2019/v/rb

