

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

ARBITRATION APPLICATION NO.10 OF 2022

M/s. Kay Vee Enterprises
Engineers and Builders,
B/o Plot No.27, Yeshwant Nagar Extension,
Nanded 431602 through its authorized person,
Venugopal Shastri S/o Ramkrishna Tumuluri,
Age 47 years, Occ. Business. ..Applicant

Versus

The Director & Secretary,
Shri. Guru Gobind Singhji
Institute of Engineering & Technology,
Vishnupuri, Nanded-431606. ..Respondent

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Mr. Sachin S. Deshmukh, Advocate for the Applicant.
Mr. S. V. Adwant a/w Mr. Harish S. Adwant and Ms. Neha B.
Kamble, Advocate for Respondent.

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CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 15.12.2022.
PRONOUNCED ON : 21.12.2022.

JUDGMENT:-

1. This application filed under the provisions of sub-Section 6 of Section 11 of the Arbitration and Conciliation Act, 1996 (for short 'the Act of 1996') for appointment of an Arbitrator.

2. The relevant clause of the agreement between the parties reads thus:

"56. All dispute and differences of any kind whatever arising out of or in connection with the Contract or the carrying out of the works whether during the progress of the works or after their completion and whether before or after the determi-

nation, abandonment or breach of the Contract) shall be referred to an Architect who shall state his decision in writing such decision may be in the form of a Find Certificate or otherwise The decision of the Architect with respect of any of the excepted matters shall be final and without appeal. But if either the Owner or the Contractor be dissatisfied with the decision of the Architect on matter, question of dispute of any kind (except any of the excepted matters) or as to the withholding by the Architect of any certificate to which the Contractor may claim to be entitled then and in any such case either party (the Owner or the Contractor) may within 25 days after receiving notice of such decision give a written notice to the other party through the Architect requiring that such matters in dispute be Arbitrated upon such written notice shall specify the matters which are in dispute be Arbitrated upon. Such written notice has been given and no other shall be and is hereby referred to the Arbitration and final decision of a single Arbitrator being a Fellow of the Indian Institute of Architect to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a single Arbitrator to the Arbitration of two Arbitrators both being fellows of the Indian Institute of Architects one to be appointed each party, which Arbitrators shall before taking upon themselves the burden of reference appoint an Umpire.*

The Arbitrator, the Arbitrators or the Umpire as the case may be shall have power to open up review and any certificate, opinion, decision, requisition or notice save in regard to the excepted matters referred to in clause 55 and to determine all matters in dispute which shall be submitted to him or them and of choice shall have been given as aforesaid.

Upon every reference at any such reference the cost of and incidental to the reference and Award respectively shall be in the direction of the Arbitrator or Arbitrators or the Umpire as the case may be who may determine the amount thereof or direct the same to be taxed as between Attorneys and Client or as between party and party and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be a submission to Arbitration within the meaning of the Indian Arbitration Act 1940 or any modification thereof for the time being in force, subject to the condition the prescribed statutory period of declaring awards can be extended by the consent of both the parties. The Award of the Arbitrator or the Arbitrators or the Umpire as the case

may be shall be final and binding on the parties. Such reference except as to the withholding by the Architect of any certificates under Clause 49 to which the Contractor claims to be entitled shall not be opened or entered upon until after the completion or alleged completion of the works or until after the practical cessation of the works arising from any cause unless with the written consent of the owner and the Contractor. Provided always that the Owner shall not withhold the payment of an Interim Certificate nor the Contractor except with the consent in writing of the Architect in any way delay the carrying out of the works by reason of any such matters, question or dispute being referred to Arbitration but shall proceed with the work with all due diligence and all the decision of the Arbitrator or Arbitrators or the Umpire as the case may be, given abide by the decision of the Architect and no Award of the Arbitrator or the Arbitrators or the Umpire as the case may be shall relieve the Contractor of his obligations to adhere strictly to the Architects instructions with regard to the actual carrying out of the works. The Owner and the Contractor hereby also agree that Arbitration under this clause shall be a condition precedent to any right of action under the contract.”

3. Mr. Adwant, learned counsel appearing for respondent does not dispute existence of Arbitration agreement. However, he strenuously opposes the petition on the ground that the claim of applicant is hopelessly barred by limitation. Mr. Adwant has presented following chronology of events to demonstrate bar of limitation to the claim of Petitioner:

Date	Particulars
10.04.2006	Tender document submitted by the applicant for proposed extension of Hostel Building (Rs.66,23,004/-)
10.04.2006	Tender document submitted by the applicant for proposed extension of Electronics Building (Rs.14,77,998/-)
29.06.2006	Tenders submitted by the applicant were accepted and work orders were issued. Time limit of 6 months.
03.01.2008	The applicant has submitted his claims, disputes and dues to the respondent.
01.02.2008	The respondent has replied to the letters given by the

03.02.2008	applicant.
12.03.2008	The applicant has issued a notice under clause 56 of the contract, thereby submitting the claims, disputes and dues for being referred to the arbitrator for his decision.
04.04.2008	The applicant has given a letter to the respondent, requesting to finalise the final bills and informing that if the bills are finalized within 15 days, the applicant shall withdraw the Arbitration notice dated 12.03.2008.
28.04.2008	The applicant has finally called upon the respondent to appoint the Arbitrator within 3 days, failing which he will be constrained to appoint the Arbitrator.
29.04.2008	The respondent institute has proposed the name of N.P. Pagdiwala, Sr. Architect to be the Arbitrator to adjudicate the dispute raised.
05.09.2008	The respondent institute has issued a notice to the applicant to remain present for the joint measurement to be conducted on 12.09.2008.
09.09.2008	The applicant has given a letter to the respondent to settle the dispute as it did not want to involve in the Arbitration clause.
22.12.2008	Termination of Contract with respect to Extension of Hostel Building.
27.01.2009	Termination of Contract with respect to Extension of Electronics Building.
17.03.2009	Letter given by the respondent institute to the applicant to come for discussion and resolving the issue amicably.
02.04.2009	Letter given by the applicant to the respondent reminding to release the payment.
12.01.2015	Letter given by the applicant to the respondent to allow him to correct the bills and claim generated by the respondent institute.
27.01.2022	Letter given by the respondent institute to the applicant to pay an amount of Rs.12,83,432/- + interest thereon @18% within 3 days.
04.02.2022	Letter given by the applicant to the respondent seeking to invoke clause 56 of the contract.
24.03.2022	The applicant has filed Arbitration Application No.10/2022.

4. On the other hand, Mr. Deshmukh, the learned counsel appearing for applicant has relied upon letter dated

27/28.01.2022 of respondent by which respondent has demanded an amount of Rs.12,83,432/- + interest @ of 18% p.a. Mr. Deshmukh would submit that apart from the original claim of applicant being within the limitation, the letter dated 27/28.01.2022 of respondent raising the claim against applicant would, in any case, bring the claim within limitation.

5. It is well established principle that all objections with regard to the claims of respective parties should be left to be determined by the Arbitrator. This well settled principle has been reiterated by the Apex Court in its recent decision in **Mohammed Masroor Shaikh Vs. Bharat Bhushan Gupta & Ors.**, (2022) 4 SCC 156 in which the Apex Court has referred to its previous decision in **Vidya Drolia & Others Vs. Durga Trading Corporation**, (2021) 2 SCC 1 and has held as under:

18. The learned counsel appearing for Respondent 1 has relied upon what has been held in paras 95 and 98 of the decision of this Court in Vidya [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] . The conclusions of this Court have been summarised in para 154 of the said decision, which reads thus : (SCC p. 121)

“154. Discussion under the heading “Who Decides arbitrability?” can be crystallised as under:

154.1. Ratio of the decision in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and

competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”

*19. Thus, this Court held that while dealing with petition under Section 11, the Court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable. In such case, the issue of non-arbitrability is left open to be decided by the Arbitral Tribunal. **On perusal of the impugned order, we find that the issues of non-arbitrability and the claim being time-barred have not been concluded by the learned Single Judge of the Bombay High Court.** In fact, in SCC OnLine Bom para 6(vii) of the operative part of the impugned order [Bharat Bhushan Gupta v. M.M. Developers, 2020 SCC OnLine Bom 11658] , the learned Single Judge has observed that the contentions of the parties have been kept open. The petitions filed by the appellant under Section 34 of the Arbitration Act, challenging*

the order dated 25-5-2021 are pending before the High Court in which the appellant can raise all permissible contentions.
(Emphasis supplied)

6. Considering above established principle, ideally the issue of limitation also ought to have been left to be determined by the Arbitrator. However, Mr. Adwant strenuously submits that there are other decisions of the Apex Court holding that the dead claim cannot be revived by appointment of an Arbitrator. Therefore, I have heard Mr. Deshmukh and Mr. Adwant on the issue as to whether appointment of an Arbitrator can be made in the facts and circumstances of the present case.

7. The chronology of events extracted hereinabove does create an impression that the claim of applicant against respondent dates back to the year 2008. Applicant in fact invoked Arbitration clause by notice dated 12.03.2008 and thereafter it did not exercise its remedy for appointment of Arbitrator upon respondent's failure to act upon the notice of invocation of Arbitration clause. It is on account of this factual position that Mr. Adwant submits that the claim of applicant is dead and therefore, Arbitrator cannot be appointed under the provisions of Section 11(6) of the Act of 1996.

8. In support of his contentions Mr. Adwant has relied upon the following judgments:

(I) In **Vishram Varu & Co. Vs. Union of India, represented by the General Manager, South Eastern Railway, Kolkata; Civil Appeal No.2964/2022** decided on 21.04.2022, the work order was issued in the year 1982 and the work was executed in the year 1986. The claim was towards extra work executed and after mak-

ing various correspondence demanding additional amount, a notice was issued on 31.12.2018 to either pay the additional amount or to refer the disputes to the Arbitrator. The Arbitration clause was once again invoked on 31.07.2019. The application filed under Section 11(6) of the Act of 1996 came to be rejected by the High Court on the ground that the claim was hopelessly barred by the limitation. In this factual backdrop, the Apex Court has held in paragraph nos.4, 5 and 6 as under:

“4. We have heard Shri Pijush K. Roy, learned counsel appearing for the appellant at length. At the outset, it is required to be noted that in the present case, work order was issued on 7.4.1982 and the work/excess work was completed in the year 1986. Even as per the statement of claim, the amount due and payable was under work order dated 7.4.1982, which was executed up to 11.05.1986 and work order dated 15.01.1984 which was executed up to 26.8.1985. Therefore, right to claim the amount, due and payable, if any, can be said to have accrued in the year 1985/1986. Thereafter, the correspondences under the RTI Act had taken from the year 2012 onwards. Thereafter, for the first time, the appellant served a legal notice upon the General Manager, South Eastern Railway on 22.10.2018 requesting either to release the amount which was overdue or to refer the dispute to the arbitrator under clauses 63 & 64 of GCC under the 1996 Act. The aforesaid legal notice is thereafter followed by three to four letters/communications and thereafter the appellant herein filed the present application under Section 11(6) of the 1996 Act before the High Court in the year 2019. Merely because for the claim/alleged dues of 1985/1986, the legal notice calling upon the respondent to pay the amount due and payable or to refer the dispute to the arbitrator is made after a period of approximately thirty-two years, the appellant cannot be permitted to say that the cause of action to file the application under Section 11(6) of the 1996 Act had accrued in the year 2018/2019. In the present case, the legal notice has been served and the arbitration clause is invoked and request to appoint the arbitrator was made after a period of approximately thirty-two years from the date of completion of work. Therefore, the appellant, who served the legal notice invoking the arbitration clause and requesting for appointment of an arbitrator after a period of approximately

thirty-two years, cannot contend that still his application under Section 11(6) of the 1996 Act be considered as the limitation would start from the date of serving the legal notice and after completion of 30 days from the date of service of the legal notice and invoking arbitration clause.

5. Now, so far as the reliance placed upon the decision of this Court in the case of Bharat Sanchar Nigam Limited (supra) is concerned, the said decision shall not be applicable to the facts of the case on hand. In the aforesaid decision, the Court was not dealing with such a situation where the legal notice was issued and served and the arbitration clause was invoked after a period of thirty-two years. In the aforesaid decision, this Court has not stated and/or observed and/or held that despite the fact that the legal notice invoking the arbitration clause and/or request for referring the dispute to the arbitrator is made after 20/30 years, still the application under Section 11(6) of the 1996 Act can be entertained.

6. Therefore, in the facts and circumstances of the case, narrated hereinabove, the High Court has not committed any error in dismissing the application under Section 11(6) of the 1996 Act on the ground that it is hopelessly barred by limitation and is a stale claim. We are in complete agreement with the view taken by the High Court.”

(II) In Bharat Sanchar Nigam Limited and Another Vs. Nortel Networks India Private Limited, (2021) 5 SCC 738, the Apex Court after considering its decision in **Vidya Drolia** (supra) has held in paragraph nos.46, 47 and 49 as under:

“The upshot of the judgment in Vidya Drolia is affirmation of the position of law expounded in Duro Felguera and Mayavati Trading, which continue to hold the field. It must be understood clearly that Vidya Drolia has not re-surrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engineering (supra).

It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court

may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.

The present case is a case of deadwood / no subsisting dispute since the cause of action arose on 04.08.2014, when the claims made by Nortel were rejected by BSNL. The Respondent has not stated any event which would extend the period of limitation, which commenced as per Article 55 of the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the Final Bill by making deductions.”

(III) Mr. Adwant has also sought to distinguish the judgment of the Apex Court in **Mohammed Masroor Shaikh** (supra) by relying on the judgment of the Apex Court in **Subodh Kumar Vs. Shamim Ahmed**, 2021 SCC OnLine Sc 164 and **Inbasakaran and Another Vs. S. Natarajan (Dead) Through Legal Representative**, (2015) 11 SCC 12, in support of his contention that ratio of any decision must be understood with the background of the facts of that case. In paragraph no.4 of the **Subodh Kumar** (supra), the Apex Court has held as under:

“4.The facts of any case are the foundation on which the dispute between the parties arises. The arguments are built by the counsel for the parties in reference to the foundational facts for applying the legal principles to decide the dispute. A clear grasp of foundational facts are essential. The law is applied on facts and when essential facts are missed, misapplication of law is bound to happen.”

In paragraph no.30 of the **Inbasakaran** (supra), the Apex Court has held as under:

“30. It is well settled that the ratio of any decision must be understood in the background of the facts of that case. The follow-

ing words of Lord Denning in the matter of applying precedence have been locus classicus.

“Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.””

9. Relying on the decisions in **Subodh Kumar** (supra) and **Inbasakaran** (supra) Mr. Adwant would contend that the judgment of the Apex Court in **Mohammed Masroor Shaikh** (supra) rendered in the facts of that case would not constitute a general principle that even time barred claims can be referred to Arbitration by appointing an Arbitrator under Section 11(6) of the Act of 1996.

10. From the judgments in **Vishram Varu** (supra) and **Bharat Sanchar Nigam Limited** (supra) it is clear that if the claim is found to be ex-facie time barred, the High Court can decline the appointment of Arbitrator under Section 11(6) of the Act of 1996.

11. In the present case however though applicant did invoke Arbitration clause by issuing notice dated 12.03.2008 and failed to take any steps thereafter for appointment of Arbitrator, the correspondence between parties in respect of the claim of applicant apparently continued till 27/28.01.2022. By that letter, certain allegations have been made by respondent against applicant with regard to the incomplete work allegedly left by applicant resulting in incurring of excess amount of Rs.35,936/- and 12,47,496/- in respect of two work orders. Some part of the claim of applicant

is also disputed. While denying the claim raised by applicant, respondent has raised counterclaim of Rs.12,83,432/- with interest at the rate of 18% against applicant. Respondent also threatened applicant with initiation of legal action in the event of failure to pay the amount.

12. In **Bharat Sanchar Nigam Limited** (supra) relied upon by Mr. Adwant, the Apex Court has held that ***‘However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the Tribunal’***. In the present matter, letter dated 27/28.01.2022 clearly creates a doubt as to whether disputes between the parties continue to subsist or not and whether the respective claims against each other are still alive or not. While deciding application under Section 11(6) of the Act of 1996, I do not wish to delve more into the aspect of limitation. All that can be said at this stage is that a doubt is created as to whether the claim of applicant is within limitation or not. Accordingly I proceed to repel the objection raised by Mr. Adwant.

13. There is no dispute about existence of Arbitration agreement between the parties. Therefore, leaving open the objection of limitation as well as all objections on merits as well as procedural aspects, I proceed to appoint sole Arbitrator to adjudicate upon disputes between applicant and respondent. Mr. Deshmukh and Mr. Adwant have jointly suggested the name of Mr. Shyam Ramchandra Borawake, Proprietor M/s. Rachana Architects, Aurangabad for being appointed as sole Arbitrator. Accordingly, I proceed to pass following order:

ORDER**a) Appointment of Arbitrator :-**

By consent, Mr. Shyam Ramchandra Borawake, Proprietor M/s. Rachana Architects, Aurangabad is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties under Partnership Deed.

(b) Communication to Arbitrator of this order :-

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from the date this order is uploaded.

(ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:-

Arbitrator : Mr. Shyam Ramchandra Borawake,
Proprietor M/s. Rachana Architects,
Aurangabad

Address : Hemand Building, Taramandal Co-op Hsg Soc.,
New Shreya Nagar, Aurangabad 431 005.

Phone : 9422702442.

Email : shyamborawake@gmail.com

(c) Disclosure :-

The learned Sole Arbitrator is requested to forward the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Registrar of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently before entering upon the reference to arbitration. That statement will be retained by the Registrar on the file of this application. Copies will be given to both sides.

(d) Appearance before the Arbitrator :-

Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.

(e) **Contact/communication information of the parties :-**

Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.

f) **Section 16 application :-**

The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.

(g) **Interim Application/s :-**

(i) Liberty to the parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator.

(ii) Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.

(h) **Fees :-**

The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

(i) **Sharing of costs and fees :-**

Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.

(j) Consent to an extension, if thought necessary.

Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.

(k) Venue and seat of arbitration :-

Parties agree that the venue and seat of the arbitration will be in Aurangabad.

14. The application is disposed of in these terms. No costs.

(SANDEEP V. MARNE)
JUDGE

Devendra/December-2022