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

COMMERCIAL ARBITRATION APPLICATION NO. 24 OF 2020

Shriram EPC Ltd. & Anr. .. Applicants
Vs.
Gaja Trustee Co. Pvt. Ltd. .. Respondent

Mr. Kevic Setalvad, Senior Advocate a/w. Ms. Rajalakshmy Mohandas,
Ms. Gauri Deshpande i/b. Rajalakshmy Associates for the applicants.

Dr. Birendra Saraf, Senior Advocate a/w. Mr. Vaibhav Charalwar, Mr.
Jatin Pore, Ms. Ankita Agrawal i/b. DSK Legal for the respondent.

CORAM : G.S. KULKARNI, J.
RESERVED ON: JUNE 7, 2022.
PRONOUNCED ON: AUGUST 30, 2022

JUDGMENT:

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short '**the Act**') whereby the applicants have prayed for appointment of an arbitral tribunal to adjudicate the disputes and differences between the parties which have arisen under the Share Subscription and Shareholders Agreement dated 31 May 2010. The arbitration agreement between the parties is contained in Clause 36 on which there is no dispute.

2. The applicant No.1 is a public listed company engaged in EPC (Engineering Procurement and Construction) and claims to have implemented projects in relation to Governments and statutory bodies as also in the private sector, both in India and abroad. The applicant No.2

is described to be a reputed renewal energy company having undertaken several wing energy projects across the country. The respondent is a company incorporated on 17 May 2007, under the provisions of the Companies Act, 1956 and is also engaged majorly in private equity investments in the country for the last 12 years.

3. The applicants contend that the respondent being an investor had entered into a Share Subscription and Shareholders Agreement (for short '**SSHA**') inter alia with one Haldia Coke and Chemicals Ltd. (for short '**Haldia**'), Wellman Coke India Ltd (for short '**Wellman**'), Ennore Coke Ltd (for short '**Ennore**'), Shriram Minerals Inc., Shriram EPC Ltd, Shriram Auto Finance and Black Gold Chemicals Pvt.Ltd. (latter three companies being designated as the '**Promoters**'). The said SSHA was further amended on 1 July 2010 and on 15 November 2011 in relation to the terms and conditions governing the investments into Haldia and the relationship of the shareholders in respect of the management and governance of the company. The applicants contend that in pursuance to the SSHA, the respondent acting as the investors had made certain investments in Haldia and was accordingly issued and allotted certain number equity and the compulsorily convertible preference shares (collectively, the '**Shares**'). Referring to the clauses of SSHA, the applicants have contended that the

SSHA in Clause 14.2.1(b) required the investors to first offer the shares to the promoters in case it wished to sell or transfer its shares in the company-Haldia and the manner of exercise of such right was also provided for.

4. The applicants have contended in paragraph 2(e) of the memo of application that it had come to the applicants knowledge that a Share Purchase Agreement dated 28 September 2015 (for short '**SPA**') was executed, interalia by the respondent acting as the 'Seller and Twarit Consultancy Services Pvt.Ltd (for short '**Twarit**') and Shriram EPC Ltd. (collectively the '**Purchasers**'), for the sale of certain number of shares held by the respondent (investor) to the purchases. It is contended by the applicants that on the same date another Share Purchase Agreement (SPA) dated 28 September 2015 was executed interalia by the respondent acting as the purchaser and one SVL Ltd. as the seller for the sale of certain number of shares held by the seller to the purchaser in Shriram EPC Ltd. The applicants have contended that on 28 September 2015 the respondent had executed a "Letter Agreement" interlia with Haldia purportedly to operate as an "Additional understanding relating to the exit of Investors from the Company" to be provided by the purchasers and seeking to effect certain modifications to the rights under the SSHA. Although Letter Agreement was executed on 28 September 2015 with Haldia to operate as another "Additional

understanding relating to the exit of Investors from the Company”(Haldia), to be provided by the purchasers. Both the said agreements are referred to as “Letter Agreements”.

5. It is the applicants’ case that pursuant to the execution of the SPAs and the Letter Agreements, the applicants came to know that the investors on 18 November 2015 had sold and transferred to Twarit 3,31,247 numbers of optionally convertible preference shares of the company for a consideration of Rs.3,31,247/-. The applicants have contended that such action on the part of the respondent was in fundamental breach of the obligation contained in Clause 14.2.1(b) of the SSHA which provided for a “right of first offer” to the promoters namely the applicants. The applicants have contended that the respondent deliberately failed to provide to the promoters more so to the applicants, right of first offer as per such clause of SSHA, as also there were other breaches of the SSHA namely, breach of the provisions of Clause 28.2. It is contended by the applicants that in utter disregard to the provisions of SSHA, the respondent modified and amended the existing provisions of the SSHA by virtue of the “Letter Agreements” without complying with the mandatory requirements under Clause 28.2 of the SSHA. It is hence, contended that the SPAs and the Letter Agreements, are illegal and non enforceable.

6. The applicants’ case is of a breach on the part of the

respondent in contending that the respondent as the selling shareholder, has also failed to obtain from Twarit a Deed of Ratification and Accession, for Transferees envisaged in Appendix B to the SSHA thereby acting and continuing to act in clear breach of Clause 14.2.8 of the SSHA.

7. The applicants state that the respondent has acted in deliberate and fundamental breach of its obligations cast under the SSHA and the Articles of Association and it is in view of such breaches, the applicants have invoked the arbitration clause being Clause no.36.1 of the SSHA against the respondent vide invocation notice dated 1 July 2019 which was received by the respondent on 11 July 2019. The applicants made nomination of the proposed arbitrator and called upon the respondent to nominate its arbitrator and as the respondent failed to nominate its arbitrator, the present petition came to be filed on 13 December 2019.

8. The applicants have also averred in paragraph 2(n) of the application that the respondent alongwith its Mauritius based affiliates, had invoked the arbitraton under the Letter Agreement dated 28 September 2015 in terms of the rules of the Singapore International Arbitration Centre ("SIAC") on 14 December 2017 seeking award of damages to the respondent in view of the purported breaches of the SPAs and the Letter Agreements by the purchasers i.e. Shriram EPC Ltd.

(applicant No.1) and Twarit, in which the applicants have appeared and had raised its pleas including the plea challenging the jurisdiction of the arbitral tribunal. However, it is the applicants' contention that the disputes between the parties under the SSHA are independent disputes and nothing to do with the said arbitration. In these circumstances, the prayer is made for appointment of the arbitrator for the respondent so that arbitral tribunal be constituted to adjudicate the disputes which have arisen between the parties under the SSHA.

9. There is an additional affidavit of Mr.R.Sridharan filed on behalf of the applicants dated 25 November 2020 which is filed almost one year after the filing of this application inter alia contending that the SSHA is an independent contract and the same is valid, legal and subsisting as also acknowledged by the respondent before the arbitration in progress before SIAC.

10. The respondent has appeared and a reply affidavit of Mr.Abhinav Jain has been filed opposing the application. At the outset, it is contended on behalf of the respondent that the present application is filed by the applicants with malafide intention to cause hurdle in the pending arbitral proceedings initiated by the respondent against the applicants and Twarit before the SIAC. It is contended that in the month of November 2020, the arbitral tribunal constituted by the SIAC had declared the proceedings closed and the parties were awaiting final

ward in the matter. A copy of the present application as filed on 30 December 2019 was served on the respondent on 2 December 2020 after declaration of SIAC proceedings to be closed. It is contended that it is *ex facie* apparent that harbouring apprehension that the final arbitral award not being in favour of applicant no.1, the applicants have decided to agitate the present proceedings with malafide intent to create hurdles in the enforcement and execution of the award which may be passed by the arbitral tribunal. This, according to the respondent, is interalia clear from the nature of the alleged dispute in paragraph 2(p) of the memo of the application.

11. The respondent has contended that pending the present application, the SIAC has passed the final arbitration award dated 7 January 2021 in the said arbitration proceedings. SIAC's arbitral award interalia directs the applicant to jointly and severally, make payment of damages along with interest. It is also directed that applicant No.1 and Twarit jointly and severally make payment of costs of arbitration and legal costs alongwith interest from the date of the final Award until the date of payment.

12. The respondent has next contended that the present application is not maintainable in law and/or facts and is liable to be dismissed for the following reasons:

(i) The facts alleged by the applicants to be in contravention of SSHA

dated 31 May 2010 which forms the basis for alleged claims/disputes raised by the applicants, namely, execution of Share Purchase Agreements dated 28 September 2015 and Letter Agreements dated 28 September 2015 by the respondent with applicant No.1 and Twarit; and sale of certain optionally convertible preference shares of Haldia held by the respondent to Twarit on 19 November 2015 pursuant to the Share Purchase Agreement dated 28 September 2015 and Letter Agreement dated 28 September 2015. It is thus contended that these alleged acts based on which the present application is filed by the applicants pertain to the year 2015. It is contended by the respondent that the applicants' admitted case is that the arbitration clause under the SSHA was invoked by the applicants pursuant to a letter dated 1 July 2019 which is issued by the applicants after a period of more than three years, from the date of the such acts of the year 2015, on the basis of which the applicants have filed the present application. It is hence contended that the present application being filed on 13 December 2019 after a period of more than three years from the date of such 2015 acts relied upon by the applicants, it needs to be held that the cause of action itself is a deadwood being hopelessly time barred. There are other grounds of opposition as raised by the respondent to contend that the applicants have approached this Court with unclean hands and by suppressing material and by distorting the facts and the document of SSHA is not

properly stamped. The other issues as adverted in the reply affidavit is in regard to the false case of the applicant pleaded in paragraph 12 of the application to contend that Twarit is neither a group company nor an affiliate or associate company of either the promoters of or the applicants herein and also does not have any common shareholders or the directors. It is contended that the respondent in the SIAC arbitration proceedings initiated by the respondent pursuant to the Share Purchase Agreement dated 28 September 2015 and Letter Agreement dated 28 September 2015 against applicant No.1 and Twarit, in the statement of defence filed by applicant No.1 and Twarit, has stated that Twarit is a sister concern of applicant No.1. It is thus contended that it is exc-facie evident that the applicants have made false statements in the present application and do not deserve any reliefs from this Court.

13. On the above conspectus, I have heard the extensive submissions made by Mr. Kevic Setalvad, learned Senior Counsel for the applicants and Dr.Birendra Saraf, learned Senior Counsel for the respondent.

14. The submissions of Mr.Setalvad primarily are on the contentions as urged in the application which are noted in detail hereinabove, to submit that there is an arbitration agreement between

the parties as contained in the SSHA and it has been rightly invoked by the applicants in the facts and circumstances of the case as set out in the memo of the application, and as the respondent refused to nominate an arbitrator, the present application has been filed which deserves to be allowed. Mr.Setalvad has also denied the case of the respondent in the reply affidavit. He submits that there is no delay and the applicant is justified in invoking the arbitration proceedings in SSHA which is independent agreement, although the cause of action being pursued by the applicants is on the respondent's action pertaining to the 2015 documents (SSHA and the Letter Agreements).

15. On the other hand Dr.Saraf, at the outset, raised a contention that the present application is a deadwood as it is clear that it espouses a cause of action which had accrued to the applicants in the year 2015 when the respondent had entered into a share purchase agreement and the Letter Agreements. According to Dr.Saraf admittedly invocation is itself of 2019, hence the cause of action which is being pursued by the present applicants, itself is clearly time-barred. It is his submission that for the contentions and objections of the respondent which are set out in the reply affidavit, the application needs to be dismissed.

16. Having heard learned Senior Counsel for the parties and

having perused the record, I find myself in agreement with the respondent that the applicants by the present proceedings are espousing a deadwood. It is clear from the several averments as made in the application that the entire cause of action of the applicants is on the grievance of the respondent entering into a share purchase agreement dated 28 September 2015 and the letter agreement dated 20 September 2015, which is clear from reading of paragraphs 2(e) to 2(h). It clearly appears that the applicants were aware of the SPA as also the 'Letter Agreements Nos.1 and 2'. This is clear from not only the arbitral proceedings before the SIAC but also otherwise. It clearly appears that there is no other cause of action except to assail the SPAs and the Letter Agreements which are dated 28 September 2015 which are the only subject matter of grievance of the applicants against the respondent. A grievance against the same is espoused by the applicant by invoking the arbitration in the year 2019 when the applicants addressed the invocation notice dated 1 July 2019. The applicants, if at all, were to be aggrieved by the cause of action as set out in the application, they ought to have invoked the arbitration within the prescribed limitation of three years as provided in Article 53 and 54 of the Limitation Act, 1963. The respondent is correct in its contention that the applicants are pursuing a deadwood as the cause of action had accrued to the applicants in the year 2015. Dr.Saraf, learned Counsel for the respondent would be

correct in placing reliance on the decision of the Supreme Court in **Bharat Sanchar Nigam Ltd. & Anr. Versus M/s. NORTEL Networks India Pvt. Ltd.**¹ where the Supreme Court has clearly held that it would not be appropriate for the Court to foist unwarranted arbitration and when clearly on facts a cause is a deadwood.

17. It would be useful to refer to a recent decision of this Court in **Graceworks Realty & Leisure Pvt. Ltd. Vs. Mr. Zahid Hussain Khan** in Arbitration Application (L.) No.16813 of 2021 in which in a similar situation wherein an agreement which was terminated on 07 February, 2015 was being espoused by invoking arbitration in the year 2021 by the applicant's notice dated 8 May 2021. The Court held that the claim of the applicant in such case was ex-facie a dead claim being barred by limitation. Applying the principles of law as laid down by the Supreme Court in **Vidya Drolia & Ors. V/s. Durga Trading Corporation**², **Bharat Sanchar Nigam Ltd. & Anr. Versus M/s. NORTEL Networks India Pvt. Ltd.**³, and **Secunderabad vs. B. Ramachandriah & Ors.**⁴ this Court rejected the petition. This Court in paragraphs 14 to 17 observed thus:-

“14. Be that as it may, even considering as to what the applicant had stated in paragraph 7 of the invocation notice that on the termination of the agreement on 07 February, 2015, the respondent was under an obligation to execute a deed of termination/cancellation of the agreement, in my opinion, even to assert such right, the

1 (2021) 5 SCC 738

2 (2021) 2 SCC 1

3 (2021) 5 SCC 738

4 AIR 2021 SC 1391

cause of action had certainly accrued to the applicant, as on the date of termination of the agreement, for which the applicant could have instituted proceeding within the limitation as prescribed under Article 58 read with Article 59 of the Limitation Act. Thus the claim of the applicant is ex-facie a dead claim, being barred by limitation.

15. The Court in exercise of its jurisdiction under Section 11 of the Act would certainly be required to consider whether the claim being made by the applicant is manifestly time barred, so that such jurisdiction is not exercised. The law in this regard is well settled. The Supreme Court in **Vidya Drolia & Ors. V/s. Durga Trading Corporation**⁵ has clearly held that the Court at the referral stage can refuse to interfere only when it is manifest that the claims are *ex facie* time barred or dead or there is no subsisting dispute.

16. In **Bharat Sanchar Nigam Ltd. & Anr. Versus M/s. NORTEL Networks India Pvt. Ltd.**⁶, the issue which fell for consideration of the Supreme Court was as to whether the claim being made by the respondent NORTEL Networks India Pvt.Ltd. was time barred, inasmuch as the claims made by the Nortel were rejected by the appellant – BSNL on 4 August 2014. Nortel had invoked the arbitration agreement by its notice dated 29 April 2020, which was after a period of five and half years after rejection of its claim by the BSNL, which was quite similar to the case in hand. It is in such context, the Supreme Court held that, once there was no vestige of doubt that the claim was *ex facie* time barred, then the Court may decline to make the reference to arbitration, for the reason that such case would be required to be categorised as a deadwood, having no subsisting disputes between the parties. The Supreme Court also observed that by issuing a notice of arbitration would not extend the limitation which had started running from the date of rejection of the Nortel's claim by BSNL on 4 August 2014. It was also observed that Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement/discussion. The Court referred to Section 9 of the Limitation Act, which provides that "*where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it.*" It was observed that there must be a clear notice invoking arbitration setting out a particular dispute (including claims/amounts) which must be received by the other party within a period of three years, (in that case from the rejection of the final bill) failing which the time bar would prevail. It was thus held that as the notice

5 (2021) 2 SCC 1

6 (2021) 5 SCC 738

invoking arbitration was issued five and half years after rejection of the claim (on 4 August 2014), the notice invoking arbitration was *ex facie* time barred and the disputes between the parties could not be referred to arbitration in the facts of the case. The law as laid down in the said decision is clearly applicable in the facts of the present case. The relevant observations of the Supreme Court are required to be noted which reads thus:-

“47. 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.

48. Applying the law to the facts of the present case, it is clear that this is a case where the claims are *ex facie* time barred by over 5 ½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 04.08.2014. The notice of arbitration was invoked on 29.04.2020. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable Section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation.

49. 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.

.. . . .

51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that : “where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it.” There

must be a clear notice invoking arbitration setting out the “particular dispute”²¹ (including claims / amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail.

52. In the present case, the notice invoking arbitration was issued 5 ½ years after rejection of the claims on 04.08.2014. Consequently, the notice invoking arbitration is *ex facie* time barred, and the disputes between the parties cannot be referred to arbitration in the facts of this case.”

(emphasis supplied)

17. Also in a recent decision of the Supreme Court in **Secunderabad vs. B. Ramachandriah & Ors.**⁷ the Supreme Court held that the claim of the appellant therein was *ex facie* time barred. It was held that the High Court was in clear error in referring the disputes to arbitration exercising jurisdiction under Section 11 of the Act. The Supreme Court in such context has observed as under:-

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

18. Considering the position in law in the decisions of the Supreme Court in **Vidya Drolia & Ors. V/s. Durga Trading Corporation** (supra), **Bharat Sanchar Nigam Ltd. & Anr. Versus M/s. NORTEL Networks India Pvt. Ltd.**(supra), and **Secunderabad vs. B. Ramachandriah & Ors.**(supra), in my opinion, in the facts of the present case, the reliance of Mr. Setalvad on the decision of **Uttarakhand Purv Sainik Kalyan Nigam Limited vs. Northern Coal Field Limited**⁸ is not well founded. No doubt that in a given case, the issue of limitation would be a mixed question of law and fact, but the Supreme Court being conscious of this position in its decision in **Bharat Sanchar Nigam Ltd. & Anr. Versus M/s. NORTEL Networks India Pvt. Ltd.** (supra), has clearly held that once on the face of the record it is seen that the cause is a deadwood, then the Court would certainly not proceed to appoint an arbitral tribunal.

19. In the light of the above discussion, in my opinion, the application needs to fail. It is accordingly dismissed. No costs.

[G.S. KULKARNI, J.]