

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

MISC. CIVIL APPLICATION (ARBN.) NO. 11 OF 2019

Shri Ravindra S/o. Shrawan Ambatkar
Age 52 Yrs, Occu: Business,
R/o. Motghare Mohalla, Hansapuri,
C.A. Road, Nagpur. **APPLICANT**

...V E R S U S...

1. Devendra S/o. Manikrao Kapse
Proprietor M/s Deven Automobiles,
Kalmeshwar, Age: 47 Yrs, Occu: Business
R/o. 16, Mahavir Nagar, Azamshasha Layout,
Nagpur.
2. Jagdish S/o. Krishnarao Harde
Age: 66 Yrs, Occu: Service,
R/o. 6/2, Bhagirath Apartment,
Bharat Nagar, Amravati Road,
Nagpur. **NON-APPLICANTS**

Mr. Raju Dhoble, Advocate for Applicant
Mr. M. S. Sharma, Advocate for Non-Applicant 1.
Mr. S. B. Mohta, Advocate for Non-Applicant 2.

CORAM: **ROHIT B. DEO, J.**
DATE: **20th APRIL, 2022.**

ORAL JUDGMENT:

This application is preferred under Section 11 of the Arbitration and Conciliation Act, 1996 (Act) for appointment of Arbitrator. The gist of the averment in the application is that non-applicant 1 is an agent of the Indian Oil Corporation (IOC)

and operates a petrol pump under the name and style “M/s. Deven Automobile” which is situated on Nagpur-Kalmeshwar Road. For diverse reasons, the non-applicant 1 was facing difficulties in operating the petrol pump and approached the applicant to take over the agency. Negotiations ensued, which culminated into an agreement dated 23.03.2010. Certain disputes arose, and the applicant instituted Special Civil Suit 585/2013 in which non-applicant 1 preferred an application under Section 8 of the Act for referring the dispute to an arbitrator in view of the arbitration clause in the agreement dated 23.03.2010. The Civil Judge allowed the application under Section 8 of the Act vide order dated 18.10.2014. The applicant approached the High Court in civil revision challenging the order of the Civil Judge whereby the parties were directed to refer the dispute to the arbitrator. The High Court rejected the civil revision application vide order dated 20.09.2017.

The applicant contends that since the order of the Civil Judge dated 18.10.2014 was confirmed, the applicant requested the non-applicant 1 to appoint an arbitrator with the consent of all the stake holders, and since the non-applicant 1 did not act, the applicant issued notice dated 13.04.2018 informing the

non-applicants of the appointment of an arbitrator. The non-applicants did not comply with the request to contact the arbitrator named in the notice dated 13.04.2018, and hence the applicant is constrained to approach this Court under Section 11 of the Act.

2. The non-applicant 1 has opposed the application under Section 11 of the Act, *inter alia* contending that the application under Section 11 is hopelessly barred by limitation. It is submitted that the claim itself is time barred and it would be an exercise in futility to appoint an arbitrator. Similar contentions are raised in the affidavit-in-reply filed by the non-applicant 2 who additionally contends that there is no arbitrable dispute between the applicant and non-applicant 2.

3. The applicant has filed a rejoinder contending that the limitation for invoking the provisions of Section 11 of the Act shall stand triggered only with the rejection of the civil revision application on 20.09.2017, and therefore, the application under Section 11 of the Act is within limitation. The applicant contends that the time consumed in the disposal of the civil revision application will have to be excluded in view of the provisions of

Section 14 of the Limitation Act, 1963 (Limitation Act).

4. I have heard Mr. Raju Dhoble, the learned counsel for the applicant, Mr. M. S. Sharma, the learned counsel for the non-applicant 1 and Mr. S. B. Mohta, the learned counsel for the non-applicant 2. Certain decisions are pressed in service by the learned counsel, which shall be considered to the extent relevant, and at an appropriate stage.

5. Mr. Raju Dhoble, the learned counsel for the applicant would advance submissions on the lines of the contents in the application and the rejoinder and in rebuttal Mr. M. S. Sharma and Mr. S. B. Mohta would emphasize that in view of the settled position of law, the application under Section 11 of the Act is clearly time barred.

6. In view of the submissions advanced, two questions arise for consideration. The first question is when is the limitation triggered in the factual matrix and the second question is, if the limitation has otherwise expired, is the applicant entitled to the benefit of Section 14 of the Limitation Act.

7. Mr. Raju Dhoble invites my attention to the decision of the Supreme Court in *Bharat Sanchar Nigam Limited and another v. M/s Nortel Networks India Pvt. Ltd. Civil Appeal Nos.843-844 of 2021 (Arising out of SLP (C) No. 1531-32/2021)*. The Supreme Court formulated two issues for consideration, to wit (i) the period of limitation for filing an application under Section 11 of the Act and (ii) whether the Court may refuse to make reference under Section 11 where the claims are *ex facie* time barred.

The Supreme Court noted that Section 11 does not prescribe any time period for filing an application under sub-section (6) for appointment of an arbitrator, and recourse will have to be taken to Section 43 of the Act, which provides that the Limitation Act shall apply to arbitrations, as it applies to proceedings in Court. The Supreme Court then noted that since none of the articles in the schedule to the Limitation Act provide a time period for filing an application for appointment of an arbitrator under Section 11, the residual provision Article 137 comes into play which provides for period of limitation of three years which begins to run when the right to apply accrues. Significantly, the Supreme Court then noted that the limitation for filing an application under Section 11 would arise upon the failure

to make the appointment of the arbitrator within a period of thirty days from issuance of the notice invoking arbitration. The Supreme Court sounded a note of caution that the period of limitation for filing an application under Section 11 of the Act cannot be confused or conflated with the period of limitation applicable to the substantive claim made on the basis of the underlying commercial contract, which is necessarily distinct.

Answering the second question, the Supreme Court held, after taking a resume of several decisions, that while exercising jurisdiction under Section 11 of the Act, the Court must exercise the *prima facie* test to screen and knock down *ex facie* meritless, frivolous, and dishonest litigation and that at the reference stage, the Court can interfere only when it is manifest that the claims are *ex facie* time barred and dead. The articulation of the Supreme Court is that ordinarily the issue of limitation must be decided by the Arbitral Tribunal either as a preliminary issue, or at the final stage, after evidence is led by the parties. Having thus observed, the Supreme Court notes the observations of a three-Judge Bench in ***Vidya Drolia v. Durga Trading Corporation*** which are to the effect that the Court must undertake a primary first review to weed out manifestly *ex facie* non-existent and invalid arbitration agreements, or non-arbitrable disputes. Holistic reading of the

decision would suggest that the Court is not precluded from, or rather is expected to, *prima facie* consider the objection on the ground of limitation and if the claim is found to be manifestly barred by limitation or dead, the Court may decline the prayer to appoint arbitrator.

8. The learned counsel for the non-applicants pressed in service the decision of the Supreme Court in ***Secunderabad Cantonment Board v. M/s. B. Ramachandraiah and Sons AIR 2021 SC 1391***, in which the decision in *Bharat Sanchar Nigam Limited supra* is noted and considered. Applying the ratio of the decisions considered, the Supreme Court held that the application under Section 11 of the Act was time barred since the first refusal to appoint was after expiry of thirty days from the first demand for arbitration made vide letter dated 07.11.2006, and once the time starts running, subsequent events and developments would not be relevant. The Supreme Court further held, that the substantive dispute was itself *ex facie* time barred.

9. The learned counsel for the non-applicants further relied on three-Judge decision of the Supreme Court in ***M/s. Geo Miller and Co. Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan***

Nigam Ltd. AIR 2019 SC 4244, to buttress the submission that once the applicant asserted his claim and the non-applicants allegedly failed to respond, the failure will be treated as a denial of the claim giving rise to a dispute and therefore, the cause of action for reference to arbitration shall accrue. In *Geo Miller* the Supreme Court observes that while on certain set of facts and circumstances, the period during which the parties were *bona fide* negotiating may be excluded for the purpose of computing the period of limitation for reference to arbitration, the entire negotiation history must be specifically pleaded and the Court must find out what was the 'breaking point' at which reasonable person would abandon efforts at arriving at a settlement and contemplate reference to arbitration. The Supreme Court observes that such breaking point would then be treated as the date on which, the cause of action arose, for the purpose of limitation. The concept of breaking point is explained and qualified by the Supreme Court thus:

The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim.

10. In the present case, the factual matrix present hardly any difficulty in ascertaining the starting point of the limitation for the substantive claim. It is the case of the applicant that the cause of action for the substantive claim arose on 23.03.2010 when the agreement was executed and then on 13.08.2010 when the applicant made the part payment to the non-applicant 1. The applicant averred in Special Civil Suit 585/2013 that the cause of action lastly arose on 05.02.2013 when the applicant issued legal notice demanding the dues. In my considered view, the substantive claim itself is clearly time barred as is apparent from the contents of the plaint in Special Civil Suit 585/2013, which is placed on record. The issue of limitation need not be kept open for the arbitrator to decide. This Court is expected to apply the *prima facie* test and having done so, I am more than satisfied, that the substantive claim is time barred on the face of the case pleaded by the applicant.

11. Submissions were advanced to highlight the conceptual difference between the limitation for the substantive claim and the limitation for preferring an application under Section 11 of the Act. I need not delve deeper, since the well entrenched position of law is that if the substantive claim itself is

ex facie barred by limitation the Court would be justified in declining reference.

12. Mr. Raju Dhoble, the learned counsel for the applicant would however, urge that the principles of Section 14 of the Limitation Act will be applicable since the applicant was prosecuting the revisional remedy. The submission is noted only for rejection. Section 14 of the Limitation Act reads thus:

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 XXIII of the Code of Civil Procedure, 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) mis-joinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

Sub-section (1) provides that 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 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.

Sub-section (2) speaks of exclusion of time where the prosecution is for the same relief, and in good faith, in a Court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

I have already noted that the civil revision application which was filed by the applicant in the year 2015 and which was rejected vide order dated 20.09.2017 sought to challenge the order of the Civil Court which directed the parties to refer the dispute to arbitration. It is manifest, that the applicant was not interested in arbitration and therefore, approached the High Court in civil revision application assailing the order under Section 8 of the Act. The civil revision application is rejected on the ground that the order under Section 8 of the Act is not revisable. The applicant did seek permission to convert the civil revision application into writ petition, with permission the High Court denied. It is not the case of the applicant, that thereafter the jurisdiction under Article 226 or 227 of the Constitution of India was invoked. The conduct of the applicant manifests total absence of diligence and *bona fides*. Sub-section (2) of Section 14 has no application since the relief claimed in the civil revision application is not the relief claimed in the present matter. Rather, the reliefs are distinct and mutually exclusive.

The decision of a learned Single Judge of this Court in the *Deepdharshan Builders Pvt. Ltd. v. Saroj, Widow of Satish Sunderrao Trasikar and others (Commercial Arbitration Application No.107 of 2018 Along with Notice of Motion No.814*

of 2018 In Commercial Arbitration Application No.107 of 2018)

is of no assistance to the applicant since on facts, I have held that the applicant is not entitled to the benefit of Section 14 of the Limitation Act.

13. Since the substantive claim is itself time barred, I decline to refer the dispute to arbitration.

14. The application is rejected.

JUDGE

NSN