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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ARB.P. 866/2019**

V K DEWAN & CO.

..... Petitioners

Through: Mr. Shashi Dewan, Partner of
petitioner in person.
(M): 9810111765

versus

DELHI JAL BOARD & ANR.

..... Respondents

Through: Ms. Kanika Aghihotri with
Mr. Rohan Anand, Advocates.
(M): 9968791199
9810980027
Email: skuka@skva ssociates.com
skvka@gmail.com

CORAM:**HON'BLE MS. JUSTICE MINI PUSHKARNA****JUDGMENT**

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06.10.2022**MINI PUSHKARNA, J.**

1. The present is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as "Act") for appointment of an Arbitrator.

2. Facts relevant for the present case are that a contract was executed between the parties on 09.10.2000 for work of construction of Underground Reservoir and Booster Pumping Station at Surajmal Vihar, Trans Yamuna, Delhi. Time period for execution of the contract was extended several times by respondent and the said work was completed by petitioner on 31.01.2005. Completion certificate



was issued by the respondent – Delhi Jal Board to the petitioner on 01.03.2005.

3. After completion of the work, disputes arose between the parties in regard to the payments due to the petitioner by respondent. A notice dated 28.11.2005 was sent by petitioner to respondent for appointment of an Arbitrator. Pursuant to the said notice, respondent – Delhi Jal Board by letter dated 16.12.2005 appointed Sh. Surinder Gandotra as sole Arbitrator to adjudicate upon the disputes.

4. Before the sole Arbitrator, petitioner raised the following claims:’

Claim No. 1 – Rs.6,46,975.29/- towards escalation under Clause 12 CC of the contract agreement for the period from June, 2002 to February, 2005.

Claim No. 2 – Rs.5,00,000/- towards refund of security deposit

Claim No. 3 – Rs.40,210/- towards withheld amount from 24th running bill.

Claim No. 4 – Rs.75,000/- towards the withheld amount from running bills on account of non-deputation of engineer.

Claim No. 5 – Rs.1,55,742.69/- towards loss of profit.

Claim No. 6 – Rs.41,29,488.25/- towards loss of profit due to prolongation of the contracted period by more than 32 months.

Claim No. 7 – Rs.17,78,510/- towards amount of extra expenditure incurred due to prolongation of the contracted period by more than 32 months.

Claim No.8 – interest @18 percent per annum on all the claims from 31.01.2005 till date of payment.

Claim No.9 – Rs.11,59,239.05/-

Claim No. 10 – Rs.2,00,000/-.



5. No counter claims were filed on behalf of the respondent – Delhi Jal Board.

6. On the very first day of the proceedings, learned Arbitrator issued an interim bill of Rs.1,75,000/- by applying Rules of Indian Council of Arbitration. The petitioner challenged the mandate of the Arbitrator by filing O.M.P. No.154/2006 on the ground that the contract in question did not provide for application of the Rules of Indian Council of Arbitration and that the learned Arbitrator had exceeded his jurisdiction. By order dated 18.04.2006, this Court stayed the proceedings before the said Arbitrator. However, subsequently the said petition was withdrawn by the petitioner on 20.09.2007.

7. Thereafter, the petitioner wrote a letter dated 14.01.2008 to the sole Arbitrator thereby withdrawing all his claims before the Arbitrator without prejudice to his right to agitate elsewhere.

8. Subsequently, the sole arbitrator passed an Award on 18.06.2008, thereby awarding costs of Rs. 9,91,550/- against the petitioner on account of cost of litigation and arbitration fees.

9. Aggrieved by the aforesaid Award, petitioner challenged the same before this Court by way of O.M.P. No. 346/2008, later re-numbered as O.M.P. (COMM) 43/2017. The said petition came to be disposed of by way of order dated 16.10.2018. Operative part of the order dated 16.10.2018 passed by this Court is as follows:

“7. However, there is no basis to award Rs.5 Lakhs to the CEO of Delhi Jal Board and Rs.3 Lakhs towards the cost



of litigation in the Delhi High Court and Arbitration. The fee of the Arbitrator appears to be exaggerated. The computation of the arbitrator's fees is as under:

<i>Arbitration Fee</i>	<i>Rs.60,000/-</i>
<i>Based on the claim of M/s. Dewan & Co. including interest right from the beginning of the contract till the end of the contract and interest on delayed payments made by Delhi Jal Board to the contractor.</i>	<i>Rs.55,000</i>
<i>Administrative Fee</i>	<i>Rs.30,000</i>
	<i>Rs.30,000</i>
<i>TOTAL</i>	<i>Rs.1,75,000</i>
<i>Towards conveyance charges @ Rs.750/- per hearing and total hearing in this case were around 20</i>	<i>Rs.16,550</i>
<i>Grand Total</i>	<i>Rs.1,91,550</i>

8. The Petitioner has submitted that the Arbitrator has charged fees which are totally baseless in as much as administrative fees has been charged when there was no secretarial staff used by the Arbitrator. Further, commuting charges have been billed, when the hearings were held in the office of the arbitrator itself.

9. This Court does not wish to examine the objections which have been raised as unnecessary allegations are being made against the Arbitrator and the fee awarded. The fact remains that the Petitioner had withdrawn his claims and a reasonable amount could have been awarded by the Arbitrator as costs. There is no doubt that the Petitioner has withdrawn the claims on 14th January, 2008 and the award was published on 18th June, 2008. Thus the matter was contested in the High Court as also before the arbitrator, by the Respondent. The initial disputes arose in 2005 and the withdrawal took place in



2008 i.e., after a period of three years. So the Respondent cannot be faulted for demanding costs. Without going into the different terms and heads under which the costs have been awarded, a lump sum cost of Rs.1,50,000/- is awarded in favour of the Respondent which would cover both the fee of the Arbitrator as well as litigation costs before the Arbitrator.

10. The amount is directed to be paid by the Petitioner within a period of four weeks failing which simple interest @ 8% per annum shall be payable on the awarded amount.

11. OMP is disposed of in the above terms.”

10. Pursuant to the aforesaid disposal of the petition under Section 34 of the Act by this Court, petitioner sent notice dated 26.07.2019 to the respondents thereby invoking the arbitration clause as contained in the contract agreement. Petitioner demanded appointment of Arbitrator as per the procedure given in the contract agreement for adjudication of its claims. Since no response was received from respondents, present petition came to be filed.

11. Petitioner in person appeared and argued the present case. It was submitted that the contract agreement between the parties contains an arbitration clause and that the petitioner has validly invoked the arbitration clause through notice dated 26.07.2019. Thus, it was prayed by the petitioner that an Arbitrator be appointed by this Court for adjudication of its claims.

12. On the other hand, learned counsel appearing for the respondents submitted that the present petition is barred by limitation. The claims raised by petitioner in the present petition through its notice dated 26.07.2019 were the same claims which the petitioner



had raised qua its previous notice dated 28.11.2005 and had been withdrawn by the petitioner before the learned Arbitrator.

13. It was further contended that this Court did not set aside the Award dated 18.06.2008 in O.M.P.(COMM) 43/2017, but only reduced the amount to be paid by the petitioner from Rs.9,91,550/- to lump sum costs of Rs.1,50,000/-.

14. Learned counsel for respondent further submitted that the petitioner is estopped and barred from raising the same claims which it had withdrawn vide its letter dated 14.01.2008. Thus, it was contended that once party to an agreement had waived off its right in respect of various claims by withdrawing them, they cannot be permitted to raise the same issue by way of a separate petition.

15. It was further argued that the present petition deserved to be dismissed for suppression of material facts and misrepresenting distorted facts before this Court. It was submitted that petitioner cannot be granted the relief sought, as the claims raised by the petitioner have already been adjudicated and Award dated 18.06.2008 has been passed by the learned sole Arbitrator. It was contended that in view of Award passed by learned Arbitrator dated 18.06.2008 and the fact that petitioner had withdrawn its claims vide letter dated 14.01.2008 before the learned Arbitrator and the challenge to the Award was disposed of by this Court by order dated 16.10.2018, the present petition is hit by principles of *res judicata*.

16. On behalf of respondents, following judgments were relied upon:

- Anil v. Rajendra, reported as (2015) 2 SCC 583



- Hope Plantations Ltd. v. Taluk Land Board, reported as (1999) 5 SCC 590.
- Shakambari v. Union of India, reported as 2008 SCC OnLine Cal 642.
- Satyadhyan Ghoshal v. Deorajin Debi, reported as (1960) 2 SCR 590.
- BSNL v. Nortel Networks (India) (P) Ltd., reported as (2021) 5 SCC 738.

17. Considering the pleadings and documents on record, it is seen that in the present case, work was completed by the petitioner pursuant to agreement between the parties in the year 2005. Completion certificate was issued by respondent to petitioner on 01.03.2005. Since there were disputes between the parties as regards payments claimed by the petitioner herein, petitioner issued notice seeking appointment of arbitrator by way of letter dated 28.11.2005. Subsequently, sole Arbitrator was appointed by respondent – Delhi Jal Board on 16.12.2005.

18. Petitioner challenged the appointment of the sole Arbitrator in the year 2006 by way of petition being O.M.P. 154/2006. However, the said petition was withdrawn by petitioner which came to be dismissed as withdrawn vide order dated 20.09.2007 passed by this Court.

19. Subsequently, petitioner herein withdrew his claims before the learned Arbitrator by letter dated 14.01.2008, which is reproduced as below:



“

Dated:14.1.2008

*Shri Surinder Gandotra,
Sole Arbitrator,
115, Palika Bazar, Connaught Place,
New Delhi-110001*

In the matter of arbitration between:

*V.K. Dewan & Co.,
MD-67, Vishakha Enclave,
Pitampura, Delhi-110088*

v/s

*Delhi Jal Board,
(thru) Executive Engineer
Jal Sadan, Shiv Mandir Marg,
Lajpat Nagar, Phase-11
New Delhi-1100*

*In regard to: Construction of under ground reservoir and
booster pumping station at SurajMal Vihar, Trans-Yamuna,
Delhi*

(Contract agreement no.: 8 of 2000...)

*In the aforesaid matter, without prejudice to his right to
agitate elsewhere, the claimant contractor withdraws all his
claims.*

Copy to:

*Delhi Jal Board
(thru) Executive Engineer
Jal Sadan, Shiv Mandir Marg
Lajpat Nagar, Phase-11
New Delhi-1100”*

20. Since the petitioner withdrew his claims before the Arbitrator, the learned Arbitrator passed an Award dated 18.06.2008, thereby imposing cost upon the petitioner towards cost of litigation and cost of arbitration. The petitioner challenged the said Award by way of O.M.P. (COMM) 43/2017 (earlier O.M.P. 346/2008). The said petition came to be disposed of by judgment dated 16.10.2018, wherein this Court reduced the cost awarded against the petitioner.



21. Thereafter, after the disposal of the aforesaid petition, the petitioner issued a fresh notice dated 26.07.2019 seeking appointment of Arbitrator.

22. Perusal of the aforesaid facts make it clear that the present petition for appointment of an Arbitrator is clearly barred by limitation.

23. Cause of action in the present case arose in the year 2005, when completion certificate was issued by respondent- Delhi Jal Board and disputes arose in regard to payments payable to the petitioner. Thereafter, though the matter was referred to sole Arbitrator in the year 2005 itself, petitioner by way of letter dated 14.01.2008 withdrew claims filed before the learned Arbitrator. The cause of action in favour of petitioner having arisen in the year 2005, plea of petitioner for reference of the claims to an Arbitrator by way of issuing a second notice dated 26.07.2019, is clearly barred by limitation. Withdrawal of claims by the petitioner before the learned Arbitrator by way of letter dated 14.01.2008 did not stop the limitation period in any manner. No fresh cause of action can be said to have arisen in favour of the petitioner merely because the petitioner withdrew his claims by letter dated 14.01.2008.

24. Contention on behalf of petitioner that his claims are alive as on date in view of Section 43 (4) of the Act, is totally misplaced and liable to be rejected.

25. In the present case, petitioner had withdrawn his claims before the Arbitrator. Thus, by way of Award dated 18.06.2008, learned Arbitrator awarded costs towards litigation and cost of arbitration in



view of the fact that the claims of petitioner kept on pending before the learned Arbitrator from 2005 till 2008 for a period of approximately three years. Award dated 18.06.2008 passed by the learned Arbitrator was not set aside by this Court by way of judgment dated 16.10.2018 in O.M.P. (COMM) 43/2017, but the costs imposed against the petitioner were reduced from Rs.9,91,550/- to Rs.1,50,000/- in favour of the respondent which would cover the fee of the Arbitrator as well as litigation costs before the Arbitrator. It is only in those cases where an arbitral award is set aside by the Court that the period between the commencement of the arbitration and date of the order of Court shall be excluded in computing the time prescribed by the Limitation Act. Section 43 (4) of the Act stipulates as follows:

“43. Limitations

....

....

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.”

26. Perusal of the aforesaid clearly shows that petitioner cannot seek advantage of Section 43(4) of the Act in order to contend that his claims are within limitation. In the present case, order dated 16.10.2018 passed by this Court in O.M.P. (COMM) 43/2017 has attained finality, as no appeal was filed against the said order. Even



otherwise, in the present case, claims were withdrawn by the petitioner and it is not a case where the Award was set aside by this Court so as to attract the provisions of Section 43(4) of the Arbitration and Conciliation Act.

27. In view of the aforesaid, the limitation period shall be counted from the year 2005, when the contract was completed and disputes arose between the parties qua the amounts payable to the petitioner. Thus, when the cause of action in the present case commenced in the year 2005, notice dated 26.07.2019 seeking fresh appointment of Arbitrator will not give rise to fresh cause of action in favour of the petitioner. Once the time of limitation has begun to run, subsequent withdrawal of the claims by the petitioner would have no effect on the running of the limitation period. In view thereof, the present petition under Section 11 of the Act seeking appointment of an Arbitrator is clearly barred by limitation.

28. Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Limited and Anr. Vs. Nortel Networks India Pvt. Ltd., reported as (2021) 5 SCC 738 has categorically held that where the claim is *ex facie* time barred and is a case of deadwood or no subsisting dispute, the Court may decline to make reference. Hon'ble Supreme Court in the aforesaid case held as follows:

“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 5½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 4-8-2014. The notice of arbitration was invoked on 29-4-2020. 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 4-8-2014, 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.”

29. Similarly, Hon’ble Supreme Court in the case of Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd., (2020) 14 SCC 643 upheld the decision of High Court in not referring the disputes to an Arbitrator on the ground that the claims were barred by limitation. Again in the case of Secunderabad Cantonment Board v. B. Ramachandraiah & Sons, (2021) 5 SCC 705, Hon’ble Supreme Court did not refer the disputes to arbitration as the same were held to be *ex facie* time barred. Hon’ble Supreme Court held as follows:



14. Having heard the learned counsel appearing for both parties, it is first necessary to refer to the recent judgment of this Court in *Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd.* [*Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd.*, (2020) 14 SCC 643], which extracts passages from all the earlier relevant judgments, and then lays down as to when time begins to run for the purpose of filing an application under Section 11 of the Arbitration Act. This Court, after referring to the relevant statutory provisions, held: (SCC pp. 649-52, paras 15, 21, 23-24 & 29)

“15. In *Damodar Das [State of Orissa v. Damodar Das, (1996) 2 SCC 216]*, this Court observed, relying upon *Russell on Arbitration* by Anthony Walton (19th Edn.) at pp. 4-5 and an earlier decision of a two-Judge Bench in *Panchu Gopal Bose v. Port of Calcutta [Panchu Gopal Bose v. Port of Calcutta, (1993) 4 SCC 338]*, that the period of limitation for an application for appointment of arbitrator under Sections 8 and 20 of the 1940 Act commences on the date on which the “cause of arbitration” accrued i.e. from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned.

21. Applying the aforementioned principles to the present case, we find ourselves in agreement with the finding of the High Court [*Geo Miller & Co. v. Rajasthan Vidyut Utpadan Nigam Ltd.*, 2007 SCC OnLine Raj 97 : (2008) 1 RLW 429] that the appellant's cause of action in respect of Arbitration Applications Nos. 25/2003 and 27/2003, relating to the work orders dated 7-10-1979 and 4-4-1980



arose on 8-2-1983, which is when the final bill handed over to the respondent became due. Mere correspondence of the appellant by way of writing letters/reminders to the respondent subsequent to this date would not extend the time of limitation. Hence the maximum period during which this Court could have allowed the appellant's application for appointment of an arbitrator is 3 years from the date on which cause of action arose i.e. 8-2-1986. Similarly, with respect to Arbitration Application No. 28/2003 relating to the work order dated 3-5-1985, the respondent has stated that final bill was handed over and became due on 10-8-1989. This has not been disputed by the appellant. Hence the limitation period ended on 10-8-1992. Since the appellant served notice for appointment of arbitrator in 2002, and requested the appointment of an arbitrator before a court only by the end of 2003, his claim is clearly barred by limitation.

23. Turning to the other decisions, it is true that in Inder Singh Rekhi [Inder Singh Rekhi v. DDA, (1988) 2 SCC 338] , this Court observed that the existence of a dispute is essential for appointment of an arbitrator. A dispute arises when a claim is asserted by one party and denied by the other. The term “dispute” entails a positive element and mere inaction to pay does not lead to the inference that dispute exists. In that case, since the respondent failed to finalise the bills due to the applicant, this Court held that cause of action would be treated as arising not from the date on which the payment became due, but on the date when the applicant first wrote to the respondent requesting finalisation of the bills. However, the Court also expressly observed that ‘a party cannot postpone the accrual



of cause of action by writing reminders or sending reminders’.

24. *In the present case, the appellant has not disputed the High Court's finding [Geo Miller & Co. v. Rajasthan Vidyut Utpadan Nigam Ltd., 2007 SCC OnLine Raj 97 : (2008) 1 RLW 429] that the appellant itself had handed over the final bill to the respondent on 8-2-1983. Hence, the holding in Inder Singh Rekhi [Inder Singh Rekhi v. DDA, (1988) 2 SCC 338] will not apply, as in that case, the applicant's claim was delayed on account of the respondent's failure to finalise the bills. Therefore the right to apply in the present case accrued from the date on which the final bill was raised (see Union of India v. Momin Construction Co. [Union of India v. Momin Construction Co., (1997) 9 SCC 97]).*

29. *Moreover, in a commercial dispute, while mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. It does not lie to the applicant to plead that it waited for an unreasonably long period to refer the dispute to arbitration merely on account of the respondent's failure to settle their claim and because they were writing representations and reminders to the respondent in the meanwhile.”*

(emphasis in original)

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“16. Insofar as the first issue is concerned, after examining Article 137 of the Limitation Act, this Court held: [Nortel Networks (India) (P) Ltd. case [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738] , SCC pp. 751-52, paras 15-16]

“15. It is now fairly well settled 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 30 days from issuance of the notice invoking arbitration. In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment. [Ed.: See also the broader conclusion of the Court in para 53.1 of Nortel Networks: “... The period of limitation will begin to run from the date when there is failure to appoint the arbitrator.”]

16. The period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognised even under Section 20 of the Arbitration Act, 1940. Reference may be made to the judgment of this Court in J.C. Budhraja v. Orissa Mining Corpn. Ltd. [J.C. Budhraja v. Orissa Mining Corpn. Ltd., (2008) 2 SCC 444 : (2008) 1 SCC (Civ) 582] wherein it was held that Section



37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator. Para 26 of this judgment reads as follows: (SCC p. 460)

'26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4-6-1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Act. Insofar as a petition under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition under Section 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in Inder Singh Rekhi v. DDA [Inder Singh Rekhi v. DDA, (1988) 2 SCC 338] , Panchu Gopal Bose v. Port of Calcutta [Panchu Gopal Bose v. Port of Calcutta, (1993) 4 SCC 338] and Utkal Commercial Corpn. v. Central Coal Fields Ltd. [Utkal Commercial Corpn. v. Central Coal Fields Ltd., (1999) 2 SCC 571] also make this position clear.' "



.....

“18. This Court went on to hold that limitation is not a jurisdictional issue but is an admissibility issue. It then referred to a recent judgment of this Court in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , and stated as follows: (Nortel Networks case [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738] , SCC pp. 763-66, paras 45-47)

“45. In a recent judgment delivered by a three-Judge Bench in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , on the scope of power under Sections 8 and 11, it has been held 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’. The prima facie review at the reference stage is to cut the deadwood, where dismissal is barefaced and pellucid, and when on the facts and law, the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration agreement exists, or that the subject-matter is not arbitrable, that reference may be refused.

45.1. In para 144, the Court observed that the judgment in Mayavati Trading [Mayavati Trading (P) Ltd. v. Pradyut Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] had rightly held that the judgment in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] had been legislatively overruled. Para 144 reads as: (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC pp. 114-15)



'144. As observed earlier, Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] explains and holds that Sections 8 and 11 are complementary in nature as both relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Amendments to Section 8 vide Act 3 of 2016 have not been omitted. Section 11 covers the situation where the parties approach a court for appointment of an arbitrator. Mayavati Trading (P) Ltd. [Mayavati Trading (P) Ltd. v. Pradyut Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] , in our humble opinion, rightly holds that Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] has been legislatively overruled and hence would not apply even post omission of sub-section (6-A) to Section 11 of the Arbitration Act. Mayavati Trading (P) Ltd. [Mayavati Trading (P) Ltd. v. Pradyut Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] has elaborated upon the object and purposes and history of the amendment to Section 11, with reference to sub-section (6-A) to elucidate that the section, as originally enacted, was facsimile with Article 11 of the Uncitral Model of law of arbitration on which the Arbitration Act was drafted and enacted.'

While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the court can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute. Para 148 of the judgment reads as follows: (Vidya



Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 119)

‘148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”. As observed in Fili Shipping Co. Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 Bus LR 1719 : 2007 UKHL 40] , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.’

45.2. In para 154.4, it has been concluded that: (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 121)



'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.'

45.3. In para 244.4 it was concluded that: (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 162)

'244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer".'

46. The upshot of the judgment in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] is affirmation of the position of law expounded in Duro Felguera



[Duro Felguera S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] and Mayavati Trading [Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] , which continue to hold the field. It must be understood clearly that Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] has not resurrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]

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.

(emphasis in original)

19. 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 7-11-2006. This demand was reiterated by a letter dated 13-1-2007, 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 12-2-2007. The appellant's laconic letter dated 23-1-2007, which stated that the matter was under consideration, was within the 30-day period. On and from 12-2-2007, 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 6-11-2013, 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.

20. Even otherwise, the claim made by the respondent was also ex facie time-barred. It is undisputed that final payments were received latest by the end of March 2003 by the respondent. That apart, even assuming that a demand could have been made on account of price variation, such demand was made on 8-9-2003. Repeated letters were written thereafter by the respondent, culminating in a legal notice dated 30-1-2010. Vide the reply notice dated 16-2-2010, it was made clear that such demands had been rejected. Even taking 16-2-2010 as the starting point for limitation on merits, a period of three years having elapsed by February 2013, the claim made on merits is also hopelessly time-barred.”

30. At this stage, it would be useful to refer to provisions of Order 23 CPC which deals with withdrawal and adjustment of suits. Order 23 Rule 1 CPC states that a party may at any time abandon the claims or part of the claims. Order 23 Rule 4 CPC categorically states that where a party abandons or withdraws any claims or part of the claims, he shall be liable for such costs as the Court may Award and shall be precluded from instituting any fresh suit in respect of such subject



matter or such part of the claim. For reference, Order 23 Rules 1 to 5 CPC are reproduced as below:

“ORDER XXIII

WITHDRAWAL AND ADJUSTMENT OF SUITS

[1. Withdrawal of suit or abandonment of part of claim.]—(1) *At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:*

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) *An Application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other, person.*

(3) *Where the Court is satisfied,—*

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) *Where the plaintiff—*

(a) abandons any suit or part of claim under sub-rule (1), or



(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.]”

31. In the present case, there is no explanation as to why petitioner withdrew his claims pending before the learned arbitrator, when he had already withdrawn his petition challenging the mandate of the learned arbitrator. Once the petitioner withdrew his claims pending before the learned arbitrator by way of letter dated 14.01.2008, fresh petition for appointment of an arbitrator pursuant to notice dated 26.07.2019, for adjudication of the same claims that were withdrawn in the year 2008, is clearly barred by limitation.

32. In view of the detailed discussions as aforesaid, it is clear that the claims which are *ex facie* barred by limitation need not be referred for decision in the arbitration proceedings. Limitation commences when the cause of action accrues/ arises. The fact that work was completed under the contract in the year 2005 and completion certificate dated 01.03.2005 was issued, is not in dispute. Further, disputes as regards amounts payable to the petitioner arose in the year 2005 when petitioner invoked the arbitration clause. It is well settled that by virtue of Article 137 of the Limitation Act, 1963, limitation



period for reference of a dispute to arbitration or for seeking appointment of an Arbitrator is three years from the date on which the cause of action arises. The present petition for appointment of an arbitrator for adjudication of disputes between the parties, is clearly barred by limitation. Further, the claims as raised in the present case pertain to the period before the year 2005. Thus, the claims themselves have also become time barred.

33. Thus, the present petition pursuant to notice dated 26.07.2019 seeking fresh appointment of Arbitrator to adjudicate the same disputes as raised in the previous notice dated 28.11.2005, is *ex-facie* barred by limitation.

34. Petition is accordingly dismissed.

**(MINI PUSHKARNA)
JUDGE**

October 6th, 2022
PB/c

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