

Kavita S. J.

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

COMMERCIAL ARBITRATION PETITION NO.305 OF 2023

Rajuram Sawaji Purohit

...Petitioner

Versus

The Shandar Interior Private Ltd.

...Respondent

Mr. Mayur Khandeparkar, Counsel a/w Mr. Anuj Desai, Counsel a/w Mr. Umesh Tawari i/b S. Ashwinkumar & Co. LLP, Advocates for the Petitioner.

Mr. Rakesh Agrawal, Counsel a/w Ms. Sukhada Dalvi i/b Mr. Parmeshwar Bhise, Advocate for the Respondent.

CORAM : R.I. CHAGLA, J.

DATED : 7TH FEBRUARY, 2024.

JUDGMENT :

1. By this Arbitration Petition, the Petitioner is seeking setting aside of the impugned Award dated 6th June, 2022.

2. A brief background of facts which are germane to the issue arising in the Arbitration Petition filed under Section 34 of the Arbitration Act are necessary to be adverted to and which are as under:

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(i) An Agreement dated 29th November, 2011 was executed between the Petitioner and Respondent for purchase of salvage material from project site for a lump sum consideration of Rs.1,95,00,000/-. The Petitioner had admittedly paid the sum of Rs.51,38,000/- to the Respondent as Security Deposit which was to be adjusted against the salvage material to be delivered by the Respondent to the Petitioner. The Agreement was valid from 29th November, 2011 upto December 2014. It is necessary to note that the Respondent failed to supply any salvage material to the Petitioner.

(ii) On 1st January, 2016, the Petitioner through his Advocate issued a legal notice to the Respondent calling upon the Respondent to refund the deposit amount of Rs.51,38,000/- alongwith interest.

(iii) The Respondent through its Advocate issued a Notice dated 15th January, 2016 refusing to refund the security deposit.

(iv) The Petitioner filed a Company Petition No.269 of 2016 under Sections 433, 434 and 439 of the Companies Act, 1956 (“**Winding-up Petition**”) praying for winding up the Respondent.

(v) The Company Registrar of this Court by order dated 14th June, 2016 accepted the Company Petition No.269 of 2016 and directed the Petitioner to issue notice to the Respondent.

(vi) By order dated 6th February, 2018, this Court allowed the Petitioner to withdraw the Winding-up Petition with liberty to initiate appropriate proceedings.

(vii) The Petitioner filed Commercial Summary Suit No.721 of 2018 before the this Court on 21st June, 2018 and Summons for Judgment No.79 of 2018 was taken out therein.

(viii) The Respondent filed its Affidavit seeking leave to defend the Summary Suit on 27th August, 2018.

(ix) By order dated 3rd October, 2018, this Court with consent of parties referred the dispute forming the subject

matter of the Summary Suit to arbitration before the Arbitral Tribunal consisting of Sole Arbitrator and the plaint was directed to be treated as the Statement of Claim.

(x) The impugned Award was passed on 6th June, 2022 by the Arbitral Tribunal.

(xi) The Arbitration Petition has been filed on 5th September, 2022 challenging the impugned Award.

3. Mr. Khandeparkar, learned Counsel appearing for the Petitioner has submitted that the issue involved in the present Arbitration Petition involves a pure question of law.

4. Mr. Khandeparkar has submitted that the aforementioned facts are undisputed and cause of action to sue the Respondent for refund of the Security Deposit accrued in the Petitioner's favor on 1st January, 2015 and the period of limitation would be three years from the said date. He has placed reliance upon Article 47 of the Indian Limitation Act, 1963 in this context.

5. Mr. Khandeparkar has submitted that the Petitioner was prosecuting with due diligence and in good faith the Winding-up Petition for recovery of the Security Deposit for the period from 3rd February, 2016 to 6th February, 2018 before the wrong forum. The Petitioner has made necessary averment in Paragraph 25 of the Plaint that the aforesaid period should be excluded while computing the period of limitation.

6. Mr. Khandeparkar has submitted that the Respondent in Paragraph 9(w) of its Affidavit dated 27th August, 2018 seeking leave to defend admitted that the Petitioner had approached the wrong forum by filing the Winding-up Petition but denied that the period spent by the Petitioner in prosecuting the Winding-up petition can be excluded in computing the period of limitation.

7. Mr. Khandeparkar has submitted that there was no denial by the Respondent in the context of bona fide prosecution of Winding-up Petition with due diligence.

8. Mr. Khandeparkar has referred to the Issues framed by the Sole Arbitrator and in particular Issue No.4 viz. *“Whether the claim is within limitation?”* and Issue No.5, *“What order, award and cost?”* and Issue No.6, *“Whether the Claimant proves that he is entitled to refund of the amount of Rs.51,38,000/- deposited with the Respondent as also interest on the said amount at 24% per annum?”*

9. Mr. Khandeparkar has submitted that the learned Arbitrator had answered the Issue Nos.1, 2 and 3 in favour of the Petitioner and concluded that Petitioner has from time to time deposited amounts aggregating to Rs.51,38,000/- with the Respondent as against which no material was delivered/supplied by the Respondent to the Petitioner. However, the learned Sole Arbitrator has answered the Issue No.4 against the Petitioner and held that Petitioner’s claim is barred by limitation. He has referred to Paragraph 17.8 of the impugned Award which contains such finding.

10. Mr. Khandeparkar has submitted that based upon the finding on Issue No.4, the learned Sole Arbitrator answered the Issue Nos.5 and 6 against the Petitioner and held that the Petitioner is not entitled for

refund of the amount of Rs.51,38,000/- deposited with the Respondent and accordingly dismissed the Petitioner's claim. He has referred to Paragraph 18 of the impugned Award in this context.

11. Mr. Khandeparkar has submitted that the impugned Award to the extent that it holds that the Petitioner's claim is barred by limitation by answering the Issue No.4 against the Petitioner is patently illegal and contrary to fundamental policy of law and ought to be set aside.

12. Mr. Khandeparkar has submitted that it is imperative for this Court to exercise its jurisdiction under Section 34 of the Arbitration Act and set aside the Award particularly when the impugned Award holds that the Petitioner's claim is barred by the law of limitation as a result of which the Petitioner is not entitled to any payment and thereby dismissing the Petitioner's claim, which finding is patently illegal and contrary to the public policy of India.

13. Mr. Khandeparkar has in support of his contention with reagrd to the scope of interference by Courts under Section 34 of the Arbitration Act, referred to the Judgment of the Supreme Court in

Ssangyong Engg. & Construction Co. Ltd. Vs. NHAI¹ at Paragraphs 37 & 39. The Supreme Court has held that Courts can interfere with an Award where there is patent illegality appearing on the face of the Award which illegality goes to the root of the matter and which does not amount to mere erroneous application of the law.

14. Mr. Khandeparkar has also referred to the decision of this Court in **Union of India Vs. Recon**² at Paragraphs 15(g), 16 & 16.1, wherein it is held that ‘an erroneous application of law’ does not include within its ambit the cases where the arbitrator has invoked the law incorrectly and applied the incorrect law to the facts of a given case and in such case the Award would be vulnerable as being patently illegal.

15. Mr. Khandeparkar has submitted that the decision of this Court in **Union of India Vs. Recon (supra)** has been followed in a subsequent Judgment of this Court in **BCCI Vs. Deccan Chronicles**³ at Paragraphs 14 & 16.

¹ (2019) 15 SCC 131

² 2020 SCC OnLine Bom 2278

³ 2021 SCC OnLine Bom 834

16. Mr. Khandeparkar has submitted that the learned Sole Arbitrator in the present case has erroneously invoked the law of limitation i.e. Section 14 of the Limitation Act and the law applied is also contrary to previous binding precedents of this Court, thereby applying the incorrect law to the facts of the present case. He has submitted that by the incorrect invocation of the law of limitation and consequential erroneous decision by the learned Sole Arbitrator, makes the Award vulnerable as being contrary to the public policy of India and thus hit by Section 34(2)(b)(ii) read with Clause (ii) of Explanation 1 thereof. He has placed reliance upon Judgment of the Supreme Court in the case of **Temjenkaba & Ors. Vs. Temjenwati & Ors.**⁴, wherein it was held that the Limitation Act is based on public policy.

17. Mr. Khandeparkar has also placed reliance upon the decision of Madras High Court in the case of **M/s Chennai Water Desalination Ltd. Vs. Chennai Metropolitan Water Supply and Sewerage Board,**⁵ at Paragraph 17 and 18, wherein it is held that limitation being a facet of

⁴ (2002) 10 SCC 597

⁵ O.P No.298 of 2019 dated 26.07.2022

public policy, an error of limitation clearly leaves an Award hit by Section 34(2)(b)(ii) read with Clause (ii) of Explanation 1.

18. Mr. Khandeparkar has submitted that the question involved is a pure question of law and not a mixed question of facts and law as contended by the Respondent. He has submitted that from the start of the period of limitation i.e. 1st January, 2015 till the date of filing of the Summary Suit i.e. 21st June, 2018, the period spent by the Petitioner in prosecuting the Winding-up Petition i.e. from 3rd February, 2016 to 6th February, 2018 deserves to be excluded. He has placed reliance upon Section 14 of the Limitation Act and in particular Section 14(1) thereof.

19. Mr. Khandeparkar has submitted that for availing the benefit of Section 14(1) of the Limitation Act, there are five conditions to be satisfied. Condition No.1 being that, the concerned subsequent proceeding is a Suit and Condition No.2 that the previous proceeding should be a civil proceeding, Condition No.3 is that the previous proceeding should relate to same matter in issue, further Condition No.4 is that the previous proceeding should have been prosecuted with due diligence and good faith. Lastly, Condition No.5 is that the Court

in which the previous proceeding was filed was unable to entertain it from defect of jurisdiction of other cause of a like nature. In **Tata Consultancy Services Ltd. Vs. Inspira IT Products Ltd.**,⁶ these conditions were held to have been satisfied.

20. Mr. Khandeparkar has submitted that the Judgment of the learned Single Judge in ***Tata Consultancy Services Ltd. (supra)*** has been upheld in Appeal by the Division Bench of this Court in ***Tata Consultancy Services Ltd. Vs. Inspira IT Products Pvt. Ltd.*** in Commercial Appeal No.483 of 2018 dated 14th June, 2022. Further, the Supreme Court has dismissed the Special Leave Petition (“SLP”) filed against the same in **Tata Consultancy Services Ltd. Vs. Inspira IT Products Ltd.**,⁷

21. Mr. Khandeparkar has submitted that ***Tata Consultancy Services Ltd. (Supra)*** which case is almost identical to the facts of the present case where Winding-up Petition had been filed and thereafter withdrawn with liberty to file an appropriate proceeding (Suit for recovery) before the competent Civil Court, this Court held that the time

⁶ Commercial Arbitration Petition No.996/2018 dtd.18/09/2018

⁷ SLP (c) No.15922 of 2022 dtd.14th October, 2022

expended in prosecuting the Winding-up Petition deserves to be excluded.

22. Mr. Khandeparkar has submitted that this Court in ***Tata Consultancy Services Ltd. (supra)*** held that the right of a creditor to apply for winding-up of a company, if it is unable to pay his debt, is after all nothing but a private right given to him by a special statute. Non-payment of his legitimate debt amounts to nothing but infringement of his civil right, and he may in such a case choose to adopt any remedy which may be available to him in law and if the remedy he adopts or action which he brings in such a case is not criminal in nature, there is no reason why such remedy or action should not be treated as a civil proceeding within the meaning of Section 14 of the Limitation Act. Thus, condition Nos.1 and 2 were held to be satisfied. He has relied upon Paragraphs 8 to 13 of the said decision in this context.

23. Mr. Khandeparkar has submitted that in the present case, the Petitioner had instituted the Winding-up Petition to recover its debts. The matter in issue in the Winding-up Petition and the Summary Suit is the same being the existence of debt in the Petitioner's favour from the

Respondent and the Petitioner's entitlement to recover the same and thus condition (iii) is satisfied. He has in that context placed reliance upon *Tata Consultancy Services Ltd. (supra)* at Paragraph 15.

24. Mr. Khandeparkar has submitted that it is pertinent to note that unlike Section 14(2) which is in the context of a subsequent "*application*" where the requirement is for the reliefs in the previous civil proceeding and the subsequent "*application*" should be the same, the requirement laid down in Section 14(1) which is in the context of a subsequent "*Suit*" is that the "*matter in issue*" in the previous civil proceeding and the subsequent "*Suit*" should be the same. Thus the requirements laid down in Section 14(1) and 14(2) are distinct from each other.

25. Mr. Khandeparkar has submitted that there has been sufficiency of pleadings in the present case and which meets the requirement of the settled law. He has placed reliance upon the decision of Supreme Court in the case of *M.P. Steel Corpn. Vs. CCE*,⁸ wherein the Supreme Court held that merely stating that a party was prosecuting

⁸ (2015) 7 SCC 58

its remedy before another forum which ought to be excluded was sufficient to attract the principles of Section 14 of Limitation Act. He has placed reliance upon Paragraph 8 and 9 of the said Judgment in this context.

26. Mr. Khandeparkar has submitted that reference made be made to the Judgment of *Tata Consultancy Services Ltd. (supra)* at Paragraph 14, wherein it is held that under Section 14(1) of the Limitation Act, there is no requirement that the previous proceeding must be for recovery of any debt, or, for the same relief as claimed in the Suit instituted or reference made subsequently. That, Winding-up Petition is a bona fide remedy for enforcing payment of lawful debt.

27. Mr. Khandeparkar has accordingly submitted that the aforementioned Condition 4 for the applicability of Section 14(1) of the Limitation Act viz. that the previous proceeding should have prosecuted in due diligence and in good faith has been met.

28. Mr. Khandeparkar has submitted the last Condition No.5 for applicability of Section 14(1) of the Limitation Act viz. the Court in

which legal proceeding was filed, was unable to entertain it from defect of jurisdiction or other cause of a like nature has also been met in the present case. The Petitioner was prosecuting the Winding-up Petition diligently and with the bona fide intention to recover the debt due to him from the Respondent. Since the Petitioner had approached the Company Court which could not entertain the present proceeding, the Petitioner had withdrawn the Winding-up Petition with liberty to file appropriate proceedings. Thus, the Petitioner's case was squarely covered under Section 14(1) of the Limitation Act which covers the cases where the previous proceedings could not be entertained for "*defect of jurisdiction*" as well as for "*causes of like nature*". The Respondent has itself admitted that the Petitioner had approached the wrong forum. He has in this context placed reliance upon Paragraph 16 of the Judgment of this Court in ***Tata Consultancy Services Ltd. (supra)*** at Paragraph 16. This Court has held therein that the defect is not as to the merits of the claim, but the inability of the Court to entertain it on account of some reason which is peculiar to the remedy adopted. That is nothing but a defect of a like nature as the defect of jurisdiction.

29. Mr. Khandeparkar has submitted that since the Winding-up Petition was withdrawn with liberty would not mean that the Petitioner would not be entitled to the benefit of Section 14(1) of the Limitation Act. Inability of the Court to entertain the Winding-up Petition is not a proven inability. The inability of the Company Court to entertain the Winding-up Petition was accepted by the Petitioner as a result of which the Petitioner withdrew the Winding-up Petition with liberty to approach the Civil Court. Such withdrawal signifies that the Company Court hearing the proceeding was unable to entertain it as the liberty sought by the Petitioner could not be for approaching the Company Court once again and could only be for filing recovery proceeding before the competent Civil Court. He has submitted that none of the judgments relied upon by the Respondent consider a situation where the previous winding-up proceeding was withdrawn with liberty to file appropriate proceedings before the competent Civil Court.

30. Mr. Khandeparkar has submitted that the view taken by the learned Single Judge in *Tata Consultancy Services Ltd. (supra)* which has been upheld in Appeal by the Division Bench of this Court as well as

the SLP therefrom has been dismissed by the Supreme Court squarely covers the case of the Petitioner and the Petitioner is entitled to the benefit of Section 14(1) of the Limitation Act.

31. Mr. Khandeparkar has submitted that since the Winding-up Petition was withdrawn for cause of a like nature as that of a defect in the jurisdiction and therefore, by virtue of Section 14(3) of the Limitation Act, Order 23 Rule 1(2) of the CPC, 1908 has no application in the facts of the present case and the Petitioner would be entitled to the benefit of Section 14(1) of the Limitation Act.

32. Mr. Khandeparkar has submitted that the Division Bench of this Court in *Maharashtra State Farming Corporation Ltd. Vs. Belapur Sugar and Allied Industries Ltd.*,⁹ permitted exclusion of time spent in prosecuting a Winding-up Petition and appeals therefrom while computing the period of limitation in the appropriate remedy to be adopted by the party in view of Section 14 of the Limitation Act. In the said case the party prosecuting a Winding-up Petition was relegated to ordinary remedy available in law after having pursued the Winding-up

⁹ 2004 (3) Mh.L.J. 414

Petitions and appeals diligently and bona fide. He has in this context referred to Paragraphs 15 to 18 of the said decision.

33. Mr. Khandeparkar has submitted that Section 14 of the Limitation Act ought to be interpreted in a manner that advances the cause of justice. Further, Section 14 of the Limitation Act is wide enough to cover such cases where the defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance, legal or factual, which inhibits entertainment or consideration by the Court of the dispute on the merits comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right.

34. Mr. Khandeparkar has further placed reliance upon the decision of *M.P. Steel Corpn. (supra)*, wherein it was held that where previous proceeding was being prosecuted before another appellate forum, that time period shall also be excluded in calculating the period of limitation.

35. Mr. Khandeparkar has further placed reliance upon *Union of India Vs. West Coast Paper Mills Ltd.*,¹⁰ in this context.

36. Mr. Khandeparkar has accordingly submitted that the captioned Arbitration Petition be allowed and the impugned Award be set aside. He has submitted that in view of the Petitioner seeking setting aside of the Award, the Petitioner seeks to withdraw of the Interim Application (L) No.28574 of 2022.

37. Mr. Rakesh Agarwal, learned Counsel appearing for the Respondent has submitted that the period from 3rd February, 2016, (the date of institution of Winding-up Petition) till 6th February, 2018 (when the Winding-up Petition was withdrawn) i.e. 2 years and 3 days cannot be excluded for the purpose of computation of limitation. He has submitted that the issue in Winding-up Petition is different and distinct than the issue raised in the Suit. Further, the Winding-up proceeding was withdrawn not because of a “*Defect of Jurisdiction or other cause of like nature*”. Paragraph 25 of the Complaint does not contain the pleadings to establish that the earlier Winding-up proceeding was prosecuted in

¹⁰ (2004) 3 SCC 458

“*good faith*”. This is without prejudice to the submission that the Winding-up proceeding does not relate to the “*same matter in issue*” as that of “*money recovery suit*”, and there is no evidence to establish “*good faith*”, which is a question of fact.

38. Mr. Agarwal has referred to the definition of “good faith” under Section 2(h) read with Section 14(1) of the Limitation Act. This is relevant for the purpose of deciding the present matter. He has submitted that the learned Arbitrator has rendered a well-reasoned finding in Paragraph 17.7 and 17.8 of the impugned Award. The learned Arbitrator has held that the Winding-up Petition was not dismissed on account of any “*defect of jurisdiction or other cause of a like nature*”. The learned Company Judge refused to proceed with the Company Petition as he held that the debt was bonafidely disputed by the Respondent Company. Therefore, the issue of limitation was decided in favor of the Respondent by holding that the Claim is time-barred.

39. Mr. Agarwal has submitted that the frame of the Petition under Section 34, and particularly the grounds does not show that the impugned Award is not assailed on the premise that the learned

Arbitrator has committed any error in applying the law of limitation. There is no such averment in the Petition. He has referred to Ground(F) of the Arbitration Petition, wherein the Petitioner has relied upon 2 Judgments, which are *sub-silento*, as it does not lay down any proposition of law. He has submitted that in the narrow window of Section 34 of the Arbitration and Conciliation Act, the re-appreciation of the evidence is not permissible. Whether the Petitioner was prosecuting the Winding-up Petition in good faith or not, whether the Company Petition was prosecuted with due diligence or not, whether the Company Petition was prosecuted in “good faith” or not, all these are the disputed question of fact, on which the learned Arbitrator has given his ruling.

40. Mr. Agarwal has submitted the issue in the Winding-up Petition is whether the Company is commercially solvent or not to pay its debt. The issue in the money recovery suit is whether the Plaintiff is entitled to recover the money or not. Both the issues are different and hence, it cannot be said that the Winding-up proceedings relate to the “same matter in issue” as that of a money recovery suit, which is sine-

qua-none to invoke provisions of Section 14(1) of the Limitation Act, 1963. Thus, the benefit of Section 14(1) will not be available to the Petitioner herein, in the facts of the present case.

41. Mr. Agarwal has submitted that in the unreported Judgment cited by the Petitioner in *Tata Consultancy Services (supra)* do not consider the earlier Judgments of the Supreme Court and the fundamental difference between the Winding-up Petition and money recovery suit. He has submitted that the Judgments which the Respondents have now cited were not brought to the notice of learned Single Judge. The learned Single Judge has overruled the reported Judgment of the Co-ordinate Bench in *Ajab Enterprises*¹¹. He has submitted if at all, the learned Judge defers with the view of the Co-ordinate Bench, then, the matter ought to have been referred to the Larger Bench.

42. Mr. Agarwal has submitted that in so far as the Judgment of the Division Bench in *Tata Consultancy Services (supra)* is concerned, the Judgment of the Supreme Court in *Natesan Agencies*¹² and other

¹¹ AIR 1991 Bom 35

¹² (2019) 15 SCC 70

judgments cited by the Respondents herein were not brought to the notice of the Division Bench. However, the Division Bench has distinguished the disputed and undisputed claim in Paragraph 16.

43. Mr. Agarwal has submitted that since the Claim was disputed, the Winding-up Petition cannot be said to be a bona fide remedy for the Claimant or the claimant was prosecuting said Winding-up Petition in “good faith”.

44. Mr. Agarwal has submitted that in so far as the Judgment of ***Maharashtra State Farming Corporation Ltd. (supra)*** is concerned, the Judgment is “*sub silentio*” as it does not lay down any binding proposition of law. He has submitted that as laid down in the Supreme Court in ***M.P. Steel Corporation Vs. Commissioner of Central Excise***¹³, the provisions of Section 14 of the Limitation Act, 1963 must be liberally construed. However, it does not mean that provisions can be violated by settled judicial norms.

45. Mr. Agarwal has submitted that the benefit of Section 14(1) of the Limitation Act, is not available to the Petitioner. There is correct

¹³ (2015) 7 SCC 58

application of law in the facts of the case. There are no pleadings and evidence related to the material ingredient of the Section 14(1). The burden of proof is on the claimant to prove that he is entitled to the benefit of Section 14(1). In the absence of any pleading and proof, of facts also, the claim has been rightly dismissed by the learned Arbitrator.

46. Mr. Agarwal has thereafter placed reliance upon ***Natesan Agencies (supra)*** where the Supreme Court has considered the provisions of Section 14 of the Limitation Act. In Paragraph 21.4.4, the Supreme Court has with approval quoted para 30 of the Judgment of the Division Bench of Nagpur High Court in the case of ***Kashinath Shankarappa Vs. New Akot Cotton Ginning and Pressing Company Ltd.***

¹⁴ The difference between the Winding-up Petition and money recovery proceedings has been considered and the Supreme Court has held that the benefit of Section 14 of the Limitation Act is not available.

47. Mr. Agarwal has thereafter referred to Paragraphs 21.4.5, 21.4.6, 21.5, 21.6, and 21.7 of ***Natesan Agencies (supra)*** which has been held that for the the applicability of Section 14 of the Limitation

¹⁴ 1958 SCR 1331

Act and exclusion of the time spent in the earlier proceedings, the matter in issue in both the earlier and the latter proceedings must be the same. The earlier proceeding must be prosecuted with “Due Diligence” and there must be the defect of jurisdiction which compelled the Petitioner to withdraw the earlier proceedings.

48. Mr. Agarwal has submitted that in the said decision, the Judgment in **Yeshwant Deorao Vs. Walchand**,¹⁵ has been quoted. He has in this context placed reliance upon Paragraph 5 of the said Judgment which is relevant. He has submitted that though the said Judgment is on Section 14(2) of the Old Limitation Act, Paragraph 5 quoted above distinguishes the Insolvency proceedings and money recovery proceedings. The said ratio is a binding precedent. The said judgment holds that both these proceedings are of a different nature and in terms of procedure there is a huge divergence.

49. Mr. Agarwal has referred to the reported Judgment of the ***Delhi High Court in AIR 2003 Delhi 252*** which deals with a more or less similar situation where the benefit of Section 14 was sought on the

¹⁵ *AIR (38) 1951 SC 16*

ground that the Plaintiffs therein were prosecuting the Winding-up Petition. On the question of law, the Delhi High Court in Paragraph 15 and 16 relied on the Judgment of the Supreme Court in Yashwant Deorao, Zafar Khan, and the earlier Judgments. The Delhi High Court did not exclude the time expended in prosecuting the winding up Petition as the relief sought in winding up proceedings and that for a Suit for recovery were found to be widely different.

50. Mr. Agarwal has further placed reliance upon the decision of this Court in **Rajan Products**¹⁶ in this context. He has submitted that there are number of cases wherein the benefit of Section 14 has not been given to the Plaintiff who had earlier preferred Winding-up Petition.

51. Mr. Agarwal has submitted that with the greatest respect, the unreported Judgment of this Court in ***Tata Consultancy Services (supra)*** and the Division Bench Judgment dated 14th June, 2022 cannot be said to be correct preposition of law and binding precedent in view of the Judgment of the Supreme Court in ***Natesan Agencies (supra)***.

¹⁶ 1991 Com. Cases 181 Bom.

52. Mr. Agarwal has referred to Order VII Rule 6 of the CPC. wherein it is provided that where the Suit is instituted after the expiration of the period prescribed by the law of limitation, the Plaintiff shall show the ground upon which exemption from such law is claimed. Provided that the Court may permit the Plaintiff to claim exemption from the law of limitation on any ground not set out in the Plaintiff, if such ground is not inconsistent with the grounds set out in the Plaintiff. He has submitted that so far as the burden of proof, it is not in dispute that the burden of proof will lie on the Plaintiff/Claimant to establish that he is entitled to benefit, as necessary factual ingredients are available in his pleading. He has in this context placed reliance upon the decision of the Division Bench of this Court in *Foreshore CHSL Vs. Praveen D. Desai*¹⁷ following the Judgment of the Supreme Court in *Madhavrao Narayanrao Vs. Ramkrishna Govind and others*,¹⁸ it is held that the burden of proof is on the person claiming the benefit of Section 14 of the Limitation Act.

¹⁷ 2009 (2) Mh. L.J. 29

¹⁸ AIR 1958 SC 767

53. Mr. Agarwal has submitted that the ingredients of Section 14(1) are always a disputed question of facts and law, which is to be proved by leading evidence. He has submitted that under Section 34 of the Arbitration and Conciliation Act, it is not permissible to revisit the evidence. The learned Arbitrator is the best Judge to decide the factual issues based on the quality and quantity of the evidence before him. His findings on facts cannot be assailed otherwise it will amount to violating the narrow jurisdiction of Section 34 of the Arbitration and Conciliation Act.

54. Mr. Agarwal has submitted that in the absence of appropriate pleading and in view of the fact that the mandatory ingredients of Section 14(1) of the Limitation Act are not pleaded and proved, in the humble submission of the Respondent, the present Petition is devoid of merits and the same may be dismissed with costs.

55. Mr. Agarwal has submitted that there is no wrong application of the law of Limitation. He has submitted that assuming without admitting that there is a wrong application of Section 14(1) and the Winding up proceedings are civil proceedings involving the same issue,

still in fact, there is no pleading related to Winding-up proceedings being prosecuted in “good faith” or Winding-up Petition was withdrawn due to “defect of jurisdiction or cause of like nature”. There is no evidence related to said disputed question. He has placed reliance upon the decision of this Court in ***Thomas Cook (India) Ltd. Vs. Red Apple Chandrarat Travel*** particularly Paragraph 41 to 47 thereof. This is in the context of the ground of limitation, being a mixed question of law and fact, can never be a ground which would involve any basic notion of morality of justice for an Arbitral Award to be set aside. Mr. Agarwal has submitted that given the settled preposition of law on microscopic jurisdiction under Section 34 of the Arbitration and Conciliation Act, it is not permissible to look into the disputed questions of facts, which warrants the re-appreciation of the evidence. He has submitted that the issue of whether the requisite parameters under Section 14(1) of the Limitation Act has been complied with or not, will require the reassessment of the evidence. He has submitted that in the narrow compass of Section 34 of the Arbitration and Conciliation Act, this is not permissible.

56. Mr. Agarwal has thereafter made submissions on the liberty granted by the learned Company Court and that such liberty given by the learned Company Judge cannot be interpreted to construe that the legal and factual parameter, and the burden of proving the same, has been dispensed with. He has in this context relied upon the judgment of Guwahati High Court in Dipak Das Vs. Dhariyodhan Deb¹⁹ at Paragraph 12 and the decision of the Supreme Court in Asgar and Ors Vs. Mohan Verma at Paragraph 22. He has submitted that from the aforesaid settled preposition of law, it can be safely stated that the liberty granted by the learned Company Judge to file the appropriate proceedings for money recovery does not absolve the Petitioner from following the law (including the Limitation Act) and rules of pleading including Order VII Rule 6 of CPC. He has submitted that in the absence of appropriate pleading and in view of the fact that the mandatory ingredients of Section 14(1) of the Limitation Act are not pleaded and proved, the present Petition is devoid of merits and the same be dismissed with costs.

¹⁹ 1998 AIHC 744

57. Having considered the rival submissions, in my view, it is necessary to consider, whether the Petitioner has met the conditions for availing the benefit of Section 14(1) of the Limitation Act. There appears to be no dispute on the dates and events which have been relied upon by the Petitioner. The only dispute appears to be whether Section 14(1) was at all applicable. This was one of the issues which had been framed by the Sole Arbitrator viz. Issue No.4, “*Whether the claim is within limitation?*” The learned Sole Arbitrator had answered Issue Nos.1, 2 and 3 in favour of the Petitioner and concluded that the Petitioner has from time to time deposited amounts aggregating to Rs. 51,38,000/- with the Respondent as against which no material was delivered/supplied by Respondent to the Petitioner. The claim of the Petitioner has been rejected solely on the ground of limitation. Accordingly, the learned Arbitrator has held that the Petitioner will not be entitled to refund of amount of Rs.51,38,000/- deposited with the Respondent.

58. Much has been said about the scope of interference under Section 34 of the Arbitration Act. The contention of the Respondent

being that limitation is a mixed question of facts and law and that the Court under Section 34 of the Arbitration Act cannot re-appreciate evidence. In my view, there is much merit in the submission of Mr. Khandeparkar that the present issue on limitation involves a pure question of law. As aforementioned, the facts are undisputed. Thus, it is well settled that there will be interference by the Court under Section 34 of the Arbitration Act where there is patent illegality appearing on the face of the Award which illegality goes to the root of the matter and which does not amount to mere erroneous application of the law. Reference can be made to the judgment of the Supreme Court in ***Ssangyong Engg. & Construction Co. Ltd.(supra)*** in this context. There are other decisions of this Court which Mr. Khandeparkar for the Petitioner has placed relied upon viz. ***Recon (supra)*** and ***BCCI Vs. Deccan Chronicles (supra)*** which adopt the same view. Thus, in the event it is held the learned Arbitrator has erroneously involved the law of limitation by holding that the exclusion under Section 14(1) of the Limitation Act cannot be applied, such finding would amount to a patent illegality appearing on the face of the Award. Further, the Supreme Court in ***Temjenkaba (supra)*** has held that the Limitation Act is based

on the public policy. Thus, the incorrect invocation of the law of limitation makes the Award vulnerable as being contrary to Public Policy of India and thus hit by Section 34(2) (b) (ii) read with Clause (ii) of explanation 1 thereof of the Arbitration Act.

59. In my considered view, it appears from the pleadings in the Summary Suit and in particular Paragraph 25 thereof that the Petitioner had claimed that he pursued the prior proceeding for Winding-up before the Company Court with due diligence and bonafidely. It would thus be necessary to reproduce Paragraph 25 of the Complaint filed in the Summary Suit which reads thus:

“25. Plaintiff states that the agreement dated 29th November, 2011 framing subject matter of the suit was valid till December, 2014 within which the Defendant suppose to perform it's part of consideration, which the Defendant failed to perform. Then Plaintiff filed the Company Petition No. 269 of 2016 on 3rd February, 2016 and the same was withdrawn with liberty to file the present suit as advised by this Hon'ble High Court on 16th February, 2018, thus the time taken in

pursuing the Company Petition No. 269 of 2016 needs to be excluded while calculating the period of limitation In the view of the above no part of the plaintiff's claim is barred by law of limitation and the present summary Suit is well within time, as the Plaintiff have diligently and bonafidely pursued the Winding up Petition before this Hon'ble Court diligently and bonafidely."

60. It appears from the Affidavit filed by the Respondent seeking leave to defend the Summary Suit dated 27th August, 2018 that the Respondent had admitted that the Petitioner had approached the wrong forum by filing the Winding-up Petition but denied that the period spent by the Petitioner in prosecuting the Winding-up petition can be excluded in computing the period of limitation. It is necessary to Paragraph 9(w) of the Respondent's Affidavit which reads thus:

"w. With reference to paragraph 25 of the Plaint, The Defendant says that, the suit filed by the plaintiff is not within the period of the limitations, the earlier petition was filed with wrong forum and hence the present suit for recovery is barred

by limitation and as such the contents of the said para is not acceptable to the present defendant.”

61. However, it is pertinent to note that there is no denial by the Respondent in the context of bonafide prosecution of Winding-up Petition by the Petitioner with due diligence.

62. Further, there is no dispute in so far as the start of the period of limitation i.e. 1st January, 2015 and the period spent by the Petitioner in prosecuting the Winding-up petition i.e. from 3rd February, 2016 to 6th February, 2018 which has been sought to be excluded. In this context it is necessary to reproduce Section 14 of the Limitation Act, 1963 which 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 (5 of 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) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.”

63. There are five conditions which have been imposed by Section 14(1) for availing its benefit. First of the conditions is that, the concerned subsequent proceeding is a Suit. Secondly the previous proceeding should be a civil proceeding. Thirdly the previous proceeding should relate to the same matter in issue. Fourthly the previous proceeding should have been prosecuted with due diligence and in good faith and fifthly the Court in which the previous proceeding was filed was unable to entertain it from defect of jurisdiction or other cause of a

like nature. In so far as the 4th and 5th conditions are concerned it appears from the pleadings in the Summary Suit that there was no dispute with regard to the proceedings having been prosecuted with due diligence and in good faith as well as the prior proceeding in Winding-up suffering from defect of jurisdiction.

64. In the decision of the learned Single Judge of this Court in *Tata Consultancy Services Ltd. (supra)* it has been held that that the right of a creditor to apply for winding-up of a company, if it is unable to pay his debt, is after all nothing but a private right given to him by a special statute. This Court has accordingly held that there is no reason why such remedy or action should not be treated as a civil proceeding within the meaning of Section 14 of the Limitation Act. This has been held in Paragraphs 8 to 13 of the said decision. It is further relevant to note that the said decision has been upheld in Appeal by the Division Bench of this Court as well as the SLP therefrom has been dismissed by the Supreme Court. The said decisions have been relied upon on behalf of the Petitioner.

65. I do not see any reason to depart from the view expressed by this Court in ***Tata Consultancy Services Ltd. (supra)*** that the concerned subsequent proceeding is the Suit and the previous proceeding is a civil proceeding. Thus, condition Nos.1 and 2 for availing the benefit of Section 14(1) of the Limitation Act have been satisfied.

66. In so far as the Condition No.3 is concerned, the contention on behalf of the Respondent is that the relief in the previous proceeding should be the same as that in the subsequent proceeding for the applicability of Section 14(1) of the Limitation Act. This is contrary to a reading of Section 14(1) of the Limitation Act which states that the issues and not the relief in both the proceedings are required to be the same. I find much merit in the contention of the Petitioner that the matter in issue in the Winding-up Petition is the same as that in the Summary Suit. This has also been held by this Court in ***Tata Consultancy Services Ltd. (supra)***. The Petitioner has instituted the Winding-up Petition to recover its debts. Whereas the Summary Suit has also been instituted for recovery of debts. Thus, the issue involved in both the Winding-up Petition and the Summary Suit is the same.

67. I find that unlike Section 14(1), the requirement in Section 14(2) is for the reliefs in the previous civil proceeding and the subsequent “*application*” should be the same.

68. The Judgment of the Supreme Court in *Natesan Agencies (supra)* has been relied upon by the Respondent for contending that the matter in issue Winding-up Petition and Summary Suit cannot be said to be the same as the relief sought in the Winding-up Petition and Summary Suit is different. The said decision is required to be read in the context of the facts that arose in that case.

69. The Supreme Court in *Natesan Agencies (supra)* had found the matter in issue in the writ proceedings different from the matter in issue in the Suit. Further, in that case the writ proceedings were dismissed on merit and not for want of jurisdiction which is not the situation in the present case. This is clear from Paragraphs 21.4.6 and 21.5 of the said decision. The Supreme Court had accordingly not excluded the time spent in the earlier writ proceedings in calculating the period of limitation in prosecuting the subsequent Suit on that basis. Thus, in my view the decision of the Supreme Court in *Natesan Agencies*

(supra) is distinguishable on facts and inapplicable in present case. Further, the Supreme Court in *Natesan Agencies (supra)* had relied upon the Judgment of the Division Bench of the Nagpur High Court in *Kashinath Shankarappa Vs. New Akot Cotton Ginning and Pressing Co. Ltd., (supra)* and had also placed reliance upon the earlier decision of the Supreme Court in *Yashwant Deorao (supra)*.

70. It is the contention on behalf of the Respondent that the decision of this Court in *Tata Consultancy Services Ltd. (supra)* had not considered the aforementioned decision. However, it is noted that the decision of the Nagpur High Court in *Kashinath Shankarappa (Supra)* had been challenged before the Supreme Court. The Supreme Court in *Kashinath Shankarappa Wani Vs. New Akot Cotton Ginning and Pressing Co. Ltd.*²⁰ had doubted the findings of the Nagpur High Court in the context of Limitation and came to a conclusion that parties could not establish that the liquidation proceedings had been filed in the Courts below and that there was nothing to show that the requirements of Section 14 were at all satisfied. This is apparent from a reading of Paragraphs 9 to 11, 13 and 14 of the Judgment of the Supreme Court.

²⁰ AIR 1958 SC 437.

In view of the Judgment of the Nagpur High Court having merged with the Judgment of Supreme Court, the Judgment of Supreme Court can only be looked into for the proposition of law laid down in that case. In any event the factual scenario in that case and the present case are different. In the facts of the present case, liberty had been granted to withdraw the Winding-up Petition. That was not the case before Nagpur high Court.

71. Further, the decision of the Supreme Court in ***Yashwant Deorao (supra)*** was the case, where the reliefs have been sought in insolvency proceedings which was found to be different from the reliefs sought in an Execution Application and therefore time spent in prosecuting the insolvency proceedings was held not to be excluded in computing the period of limitation for filing an Execution Application. In my view, this judgment is inapplicable to the facts of the present case as that case was passed in the context of an “*application*” which is covered under Section 14(2) of the Limitation Act which requires that the reliefs sought in the subsequent “*application*” must be the same as the relief sought in the previous civil proceedings. Whereas, in the

present case, in the context of a “*Suit*” which is covered under Section 14(1) of the Limitation Act what is required to be seen is that the “*matter in issue*” in the subsequent “*Suit*” must be the same as that of the prior civil proceedings.

72. It is trite law that a Judgment must be read as a whole and the observations from the Judgment have to be considered in the light of the questions which were before the Court. A Court must be careful in ascertaining the true principle laid down in the decision of the Court and not to pick out words or sentences from the Judgments, divorced from the context of the questions under consideration by that Court, to support their reasonings. This has been held by the Supreme Court in *Commissioner of Income Tax v. Sun Engineering Works (P) Ltd.*,²¹. Thus, I find the decisions relied upon on behalf of the Respondent are inapplicable to the present case. Further, I do not find any merit in the contention on behalf of the Respondent that the decision of this Court viz. *Tata Consultancy Services Ltd. (supra)* is in any way per incuriam. Thus, *Tata Consultancy Services Ltd. (supra)* is good law and the facts therein are almost identical to the facts of the present case. There

²¹ (1992) 4 SCC 363

similar proceedings were filed viz. winding-up Petition before the Company Court and subsequent Suit for recovery of debt. Therefore, the judgment in ***Tata Consultancy Services Ltd. (supra)*** having been upheld by the Division Bench of this Court and thereafter SLP dismissed by the Supreme Court is binding upon this Court.

73. I thus find that the decision of this Court in ***Tata Consultancy Services Ltd. (supra)*** is squarely applicable to the facts of the present case and the decisions of the Delhi High Court relied upon by the Respondent which hold otherwise cannot come in the way of this finding. Thus, I hold that Condition No.3 for availing benefit under Section 14(1) of the Limitation Act viz. the previous proceeding should relate to the same matter in issue is satisfied in the present case.

74. I further find that there is no merit in the submission on behalf of the Respondent that there is insufficiency of pleadings to attract the principles of Section 14(1) of the Limitation Act. The decision of the Supreme Court in ***M.P. Steel Corpn.(supra)*** relied upon on behalf of the Petitioner has held that merely stating that a party was prosecuting its remedy before another forum which ought to be

excluded was sufficient to attract the principles of Section 14 of Limitation Act.

75. Further, the decision of this Court in ***Tata Consultancy Services Ltd. (supra)*** has held that under Section 14 (1) of the Limitation Act, there is no requirement that the previous proceeding must be for recovery of any debt, or, for the same relief as claimed in the Suit instituted or reference made subsequently. That, Winding-up petition is a bona fide remedy is indeed one of the remedies for enforcing payment of lawful debt. In this context, Paragraph 14 of the said decision is relevant which reads thus:

*“14 Ms. Sethna, however, contends that a winding up petition is not a bona fide remedy for recovery of debt and inasmuch as the Respondent has filed a winding up petition, as opposed to a suit, for recovery of his debt, he cannot be said to have prosecuted the action in good faith. Learned Counsel relies on the case of **IBA Health (India) Private Ltd. vs. InfoDrive Systems SDN.BHD.**⁷ in this behalf. In the first place, there is no legal requirement that the proceeding must*

be for recovery of any debt, or, for that matter, for the same relief as claimed in the suit instituted or reference made subsequently. Secondly, and at any rate, a winding up petition is indeed one of the remedies for enforcing payment of a lawful debt. After all, what the petitioner does in such a case is to seek winding up so that the assets of the company can be administered and dividends can be declared towards payment of dues owed by the company to its creditors including the petitioner himself. It is in that sense a mode of equitable execution. The Supreme Court has recognized it as such in the case of **Harinagar Sugar Mills Co.Ltd. vs. M.W. Pradhan, Court Receiver, High Court, Bombay 8**. The court cited with approval the observations in *Palmer's Company Precedents (Part II)*, 1969 Ed., P.25 to the effect that winding up petition was a perfectly proper remedy for enforcing payment of a just debt, and held that filing a winding up petition was a mode of execution which the court gives to the creditor against a company unable to pay its debts. Our Court, following this view, unequivocally held in **Modern Dekor Painting Contracts**

*Pvt. Ltd. Vs. Jenson & Nicholson (India) Ltd.*⁹ that a winding up petition being a legitimate mode of recovery of a debt due and payable by the company at the date of the petition, no question of bar of limitation as at the date of the order in a winding up petition would ever arise. The dictum in the case of *IBA Health (India) Private Ltd.* (supra) to the effect that winding up is not a means of enforcing payment of a disputed debt is in an altogether different context. The winding up petition, in the present case, unless contrary is shown, can well be said to be a prosecution of a civil proceeding in good faith. Besides, whether or not the petition was prosecuted bona fide is a mixed issue of law and facts and the arbitrator's conclusion in that behalf (holding the prosecution to be bona fide) cannot be assailed within the parameters of Section 34 of the Act. It cannot either be termed as opposed to public policy or patently illegal. The petition was, thus, prosecuted in good faith. There is no submission in the present case that it was not prosecuted with due diligence.”

76. Thus, the Condition No.4 viz. is previous proceeding having been prosecuted with due diligence and good faith is satisfied. This is apart from the aforementioned finding that there is no denial in the pleadings on behalf of the Respondent to the assertion by the Petitioner in the Complaint filed in the Summary Suit that the previous proceeding of winding up was prosecuted with due diligence and in good faith.

77. Further, the Condition No.5 viz. the Court in which the previous proceeding was filed, was unable to entertain it from defect of jurisdiction or other cause of a like nature has also been satisfied. It has been held in the decision of this Court in ***Tata Consultancy Services Ltd. (supra)***, at paragraph 16 where also the Winding-up Petition was withdrawn, that the defect is not as to the merits of the claim, but the inability of the Court to entertain it on account of some reason which is peculiar to the remedy adopted. That is nothing but a defect of a like nature as the defect of jurisdiction. The withdrawal of the winding up Petition with liberty to approach the Civil Court signifies that the Company Court hearing the proceeding was unable to entertain it as the liberty sought by the Petitioner could not be for approaching the

Company Court once again and could only be for filing recovery proceeding before the competent Civil Court.

78. I find that the Respondent has not placed reliance upon a single judgment where the previous winding-up proceeding was withdrawn with liberty to file an appropriate proceeding before the competent Civil Court. Thus, I find no reason to defer from the view expressed by the learned Single Judge in ***Tata Consultancy Services Ltd. (supra)***, which view has been upheld by the Division Bench and not interfered by the Supreme Court.

79. The Respondent has relied upon the judgment of the Supreme Court in ***Asgar (Supra)*** to contend that when a proceeding is dismissed by a Court by observing that a party is free to pursue an appropriate remedy does not preclude the contesting party from setting up all the defences available to it upon invocation of such remedy. In the present case there is no dispute as to the Respondent raising all defences. This does not mean that the Court is in any manner precluded from finding that the Arbitrator has wrongly invoked the law by holding that the

exclusion in Section 14(1) of the Limitation Act is not applicable to the present case.

80. Having considered the applicability of Section 14 of the Limitation Act in my view, this provision is required to be interpreted in the manner that advances the cause of justice.

81. I accordingly set aside the impugned Award dated 6th June, 2022.

82. The Arbitration Petition is accordingly disposed of.

[R.I. CHAGLA, J.]