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Arb.O.P(Com.Div)No.21 of 2024

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED : 14.03.2024

CORAM :

**THE HONOURABLE MR.JUSTICE C.SARAVANAN**

Arb.O.P.(Com.Div.)No.21 of 2024

M/s.Brakes India Private Limited,  
Foundry Division,  
Rep.by its Sr.Officer-Personnel  
Mr.S.T.Senthilnathan

.. Petitioner

.VS.

1. M/s.Bharat Sanchar Nigam Limited (BSNL),  
Rep.by its Assistant General Manager (NWP)CM,  
Having Office of General Manager, BSNL Bhavan,  
No.1, Infantry Road, Vellore 632 001.

2.The Principal Controller of Communication Accounts,  
(Administration, Legal & USO Sections),  
7<sup>th</sup> Floor, R.K.nagar Telephone Exchange Building,  
No.238, R.K.Mutt Road, Chennai 600 028.

.. Respondents

Prayer: Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint an arbitrator to enter reference relating to disputes that has arisen between the parties and to conduct arbitration proceedings in the manner known to law.



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For Petitioner : Mr.G.Vijayakumar  
For R1 : Mr.G.Prabhakar  
For R2 : Mr.N.Ramesh  
Senior Panel Counsel

### **ORDER**

This Original Petition has been filed for appointment of Arbitrator to resolve the dispute between the petitioner and the respondents under the Standard Lease Agreement (SLA) dated 01.09.2006 and 24.08.2009. They contain a clause for resolution of dispute through Arbitrator :-

20. “ Disputes”. If any, shall be settled by mutual discussion and agreement between the parties. If any disputes cannot be resolved by mutual agreement within days, the same shall be settled in accordance with the provisions of Arbitration and Conciliation Act, 1996 and the Rules made thereunder:-

2. It appears that the aforesaid Lease Agreement came to an end way back in May 2012. However, the tower which was installed by the first respondent in the petitioner's premises was dismantled but not removed by the first respondent.



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3. In this connection, there have been exchange of communication, By letter dated 26.05.2018, the first respondent has stated that in order to sort out the issue regarding non-availability of mobile signal in the area, requested the petitioner to co-operate for re-energizing mobile signal from the available tower at M/s.Brakes India, Sholingur.

4. The petitioner has sent a notice to the first respondent dated 14.03.2023 wherein the petitioner has stated that a sum of Rs.7,84,050/- was due and payable towards arrears of electricity charges and rent dues till date and called upon the respondent to :-

- (a) Dismantle the IMPCS towers and all connected implements and we shall be entitled to the cost incurred towards such dismantling from BSNL;
- (b) We shall be entitled to sell the above implements as scrap in open market and adjust such monies towards the above amounts payable to us and BSNL shall be liable for all consequences;
- (c) Initial suitable legal proceedings for recovery of the dues payable to us.



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5. Despite the same, the first respondent has not come forward .

Since there was no response to the first respondent, the petitioner has issued another notice dated 20.04.2023 to the second respondent expressing the desire to resolve the dispute between the petitioner and the respondents for arbitration as a sum of Rs.7,84,050/- was due towards electricity charges and Rs.2,19,200/- towards rents.

6. The respondents have opposed the petition on the ground that the cause of action if any has expired wayback in 2012 and therefore invocation of Arbitration Clause on 20.04.2023 was beyond the period of limitation prescribed under the Limitation Act and Arbitration and Conciliation Act, 1996.

7. In this connection, the learned counsel for the petitioner has placed reliance on the following the decision of the Hon'ble Supreme Court : -

- (i) **Bharat Sanchar Nigam Ltd., and another vs. M/s.Nortel Networks India Pvt.Ltd.,**  
C.A.Nos.843-844 of 2021 dated 10.03.2021
- (ii) **Arif Azim Co., Ltd., vs. Aptech Ltd,** 2024  
SCC OnLine SC 215



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iii) *Himangni Enterprises v. Kamaljeet Singh Ahluwalia*, (2017) 10 SCC 706

8. It is submitted that mere exchange of communication will not revive the limitation. It is submitted that in the said decision of the Hon'ble Supreme Court squarely applies to the facts of the present case. It is submitted that unless, an application under Section 11 of the Act was filed within the period of limitation prescribed question of maintaining this petition does not arise.

9. The Exchange of communication between the petitioner and the respondents is not sufficient to conclude that the invocation of Arbitration Clause was beyond the period of limitation or that the Arbitration Clause was invoked belatedly long after limitation expired.

10. The learned counsel for the petitioner has placed reliance on the decision of the Hon'ble Supreme Court in **Bharat Sanchar Nigam Ltd., and another vs. M/s.Nortel Networks India Pvt.Ltd.**, to the above mentioned paragraphs. It is to be noted that in paragraph Nos.32,35 & 36, the Hon'ble Court Supreme Court held as under:-



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32. The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the arbitral tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some precondition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.
35. The issue of limitation which concerns the “admissibility” of the claim, must be decided by the arbitral tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties.
36. In a recent judgment delivered by a three-judge bench in *Vidya Drolia v. Durga Trading Corporation*<sup>19</sup>, 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 bare faced 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.

In paragraph 144, the Court observed that the judgment in *Mayavati Trading* had rightly held that the judgment in *Patel Engineering* had been legislatively overruled. Paragraph 144 reads as : “144. As observed earlier, *Patel Engg. Ltd.* 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



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where the parties approach a court for appointment of an arbitrator. Mayavati Trading (P) Ltd., in our humble opinion, rightly holds that Patel Engg. Ltd. 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. 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.” (emphasis supplied) 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. Paragraph 148 of the judgment reads as follows : -

“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



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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 Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , 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.” In paragraph 154.4, it has been concluded that :-

“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**



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**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.”** (emphasis supplied) In paragraph 244.4 it was concluded that :

“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”.

11. That apart, limitation is always mixed question of facts under law and it is better left to be decided by the Arbitral Tribunal.

12. Considering the same, Court is inclined to appoint Mr. **T.Mohan, Senior Advocate ( Mobile No. 80561 00357)** residing at No.2, Temple Glade Apartments, Kalakshetra Colony, Besant Nagar, Chennai-600 090, as a sole Arbitrator to enter upon reference and adjudicate/resolve the *inter se* dispute between the parties. It is open for the respondents to raise all the objections including limitation under Section 16 of the Arbitration and Conciliation Act, 1996.



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13. The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, endeavour to complete the arbitral proceedings and pass an award strictly in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as expeditiously as possible, preferably within a period of twelve months after the date of completion of pleadings under Sub-Section 4 to Section 23 as is contemplated in Section 29-A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order.

14. The learned Arbitrator appointed herein shall be paid fees and other incidental charges as may be fixed with the consent of parties or in accordance with the provisions of the Arbitration and Conciliation Act, 1996, and the same shall be borne by the parties equally. In case, the respondents remain *ex parte*, the petitioner shall pay the entire fee and other incidental charges to the Arbitrator and later recover the same from the respondents.

15. This Original Petition is allowed accordingly, leaving the parties to bear their own costs.



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16. Since this Court has appointed the Arbitrator, it is open to the petitioner as well as the respondents to seek other reliefs under Section 17 of the Arbitration and Conciliation Act, 1996, before the learned Arbitrator.

14.03.2024

Index : Yes/No  
Internet : Yes/No  
Neutral Citation : Yes/No  
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To

1. The Assistant General Manager, (NWP)CM,  
M/s.Bharat Sanchar Nigam Limited (BSNL),  
Having Office of General Manager, BSNL Bhavan,  
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**C.SARAVANAN, J.**

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