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Arb.O.P.(Com.Div.)No.572 of 2023

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

|               |            |
|---------------|------------|
| Reserved on   | 04.03.2024 |
| Pronounced on | 12.06.2024 |

CORAM :

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

Arb.O.P.(Com.Div.) No.572 of 2023

M/s.Nilakantan & Sons Pvt. Ltd.,  
2, First Floor, Gokul Towers,  
7, CP Ramaswamy Road,  
Alwarpet, Chennai – 600 018.

... Petitioner

Vs.

Union of India,  
Represented by The Chief Engineer (Construction),  
Office of the Chief Administrative Officer (Construction),  
Southern Railway, Egmore,  
Chennai, Tamil Nadu – 600 008.

... Respondent

Prayer: Original Petition is filed under Section 11(5) of the Arbitration and Conciliation Act, 1996, praying to appoint an independent Sole Arbitrator in terms of Clause 64 of the General Conditions of Contract which forms part of the Agreement dated 09.01.2008, for the purposes of adjudicating upon the disputes that have arisen between the petitioner and the respondent thereunder and to award costs of the present proceeding.



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For Petitioner : Mr.K.Harishankar

For Respondent : Mrs.S.P.Arthi  
Standing Counsel

### **ORDER**

This Original Petition has been filed under Section 11(5) of the Arbitration and Conciliation Act, 1996, for appointment of an independent Sole Arbitrator in respect of a dispute that has arisen between the petitioner and the respondent under Clause 64 of the General Conditions of Contract dated 09.01.2008.

2. According to the petitioner, the petitioner has rendered work and had raised the Final Bill on 26.06.2010.

3. Since the respondent did not issue any response on the Final Bill dated 26.06.2010, the petitioner issued a Letter on 05.01.2011 requesting the respondent for release of various payments.



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4. Since the payments for Final Bill and other bills were not forthcoming, the petitioner sent a Letter/Reminder asking the respondent to either pay a sum of Rs.48,50,000/- under the Final Bill dated 26.06.2010 or in the alternative refer the dispute for arbitration in terms of Clause 64(1)(i) of the Contract Agreement and General Conditions of Contract dated 09.01.2008.

5. The respondent has paid a sum of Rs.10,93,459/- on 31.03.2018. It is in this background, the petitioner has sent a Letter on 01.12.2019 wherein, the petitioner asking the respondent to pay the balance as per the Final Bill dated 26.06.2010 and other claims failing which, the disputes can be taken up for arbitration. In the said Letter dated 01.12.2019, the petitioner has also requested the respondent to send a copy of the Final Bill.

6. The respondent has responded with the above request of the petitioner vide Letters dated 10.11.2020, 17.02.2023 and 05.05.2023 by enclosing the break up. In this background, the petitioner has sent a second notice under Section 21 of the Arbitration and Conciliation Act,



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1996 on 11.01.2023 whereby, the petitioner has called upon the respondent to pay the balance amount of Rs.37,57,324/- together with other amounts as stated therein.

7. The respondent has responded to the same on 17.02.2023 stating that there is no need for arbitration and if at all the Arbitration Tribunal has to be constituted, the cost of Arbitration has to be borne equally as per Clause 64.6 of the General Conditions of Contract.

8. Arguing the case on behalf of the respondent, the learned Standing Counsel would submit that the limitation for invoking the arbitration clause would have expired by three months from 01.02.2019 *i.e.*, on 01.03.2019 and therefore at best the petition could have been filed within a period of three years from 01.03.2019 *i.e.*, on or before 28.02.2022.

9. It is submitted that since the limitation expired on 28.02.2022, the present petition filed during the month of November 2023 is time barred.



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10. It is therefore submitted that the petition is hopelessly time barred in terms of the decision of the Hon'ble Supreme Court in **Arif Azim Co.Ltd., Vs. Aptech Ltd., 2024 SCC Online SC 215.**

11. A specific reference was made to Paragraphs 50, 51, 53, 57, 58 and 59 from the said decision. It reads as under:-

*“50. A three-Judge Bench of this Court in [Geo Miller and Company Private Limited v. Chairman, Rajasthan Vidyut Utpadan Nigam Limited](#) reported in (2020) 14 SCC 643 observed as follows:*

*“14. Sections 43(1) and (3) of the 1996 Act are in pari materia with Sections 37(1) and (4) of the 1940 Act. It is well-settled that by virtue of [Article 137 of the First Schedule to the Limitation Act, 1963](#) the limitation period for reference of a dispute to arbitration or for seeking appointment of an arbitrator before a court under the 1940 Act (see [State of Orissa v. Damodar Das](#) [(1996) 2 SCC 216] ) as well as the 1996 Act (see [Grasim Industries Ltd. v. State of Kerala](#) [ (2018) 14 SCC 265 : (2018) 4 SCC (Civ) 612] ) is three years from the date on which the cause of action or the claim which is sought to be arbitrated first arises.*

*15. In [Damodar Das](#) [(1996) 2 SCC 216], this Court observed, relying upon [Russell on Arbitration](#) by Anthony Walton*



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(19th Edn.) at pp. 4-5 and an earlier decision of a two-Judge Bench in *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.

16. We also find the decision in *Panchu Gopal Bose* [(1993) 4 SCC 338] relevant for the purpose of this case. This was a case similar to the present set of facts, where the petitioner sent bills to the respondent in 1979, but payment was not made. After an interval of a decade, he sent a notice to the respondent in 1989 for reference to arbitration. This Court in *Panchu Gopal Bose* [(1993) 4 SCC 338] observed that in mercantile references of this kind, it is implied that the arbitrator must decide the dispute according to the existing law of contract, and every defence which would have been open to the parties in a court of law, such as the plea of limitation, would be open to the parties for the arbitrator's decision as well. Otherwise, as this Court observed : (SCC p. 344, para 8)

“8. ... a claim for breach of contract containing a reference



*clause could be brought at any time, it might be 20 or 30 years after the cause of action had arisen, although the legislature has prescribed a limit of three years for the enforcement of such a claim in any application that might be made to the law courts.”*

17. This Court further held as follows: (*Panchu Gopal Bose* case [ (1993) 4 SCC 338] , SCC pp. 345-46, paras 11-12)

*“11. Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of civil actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.*

12. In *Russell* on Arbitration....

*At p. 80 it is stated thus:*



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*‘An extension of time is not automatic and it is only granted if “undue hardship” would otherwise be caused. Not all hardship, however, is “undue hardship”; it may be proper that hardship caused to a party by his own default should be borne by him, and not transferred to the other party by allowing a claim to be reopened after it has become barred.’”*

51. Having traversed the statutory framework and case law, we are of the clear view that there is no doubt as to the applicability of the [Limitation Act, 1963](#) to arbitration proceedings in general and that of [Article 137](#) of the [Limitation Act, 1963](#) to a petition under [Section 11\(6\)](#) of the Act, 1996 in particular. Having held thus, the next question that falls for our determination is whether the present petition seeking appointment of an arbitrator is barred by limitation.

53. It has been held in a catena of decisions of this Court that the limitation period for making an application seeking appointment of arbitrator must not be conflated or confused with the limitation period for raising the substantive claims which are sought to be referred to an arbitral tribunal. The limitation period for filing an application seeking appointment of arbitrator commences only after a valid notice invoking arbitration has been issued by one of the parties to the other party and there has been either a failure or refusal on part of the other party to make an appointment as per the



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*appointment procedure agreed upon between the parties.*

*57. The other way of ascertaining the relevant point in time when the limitation period for making a [Section 11\(6\)](#) application would begin is by making use of the Hohfeld's analysis of jural relations. It is a settled position of law that the limitation period under [Article 137](#) of the [Limitation Act, 1963](#) will commence only after the right to apply has accrued in favour of the applicant. As per Hohfeld's scheme of jural relations, conferring of a right on one entity must entail the vesting of a corresponding duty in another. When an application under [Section 11\(6\)](#) of the Act, 1996 is made before this Court without exhausting the mechanism prescribed under the said sub-section, including that of invoking arbitration by issuance of a formal notice to the other party, this Court is not duty bound to appoint an arbitrator and can reject the application for being premature and non-compliant with the statutory mandate. However, once the procedure laid down under [Section 11\(6\)](#) of the Act, 1996 is exhausted by the applicant and the application passes all other tests of limited judicial scrutiny as have been evolved by this Court over the years, this Court becomes duty-bound to appoint an arbitrator and refer the matter to an arbitral tribunal. Thus, the "right to apply" of the Applicant can be said to have as its jural correlative the "duty to appoint" of this Court only after all the steps required to be completed before instituting a [Section 11\(6\)](#) application have been duly completed. Thus, the limitation period for filing a petition under [Section 11\(6\)](#) of the Act, 1996 can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and*



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*there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice.*

58. This Court in *Utkal Commercial Corporation v. Central Coal Fields Ltd.* reported in (1999) 2 SCC 571 while determining a similar question in relation to the *Arbitration Act, 1940* held thus:

*“6. Therefore, the time for the purposes of limitation begins to run from the date when the right to make an application under Section 8 accrues. Section 8 of the Arbitration Act, which is relevant for our present purposes, is reproduced below:*

*“8. Power of court to appoint arbitrator or umpire.—(1) In any of the following cases—*

*(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or*

*(b)-(c)\*\*\* any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.*

*(2) If the appointment is not made within fifteen clear days after service of the said notice, the court may, on the application*



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*of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.”*

*7. Therefore, under [Section 8](#), before an application can be made to the court under that section, the following requirements should be satisfied:*

*(1) The arbitration agreement should provide for appointment of arbitrator/s by consent.*

*(2) Parties do not concur in the appointment of an arbitrator. (3) One party serves notice on the other party to concur in the appointment.*

*(4) No appointment is made within 15 days of the service of the notice.*

*8. Thereupon the court may, on the application of the party who gave the notice and after giving the other party an opportunity of being heard, appoint an arbitrator.*

*9. In view of the express language of [Section 8](#), it is quite clear that unless a party who desires to apply has resorted to the process set out in [Section 8](#), and has failed to secure the concurrence of the*



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*other party to the appointment of an arbitrator within the prescribed period, the court will not intervene under [Section 8](#). The right to apply under [Section 8](#), therefore, would accrue when, within 15 clear days of the notice, the other parties do not concur in the appointment of an arbitrator.” (emphasis supplied)*

59. In [Secunderabad Cantonment Board v. B. Ramachandraiah & Sons](#) reported in (2021) 5 SCC 705, this Court while determining the issue of limitation in relation to a [Section 11\(6\)](#) petition under the Act, 1996 held thus:

*“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*



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*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.” (emphasis supplied).*

12. That apart, it is submitted that the cause of auction at best would have arisen only on 10.11.2020, being the date on which, the break up of the payments made on 31.03.2018 was furnished for the first time.

13. It is further submitted that if the aforesaid period is considered, the petition for invoking arbitration clause would be 30 days + 3 years. In other words, it is the submission of the learned counsel for the petitioner that the limitation would have expired only on 10.12.2023.



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14. The learned counsel for the petitioner would further placed reliance on the decision of the Hon'ble Supreme Court in **Cognizance for extension of limitation, In Re, 2022 (3) SCC 117 [In Re: Cognizance for extension of limitation in M.A.No.21 of 2022 in M.A.No.665 of 2021 in Suo motu W.P(C)No.3 of 2020** vide Order dated 10.01.2022], wherein, the Hon'ble Supreme Court has excluded the period of limitation due to Covid-19 Pandemic between 15.03.2020 and 28.02.2022.

15. It is further submitted that the notice for invoking arbitration clause in this case was sent to the respondent on 11.01.2023 which was responded by the respondent only on 17.02.2023 to which, the petitioner has sent a representation on 16.03.2023 and was responded by the respondent on 05.05.2023. He therefore submit that the petition has been filed in time and the decision of the Hon'ble Supreme Court in **Arif Azim Co.Ltd's case** (referred to supra) cannot be read in the manner in which the learned standing counsel for the respondent made her submission/cannot be read in the manner as the submission made by the learned Standing Counsel.



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16. The learned counsel for the petitioner would submit that only on 10.11.2020, the petitioner came to know about the fraud laid by the respondent in deducting payments by restricting the payment of Rs.10,93,459/- on 31.03.2018. He therefore submitted that in view of Section 17 of the Limitation Act, 1963, limitation period would commence from the date of knowledge of the fraud.

17. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Standing Counsel for the respondent.

18. There is no dispute that under Section 21 of the Arbitration and Conciliation Act, 1996, the arbitration proceeding is deemed to have commenced on the date when notice invoking the arbitration clause received by the other party.

19. The issue relating to limitation was earlier discussed by the Hon'ble Supreme Court in **BSNL Vs. Nortel Network India (P) Ltd.,** (2021) 5 SCC 738. Relevant passage from the said decision reads as under:-



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*“Limitation is normally a mixed question of fact and law, and would lie within the domain of the Arbitral Tribunal. There is, however, a distinction between jurisdictional and admissibility issues. An issue of “Jurisdiction pertains to the power and authority of the Arbitrators to hear and decide a case. Jurisdictional issues include objections to the competence of the Arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal.”*

20. The decision of the larger bench of the Hon'ble Supreme Court in **Arif Azim Co. Ltd. Vs. Aptech Ltd.**, (2024 SCC Online SC 215) has more or less reiterated the above legal position. There, the notice invoking arbitration was received by the respondent on 29.11.2002, which was beyond the three-year period limitation from the date on which the cause of action for the claim had arisen. Thus, it was held that the claims raised by the petitioner therein was *ex-facie* time barred or dead claims on the date of the commencement of arbitration.

21. In the facts of the present case, there is no dispute that the



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parties were in dialogue and several letters sent by the respondent till 05.05.2023. On 11.01.2023, a notice under Section 21 of the Arbitration and Conciliation Act, 1996 was issued by the petitioner. There, the petitioner crystallized the balance amount of **Rs.37,57,324/-** payable by the respondent, after payments were made earlier on **31.03.2018** for a sum of **Rs.10,93,459/-**. Ordinarily, the limitation would have expired on **30.03.2021**.

22. However, it is noticed that only by a Letter dated 17.02.2023, the respondent has stated that there is no need for any arbitration and if any arbitration proceeding is to be initiated, the cost of arbitration should be borne equally by both the parties as per Clause 64.6 of the General Conditions of Contract. Thus, even according to the respondent, the dispute is not a stale dispute.

23. Therefore, it cannot be readily said that the proposed arbitration was in respect of stale dispute barred by law and that the present petition filed before this Court on 30.11.2023 was also barred by law. Limitation for approaching the Court under Section 11 of the Arbitration and



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Conciliation Act, 1996 is different from assessment of limitation *qua* the claim. In the facts of the case, there are several debatable issues on facts surrounding limitation which can be decided on preliminary issue.

24. Under these circumstances, this Court is inclined to appoint **Hon'ble Mr.Justice K.Ravichandrabaabu (Retd.), Former Judge of Madras High Court residing at 1D, Crescent Castle, 13/6, II Crescent, Park Road, Gandhi Nagar, Adyar, Chennai – 20, (Mobile No.9498033336),** as an Arbitrator to enter upon reference and adjudicate/resolve the *inter se* dispute between the parties.

25. 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 29A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order.



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26. 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 respondent remain *ex parte*, the petitioner shall pay the entire fee and other incidental charges to the Arbitrator and later recover the same from the respondent.

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

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

12.06.2024

Index : Yes/No

Internet : Yes/No

Speaking Order/Non-Speaking Order

Neutral Citation : Yes/No



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**C.SARAVANAN, J.**

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Pre-Delivery Order in  
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