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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**Date of decision: 13th NOVEMBER, 2024IN THE MATTER OF:+ **ARB.P. 1410/2024**

MR VINOD KAPOOR

.....Petitioner

Through: Mr. Vikram Pradeep, Ms. Neha Rajpal, Mr. Nirmal Goenka, Mr. Anay Khandelwal, Advocates.

versus

UNION OF INDIA

.....Respondent

Through: Mr. B. S. Shukla, CGSC with MR. Rajesh Kumar, Mr. Kamaldeep and Mr. Mukesh Kumar, Advocates.

CORAM:**HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD****JUDGMENT (ORAL)**

1. The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 by the Petitioner seeking appointment of an Arbitrator to adjudicate upon the disputes which have arisen between the parties under a Contract being CA No.CEDZ-18/2006-07 entered into between the parties for Provision of Sainik Aram Ghar at Naraina Tri Junction.

2. Material on record indicates that the Petitioner was awarded the contract on 18.05.2006. Disputes arose between the parties regarding the performance of work and both parties alleged that the other party has not performed its part of the contract. The contract was foreclosed on



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28.02.2012. A final bill was sent by the Petitioner in Feb-March, 2012. On 28.03.2014, some payment was accepted by the Petitioner under protest. Clauses 70 of the Agreement, which is an arbitration clause, reads as under:

"70. Arbitration- All disputes, between the parties to the Contract (other than those for which the decision of the C.WE. or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be referred to the sole arbitration of a [Serving Officer having degree in Engineering or equivalent or having passed final/direct final examination of sub-division II of Institution of Surveyor (India) recognized by the Govt. of India) to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the works or termination or determination of the contract under Condition Nos. 55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalised by the Government to get the works completed by or through any other contractor or contractors or agency or agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act



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due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, exparte, if either party, inspite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge. the time for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual, item of dispute. [The arbitrator shall give reason for the award in each and every case irrespective of the value of claims or counter claims].

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The Award of the Arbitrator shall be final and binding on both parties to the Contract."

3. On 24.03.2017, the Petitioner wrote a letter to the Respondent/UoI for appointment of an Arbitrator to adjudicate upon the disputes between the parties. Material on record indicates that on 12.05.2017, the Petitioner was called upon to join negotiations by the Respondent/UoI which did not fructify in any settlement and after that a second notice of invoking



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arbitration was sent by the Petitioner on 30.08.2019 to the Respondent/UoI. Vide the correspondence dated 02.06.2022, the Respondent/UoI denied the appointment of an arbitrator on the ground that the same is barred by time.

4. The Petitioner has, therefore, approached this Court by filing the present petition seeking appointment of an Arbitrator on 12.08.2024.

5. A short defence taken by the Respondent/UoI is that the present petition is barred by limitation.

6. Learned Counsel appearing for the Petitioner submits that the first notice invoking arbitration was sent on 24.03.2017 and the Respondent/UoI itself called upon the Petitioner to join negotiations. It is stated that when negotiations failed, the Petitioner sent a second notice invoking arbitration on 30.08.2019 for appointment of an Arbitrator which was denied by the Respondent/UoI vide letter dated 02.06.2022. It is stated that the Petitioner has filed the present petition within three years and, therefore, the petition is not barred by limitation. In the alternative, the learned Counsel for the Petitioner contends that even assuming 30.08.2019 is the *terminus a quo*, the petition ought to have been filed on or before 30.08.2022 by applying Article 137 of the Schedule to the Limitation Act, 1963, however, in view of the onset of COVID-19 and the Order dated 10.01.2022 passed by the Apex Court in Cognizance for Extension of Limitation, In Re Suo Motu Writ Petition (C) No. 3/2020, the period between 15.03.2020 to 01.03.2022 was directed to be excluded and, therefore, the petition could have been filed on or before 30.08.2024 and the present petition has been filed on 12.08.2024 which is within the limitation period.

7. *Per contra*, learned CGSC for Union of India submits that once a notice invoking arbitration on 24.03.2017 has been sent by the Petitioner,



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the period of limitation can never be stopped on the ground of negotiations or deliberations. He contends that the petition should have been filed on or before the 24.03.2020. He contends that the second notice of invoking arbitration would not give the Petitioner a fresh cause of action for filing the petition. He states that the fact that the parties joined for negotiations on 12.05.2017 will not stop the clock running.

8. Heard learned Counsel appearing for the Parties and perused the material on record.

9. The short question which arises for consideration is whether the present petition has been filed within the limitation period or not.

10. The limitation period for filing a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of Arbitrator is governed under Article 137 of the Schedule to the Limitation Act, 1963 which reads as under:-

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from when period begins to run</i>
137. Any other application for which no period of limitation is provided elsewhere in this Division.	Three years.	When the right to apply accrues.

11. If the claims are otherwise not barred under limitation, then the starting point of limitation for filing a petition under Section 11 of the Arbitration & Conciliation Act under Article 137 according to the third column of the Article is the date on which the right to apply arises. Section 21 of the Arbitration and Conciliation Act, 1996 states that the commencement of the arbitration proceedings is the date on which a request



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is made to refer the dispute to arbitration. Notice under Section 21 of the Arbitration and Conciliation Act, 1996 would, therefore, be the *terminus quo* for calculating limitation for approaching the Court by filing a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996.

12. Material on record indicates that the Petitioner had accepted some payment from the Respondent/UoI under protest on 28.03.2014. The Petitioner chose to invoke arbitration virtually at the end of third year i.e., on 24.03.2017. On 12.05.2017, a letter was sent by the Respondent/UoI to the Petitioner directing the Petitioner to discuss the issues with the Chief Engineer. Material on record indicates that nothing concrete fructified in the discussion and a second notice invoking arbitration was sent by the Petitioner on 30.08.2019 for appointment of an Arbitrator which was denied by the Respondent/UoI vide letter dated 02.06.2022. A second notice was sent by the Petitioner on 30.08.2019 wherein the Petitioner has stated that despite requesting for appointment of Arbitrator on 24.03.2017, no action was taken by the Respondent/UoI till date to this effect and therefore, the Petitioner would be considered to take available legal redressal if an arbitrator is not appointed. On 02.06.2022, request of the Petitioner was turned down by the Respondent/UoI by only referring the letter dated 24.03.2017. Paragraph No.4 and 5 of the letter dated 02.06.2022 reads as under:

"4. Accordingly, final bill was prepared based on approved BPs and same was processed and paid. Thereafter, observation on final bill was raised vide your letter No. DECC/32013 dated 30 Dec 2013 which was replied by CWE (P) Delhi Cantt vide letter No.8641/18/452/E8 dated 12 Feb 2014. There was no further communication on any matter from your side



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thereafter.

5. Later on after lapse of three years, Condition 70 of IAFW-2249 was invoked vide your letter - No. DECC/242017 dated 24 Mar 2017 for appointment of Sole Arbitrator without mentioning the nature of dispute or list of claims etc which is surprising. Even in the letters mentioned under para 1 above, the nature of dispute or list of claims are not mentioned. This office is not in a position to address your grievances unless the nature of dispute is known."

13. The stand of the Respondent/UoI that date of limitation has to be calculated from the date when the final bill was raised cannot be accepted. Against the final bill raised by the Petitioner, some payment was made by the Respondent/UoI on 28.03.2014 which was received under protest by the Petitioner and, therefore, arbitration could have been invoked within three years from the date of payment and the arbitration was rightly invoked by the Petitioner vide letter dated 24.03.2017. The claim was therefore within the period of limitation.

14. The only question therefore is whether the petition under Section 11(6) of the Arbitration & Conciliation Act has been filed within time or not. The law as to whether after invocation of arbitration, subsequent discussions will stop the clock running or not is no longer *res integra* and it has been held that subsequent discussions after invocation of arbitration does not stop the clock of limitation. The Apex Court in Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority, (1988) 2 SCC 338, has observed as under:

"4. Therefore, in order to be entitled to order of reference under Section 20, it is necessary that there



*should be an arbitration agreement and secondly, difference must arise to which this agreement applied. In this case, there is no dispute that there was an arbitration agreement. There has been an assertion of claim by the appellant and silence as well as refusal in respect of the same by respondent. Therefore, a dispute has arisen regarding non-payment of the alleged dues of the appellant. The question is for the present case when did such dispute arise. The High Court proceeded on the basis that the work was completed in 1980 and therefore, the appellant became entitled to the payment from that date and the cause of action under Article 137 arose from that date. But in order to be entitled to ask for a reference under Section 20 of the Act there must not only be an entitlement to money but there must be a difference or dispute must arise. It is true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on 28-2-1983 and there was non-payment, the cause of action arose from that date, that is to say, 28-2-1983. **It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim.** The existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Act. See Law of Arbitration by R.S. Bachawat, first edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede*



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to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

15. In Secunderabad Cantonment Board v. B. Ramachandraiah & Sons, (2021) 5 SCC 705, the Apex Court has observed as under:

"19. Applying the aforesaid judgments to the facts of this case, so far as the applicability of Article 137 of the Limitation Act to the applications under Section 11 of the Arbitration Act is concerned, it is clear that the demand for arbitration in the present case was made by the letter dated 7-11-2006. This demand was reiterated by a letter dated 13-1-2007, which letter itself informed the appellant that appointment of an arbitrator would have to be made within 30 days. At the very latest, therefore, on the facts of this case, time began to run on and from 12-2-2007. The appellant's laconic letter dated 23-1-2007, which stated that the matter was under consideration, was within the 30-day period. On and from 12-2-2007, when no arbitrator was appointed, the cause of action for appointment of an arbitrator accrued to the respondent and time began running from that day. Obviously, once time has started running, any final rejection by the appellant by its letter dated 10-11-2010 would not give any fresh start to a limitation period which has already begun running, following the mandate of Section 9 of the Limitation Act. This being the case, the High Court was clearly in error in stating that since the applications under Section 11 of the Arbitration Act were filed on 6-11-2013, they were within the limitation period of three years starting from 10-11-2020. On this count, the applications under Section 11 of the Arbitration Act, themselves being hopelessly time-barred, no arbitrator could have been appointed by the High Court."



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16. The Apex Court in B & T AG v. Union of India, (2024) 5 SCC 358, after quoting the judgment of Major (Retd.) Inder Singh Rekhi (supra), has observed as under:

"38. Three principles of law are discernible from the aforesaid decision in Inder Singh Rekhi [Inder Singh Rekhi v. DDA, (1988) 2 SCC 338] of this Court. First, ordinarily on the completion of the work, the right to receive the payment begins. Secondly, a dispute arises when there is a claim on one side and its denial/repudiation by the other and thirdly, a person cannot postpone the accrual of cause of action by repeatedly writing letters or sending reminders. In other words, "bilateral discussions" for an indefinite period of time would not save the situation so far as the accrual of cause of action and the right to apply for appointment of arbitrator is concerned."

17. In BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738, the Apex Court has observed as under:

"48. Applying the law to the facts of the present case, it is clear that this is a case where the claims are ex facie time-barred by over 5½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 4-8-2014. The notice of arbitration was invoked on 29-4-2020. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation."



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50. In the notice invoking arbitration dated 29-4-2020, it has been averred that:

“Various communications have been exchanged between the petitioner and the respondents ever since and a dispute has arisen between the petitioner and the respondents, regarding non-payment of the amounts due under the tender document.”

51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, [S.S. Rathore v. State of M.P., (1989) 4 SCC 582 : 1990 SCC (L&S) 50; Union of India v. Har Dayal, (2010) 1 SCC 394; CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., (2020) 5 SCC 185] or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that: “where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it.” There must be a clear notice invoking arbitration setting out the “particular dispute” [Section 21 of the Arbitration and Conciliation Act, 1996.] (including claims/amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail.”

18. The Apex Court in SBI General Insurance Co. Ltd. vs. Krish Spinning, 2024 SCC OnLine SC 1754 has concluded as under:

“125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to



decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material.

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127. In Arif Azim (supra), while deciding an application for appointment of arbitrator under Section 11(6) of the Act, 1996, two issues had arisen for our consideration:

- i. Whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996? If yes, whether the petition filed by M/s Arif Azim was barred by limitation?*
- ii. Whether the court may decline to make a reference under Section 11 of Act, 1996 where the claims are ex-facie and hopelessly time-barred?*

128. On the first issue, it was observed by us that the Limitation Act, 1963 is applicable to the applications filed under Section 11(6) of the Act, 1996. Further, we also held that it is the duty of the referral court to examine that the application under Section 11(6) of the Act, 1996 is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963, i.e., 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to when the right to apply



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would accrue, we had observed in paragraph 56 of the said decision that “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 there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice.”

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134. The observations made by us in Arif Azim (supra) are accordingly clarified. We need not mention that the effect of the aforesaid clarification is only to streamline the position of law, so as to bring it in conformity with the evolving principles of modern-day arbitration, and further to avoid the possibility of any conflict between the two decisions that may arise in future. These clarifications shall not be construed as affecting the verdict given by us in the facts of Arif Azim (supra), which shall be given full effect to notwithstanding the observations made herein.”

19. The Apex Court in Arif Azim Co. Ltd. v. Aptech Ltd., (2024) 5 SCC 313, after placing reliance upon BSNL (supra) and Secunderabad Cantonment Board (supra) has affirmed the said Judgments.

20. Even in the notice dated 30.08.2019, the Petitioner has categorically stated that he has already invoked arbitration on 24.03.2017 and steps were not taken by the Respondent/UoI for appointment of an Arbitrator.

21. Applying the aforesaid law laid down by the Apex Court to the facts at hand, this Court is of the opinion that the second notice dated 30.08.2019 invoking arbitration will not give rise to a fresh cause of action. The fact that the Petitioner had been called for discussions on 12.05.2017, the same would not stop the clock running and the letter dated 02.06.2022 sent by the



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Respondent/UoI denying to appoint an Arbitrator will not give a fresh cause of action.

22. The period of three years under Article 137 of the Schedule to the Limitation Act, 1963 would have to be reckoned from 24.03.2017 and therefore, the period of three years would expire on 24.03.2020. Learned Counsel for the Petitioner contends that the limitation was extended for all proceedings before Courts and Tribunals due to COVID-19 pandemic by the Apex Court. The Apex Court in Cognizance for Extension of Limitation, in RE, (supra) has held that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purpose of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings. The Apex Court in Cognizance for Extension of Limitation, in RE, (2022) 3 SCC 117 has held as under:-

“5.1. The order dated 23-3-202 is restored and in continuation of the subsequent orders dated 8-3-2021, 27-4-2021 and 23-9-2021, it is directed that the period from 15-3-2020 till 28-2-2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

5.2. Consequently, the balance period of limitation remaining as on 3-10-2021, if any, shall become available with effect from 1-3-2022.

5.3. In cases where the limitation would have expired during the period between 15-3-2020 till 28-2-2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1-3-2022. In the event the actual balance period of limitation remaining, with effect from 1-3-2022 is greater than 90 days, that longer period shall



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apply.

5.4. It is further clarified that the period from 15-3-2020 till 28-2-2022 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29-A of the Arbitration and Conciliation Act, 1996, Section 12-A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”

23. Even if the period from 15.03.2020 till 28.02.2022 is excluded, the petition filed on 17.08.2024 is well beyond the period of limitation.

24. Resultantly, the present petition under Section 11(6) of the Arbitration and Conciliation Act cannot be entertained as being barred by limitation as it has been filed beyond the period of limitation prescribed under Article 137 of the Schedule to the Limitation Act, 1963.

25. The petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

NOVEMBER 13, 2024

S. Zakir