ORDER O-7

IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL DIVISION
ORIGINAL SIDE

AP/22/2025

SUBRATA BHATTACHARJEE
VERSUS
SUMANTA BHOWMICK & ANR.

BEFORE :
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 5th March, 2025.

Appearance:

Mr. Arijit Chatterjee, Adv.
. . for the petitioner.

1. Affidavit of service is taken on record.
2. None appears on behalf of the respondent no.1 despite service. None appears on behalf of the respondent no.2, who has refused service.
3. This is an application for appointment of a learned Arbitrator.
4. The issue is with regard to execution of a deed of assignment dated January 22, 2018. According to the petitioner, the respondents, as assignees were required to pay consideration of Rs.11,50,000/- to the assignor/petitioner. The petitioner claims that at the time of execution of the document, earnest money to the tune of Rs.2 lakhs as part of the consideration was paid. The balance amount was to be paid

within six months from the date of agreement, amounting to Rs.9,50,000/-.

5. The petitioner's contention is that Rs.15,000/- was paid some time in September, 2019. There is no further communication between the parties which would indicate that the petitioner had demanded the amount, but the respondents either refused or made part payment thereafter. Even if the period of limitation to invoke arbitration is calculated from September, 2019, the steps should have been taken by the petitioner within September, 2022. Moreover, the issue of part payment is a pleading in the notice invoking arbitration, but there is nothing on record in support of such contention. The claim is time barred. The arbitration clause was invoked some time in December, 2024, which is beyond the period of three years from the date when the right to apply expired.

6. In ***Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.*** reported in ***(2025) 1 SCC 502***), the Hon'ble Apex Court laid down the scope of interference of a referral court, inter alia, holding that at the stage of Section 11, the referral court needs to only examine whether the arbitration agreement exists; nothing more, nothing less. Such approach would uphold the intention of the parties at the time of entering into the agreement, to refer all disputes arising between themselves to arbitration. The principle is to give credence to party autonomy. However, such limited interference by the referral court

does not preclude the referral court from examining whether the claim is ‘deadwood’ or ex facie barred.

7. The claim is manifestly a ‘deadwood’. In ***Arif Azim(supra)*** it was held that:-

“**68.** Although, limitation is an admissibility issue, yet it is the duty of the Courts to prima facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process.

70. The scope of this primary examination has been carefully laid down by a three-Judge Bench of this Court in VidyaDrolia v. Durga Trading Corpn. [VidyaDrolia v. Durga Trading Corpn., (2021) 2 SCC 1 :

> “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 the Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”. As observed in Premium NaftaProducts 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.

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154. … 154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-

arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

71. The aforesaid decision in VidyaDrolia [VidyaDrolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] was relied upon and reaffirmed in another decision of this Court in NTPC Ltd. v. SPML Infra Ltd. [NTPC Ltd. v. SPML Infra Ltd., (2023) 9 SCC 385] wherein the "Eye of the needle" test was explained as follows : (SPML Infra case [NTPC Ltd. v. SPML Infra Ltd., (2023) 9 SCC 385] , SCC pp. 401-402, paras 25-28)

"Eye of the needle

25. The abovereferred precedents crystallise the position of law that the pre-referral jurisdiction of the Courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the Referral Court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

26. As a general rule and a principle, the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the Referral Court may reject claims which are manifestly and ex facie non-arbitrable [VidyaDrolia case, (2021) 2 SCC 1, para 154.4] . Explaining this position, flowing from the principles laid down in VidyaDrolia [VidyaDrolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , this Court in a subsequent decision in Nortel Networks [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738, para 45.1 : (2021) 3 SCC (Civ) 352] held : (SCC p. 764, para 45)

'45. … 45.1. … 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.'

27. The standard of scrutiny to examine the non-arbitrability of a claim is only prima facie. Referral Courts must not undertake a full review of the contested facts; they must only be confined to a primary first review [VidyaDrolia case, (2021) 2 SCC 1, para 134] and let facts speak for themselves. This also requires the Courts to examine whether the assertion on arbitrability is bona fide or not. [VidyaDrolia case, (2021) 2 SCC 1, para 154.4] The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable. [Nortel Networks case, (2021) 5 SCC 738, para 47] On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration [VidyaDrolia case, (2021) 2 SCC 1, para 154.4] .

28. The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the Referral Court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable [VidyaDrolia case, (2021) 2 SCC 1, para 154.4] . It has been termed as a legitimate interference by Courts to refuse reference in order to prevent wastage of public and private resources [VidyaDrolia case, (2021) 2 SCC 1, para 139] . Further, as noted inVidyaDrolia [VidyaDrolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court [VidyaDrolia case, (2021) 2 SCC 1, para 139] . Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator, as explained in DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd. [DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd., (2021) 16 SCC 743, paras 22 & 26]"

8. In the matter of ***SBI General Insurance Co. Ltd. vs Krish Spinning*** reported in ***2024 SCC Online SC 1754***, the Hon'ble Apex Court held as follows:-

"**126.** Before, we close the matter, it is necessary for us to clarify the dictum as laid in Arif Azim Co. Ltd. v. Aptech Ltd. reported in 2024 INSC 155, so as to streamline the position of law and prevent the possibility of any conflict between the two decisions that may arise in future.

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. <u>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.</u> To determine as to when the right to apply 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."

129. Insofar as the first issue is concerned, we are of the opinion that the observations made by us in Arif Azim (supra) do not require any clarification and should be construed as explained therein.

130. <u>On the second issue it was observed by us in paragraph 67 that the referral courts, while exercising their powers under Section 11 of the Act, 1996, are under a duty to "prima-facie examine and reject non-</u>

arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process."

131. Our findings on both the aforesaid issues have been summarised in paragraph 89 of the said decision thus:—

"89. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that while considering the issue of limitation in relation to a petition under Section 11(6) of the Act, 1996, the courts should satisfy themselves on two aspects by employing a two-pronged test - first, whether the petition under Section 11(6) of the Act, 1996 is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex-facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration, the court may refuse to appoint an arbitral tribunal."

9. In the matter of ***Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. &Anr.*** reported in ***(2025) 1 SCC 502,*** the Hon'ble Apex Court held as follows:-

"**51.** It is now well-settled law that, at the stage of Section 11 application, the referral Courts need only to examine whether the arbitration agreement exists — nothing more, nothing less. This approach upholds the intention of the parties, at the time of entering into the agreement, to refer all disputes arising between themselves to arbitration. However, some parties might take undue advantage of such a limited scope of judicial interference of the referral Courts and force other parties to the agreement into participating in a time-consuming and costly arbitration process. This is especially possible in instances, including but not limited to, where the claimant canvasses either ex facie time-barred claims or claims which have been discharged through "accord and satisfaction", or cases where the impleadment of a non-signatory to the arbitration agreement is sought, etc."

10. The contentions of the petitioner cannot be accepted as, on the face of the documents annexed to the application, it is seen that petitioner's claim is ex facie a dead claim. Thus, such claim, which is

ex facie stale and long barred by limitation, should be nipped at the bud, as the same is demonstrably non-arbitrable.

11. Under such circumstances, this Court is of the view that the referral court can weed out time barred claims which are deadwood by not saddling a party with a time consuming and expensive adjudicatory process for determination of a non-existing dispute.

12. The application is dismissed.

13. This order shall not preclude the petitioner from approaching any other forum if permissible in law.

(SHAMPA SARKAR, J.)

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