ORDER OCD-13

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION

AP-COM/120/2025
M/S. N C CONSTRUCTION
VERSUS
UNION OF INDIA & OTHERS

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 24th February, 2025.

Appearance:

Mr. Anupam Acharya, Advocate
Ms. Alivia Bhattacharjee, Advocate
... for the petitioner.

Mr. M. S. Tiwari, Advocate
Mr. Sushil Kr. Mishra, Advocate
... for Union of India.

Mr. Raj Sekhar Basu, Advocate
... for respondent No.4.

1. This is an application for appointment of an arbitrator on the strength of the dispute resolution clause, which is clause 15 of the General Terms and Conditions. The said clause was applicable in respect of the agreement and the work orders which were awarded to the petitioner. The said clause provides that any question, dispute or difference arising out of or in connection with the agreement or breach, termination or validity thereof, shall be first endeavoured to be settled through discussion/negotiation between the contractor and BSNL. If any dispute cannot be amicably settled, as soon as practicable, but not earlier than 3 months after request to settle the dispute amicably had been made to the other party, such dispute shall be settled by an arbitrator. The Chief

General Manager, West Bengal Telecom Circle or any person appointed by him, shall be the sole arbitrator.

2. The agreement between the parties was entered into on September 28, 2004. The work orders were issued sometime in 2008 and 2009. The petitioner contends to have completed the work and submitted its bills. Annexure-D contains the bills. Out of the three bills, two are dated April 20, 2010 and the third one is dated April 22, 2010. Certification of completion to that effect was issued by the Junior Telecom Officer, BSNL, Diamond Harbour, sometime in 2011.

3. The petitioner contends that the payment as raised by the petitioner,had not been made. The petitioner requested the authority by a letter dated February 2, 2017 to pay up the long pending outstanding bills amounting to Rs.8,96,939/-. A reminder was sent on November 2, 2017. The respondents did not take any step. By letter dated April 20, 2020 as well, a demand was raised. After a lapse of another four years, on June 29, 2024, another demand notice was sent by the petitioner.

4. Learned advocate for the respondents submits that the claim is ex-facie barred. In a similar case, the coordinate Bench rejected the application for appointment of an arbitrator. The ratio of the decision in ***Arif Azim Company Limited v. Aptech Limited*** reported in ***(2024) 5 SCC 313***was followed, which stated that the period of limitation for making an application under Section 11(6) of the Arbitration and Conciliation Act,

1996 was three years from the date when the right to apply accrued. The right to apply, according to their Lordships, accrued when the respondents failed to take steps despite receiving a notice invoking arbitration. According to the learned advocate for the petitioner, the decision in ***Aslam Ismail Khan Deshmukh v. Asap Fluids Pvt. Ltd. & Anr.*** reported in ***(2025) 1 SCC 502*** clarified the position of law in Arif Azim (supra) and overruled the ratio therein.

5. This Court finds from the record that after the bills were submitted in April 2010, demand notices were issued in 2017, 2020 and 2024. All the notices disclose the intention of the petitioner to go for arbitration.

6. The moot question before this Court is whether the referral court should entertain this application at all. The scope of adjudication by a referral court is undoubtedly limited. However, some parties might take undue advantage of such a limited scope of judicial interference of the referral court and force other parties to the agreement to participate in a time-consuming and costly arbitration process. The conduct of the petitioner and the documents annexed to this application,has convinced this Court that the claim is ex facie time-barred. The right to sue accrued when the bills of 2010 were not paid.The notice invoking arbitration should have been issued with three years from accrual of such cause of action. There is nothing on record to show that, within the period of limitation, the respondents had acknowledged even a part of the claim, by making payment or by communicating with the petitioner. The first demand letter

was sent more than six years after the bills were submitted and the certificate of completion was provided by the respondents. Subsequently, letters were sent in 2017, 2020 and 2024. Those will not enlarge the period of limitation. There is nothing on record to show that the respondents had acknowledged the debt at any time. No amount of attempts at amicable settlement, will extend the period of limitation applicable. In a similar matter, between the same parties, a coordinate Bench held thus:-

"However, such contention of the petitioner cannot be accepted as, on the face of the documents annexed to the application itself, it is seen that petitioner first made its demand in the year 2011, that is, long 13 years back.

The commencement of the limitation for a money claim cannot be said to start from the specific date of refusal but is the date when the money becomes due. In the present case, the money claimed by the petitioner became due to the petitioner, even as per the allegations of the petitioner, at least prior to December, 2011 when the claim was first made. Thus, the absence of any clear document to show refusal by the respondents is immaterial. Rather, it is the other way round; the petitioner had to produce at least a single communication from the end of the respondents to indicate that the criteria of Section 18 of the Limitation Act were satisfied. There being no averment in that regard either in the petition or in the demand or notice under Section 21 of the Arbitration and Conciliation Act, 1996, this Court is of the opinion that this is a case where the claim of the petitioner is a proverbial "dead wood".

Thus, such claim, which is ex facie stale and long barred by limitation (which deduction can be made even without appreciation of any evidence, on the materials annexed by the petitioner itself), should be nipped in the bud."

7. In Aslam Ismail (supra), 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. In the case in hand, the last bill was submitted on April 22, 2010. The certificate of completion was issued in 2011. The petitioner did not take any step until 2017, when the first demand was made. Again, the petitioner waited for three more years and made a demand in 2020 and thereafter in 2024. The notices were issued much later than the period of three years from accrual of the cause of action.

8. The claim is a manifestly '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.
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> **70.** The scope of this primary examination has been carefully laid down by a three-Judge Bench of this Court in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 :
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> > "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 Vidya Drolia [Vidya Drolia 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 [Vidya Drolia case, (2021) 2 SCC 1, para 154.4] . Explaining this position, flowing from the principles laid down in Vidya Drolia [Vidya Drolia 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 [Vidya Drolia 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. [Vidya Drolia 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 [Vidya Drolia 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 [Vidya Drolia 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 [Vidya Drolia case, (2021) 2 SCC 1, para 139] . Further, as noted inVidya Drolia [Vidya Drolia 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 [Vidya Drolia 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]"

9. 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</u>

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 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. 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-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."

10. 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."

11. 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.

12. Under such circumstances, this Court is not inclined to pass any order.

13. The application is dismissed.

(SHAMPA SARKAR, J.)

S. Kumar / R.D. Barua