

ORDER SHEET
AP-COM/534/2025
IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

M/S KANWAR ENTERPRISES PRIVATE LIMITED
VS
M/S SIMPLEX INFRASTRUCTURE LIMITED

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 23rd July, 2025.

Appearance:
Mr. Aritra Roy Chowdhury, Adv.
Mr. Sudipta Nayan Ghosh, Adv.
. . .for the petitioner.

Mr. Sohom Sen, Adv.
. . .for the respondent.

The Court:

1. This is an application for appointment of an Arbitrator in terms of Clause 25 of the work order dated October 1, 2016, duly amended on March 1, 2018. Both the work orders contain a similar arbitration clause. The clause provides that in the event of any dispute or difference arising out of or in connection with this work order, the same shall be first amicably settled by mutual dialogue. If the parties fail to settle their difference or dispute arising out of or in connection with the work order (including interpretation of the terms thereof), the same shall be referred to arbitration. The Arbitration proceedings shall be conducted by a single Arbitrator appointed by the Company Secretary of

Simplex Infrastructures Ltd., and the award/decision of such arbitrator shall be final and binding upon both the parties. The venue of the arbitration shall be Kolkata.

2. According to the petitioner, disputes arose out of the said work order when the bills raised were not paid in their entirety. By a letter dated November 20, 2018, the petitioner claimed Rs.46.85 Lakhs from the respondent. The payment was not made. By a notice dated July 3, 2020, the petitioner finally called upon the respondent to pay an outstanding of Rs.49,92,946/- along with interest at the rate of 18% and fees of Rs.11,000/- for cost of issuance of notice, within 15 days from the date of receipt of the said legal notice and consent to deposit the dues in accordance with law.
3. Notice was duly delivered upon the respondent. The delivery report is annexed to the application. A notice was issued under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 on December 16, 2020 by the learned Advocate for the petitioner. Thereafter, the suit was filed on March 5, 2021 before the Commercial Court No.8, Saket, New Delhi.
4. The respondent filed an application under Section 5 read with Section 8 of the Arbitration and Conciliation Act. The said application was heard and allowed by the learned Court and liberty was granted to the petitioner to approach the appropriate forum in terms of Clause 25 of the work order.

5. Mr. Roy Chowdhury submits that this application should be allowed in view of the fact that the mechanism provided under Clause 25 with regard to appointment of an Arbitrator by the Company Secretary of the respondent, was no longer good law.
6. Mr. Sen learned advocate for the respondent submits that the claim is time barred. Being aware of the arbitration clause, with mala fide intention. The petitioner instituted the suit before the learned Commercial Court at Saket, New Delhi. Even when the application was filed by the respondent for dismissal of the suit on the ground of existence of an arbitration clause, the petitioner continued to pursue the remedy before the Civil Court. Reference has been made to the submissions of the petitioner before the learned court to the effect that the petitioner had all along understood that there was no arbitration clause. Thus, when the petitioner's stand before the learned Civil Court was that there was no existence of an arbitration clause and the work order was not known to the petitioner, a contrary stand cannot be taken before this Court, by praying for reference of the dispute to Arbitration. Paragraphs 11, 16, 17, 18 and 19 of the order of the civil court have been relied upon in support of the contention that the Court had come to a specific finding that the work order was known to the petitioner and all actions, including raising of bills, execution of the works etc., were undertaken by the petitioner under the said work order. Thus, it cannot be accepted that the petitioner was unaware of the work order. It is further submitted that once the dues were claimed in 2018 for the

first time and thereafter in 2025, the claim had already become time barred. Even the invocation of the arbitration clause is barred by limitation.

7. Exclusion of time under Section 14 of the Limitation Act will not be available to the petitioner as the suit was a not bona fide proceeding and was not instituted by the petitioner in good faith. Reference has been made to a decision of the Kerala High Court in the matter of M/s. National Collateral Management Service Ltd. versus Valiyaparambil Traders passed in RFA No.469 of 2017.
8. Considered the rival submissions made by the parties. It is not in doubt that the work order dated October 1, 2016, which was duly amended on March 1, 2018, contains Arbitration Clauses. The petitioner had raised disputes with regard to non-payment of the entire dues for the first time in November, 2018. It appears that sometime in June, 2018, last payment was received from the respondent. Undoubtedly, the petitioner had approached the respondent under several legal provisions, claiming the dues, but the respondent did not take any step towards settlement. Thus, even if there is a provision for amicable settlement in Clause 25, the said provision cannot be made mandatory at a belated stage. Any further direction to settle the matter will be an empty formality.
9. The next question is whether this application should be rejected at this stage by the referral Court on the ground that, the demand which first arose in November 2018 cannot be referred to arbitration in July 2025, as the claim has become time barred. Section 14 of the Limitation Act

provides for exclusion of time consumed in a prior litigation, while computing the period of limitation to initiate any subsequent suit or proceeding, if the earlier suit or proceeding had been initiated in good faith before a Civil Court. The expression "Civil Court" has been elaborated by judicial pronouncements to mean proceedings before any tribunal or a Writ Court or under the SARFAESI Act. All prior proceedings of such nature will fall within the ambit of Section 14.

10. It is an admitted position that the suit was filed within the period of limitation, before the Civil Court in 2021. The proceeding was disposed of upon allowing the application filed by the respondent under Section 8 read with Section 5 of the Arbitration and Conciliation Act. The argument of the respondent that, Section 14 of the Limitation Act will not apply as the petitioner was not proceeding before the Civil Court in good faith must not be adjudicated by this referral court. It is a matter of evidence. The attending circumstances which led the petitioner to approach the civil court, must be weighed in evidence.
11. Moreover, the stand of the petitioner in the suit was that the arbitration clause in the work order was not known to it and the said clause was an unilateral insertion, without the consent and participation of the petitioner. The work order did not contain any signature of the petitioner. Such contentions of the petitioner was rejected by the learned Judge and the petitioner was granted liberty to approach the appropriate forum in terms of Clause 25 of the work order. Whether such finding will indicate mala fide on the part of the

petitioner, is also a matter to be adjudicated by the arbitrator. The applicability of the decision cited by the respondent will be relevant at the stage of adjudication of the issue of limitation by the learned Arbitrator. Whether Section 14 of the limitation Act should be applied in the case in hand, should not be decided by the referral court.

12. The referral Court is only required to satisfy itself about the existence of an arbitration clause. At best, the referral Court can weed out frivolous non-arbitrable claims which are ex-facie deadwood. In my prima facie view, the series of events as narrated hereinabove and the fact that the parties were litigating on the self-same claim in a suit, do not justify rejection of the prayer for reference to arbitration on the ground of limitation, inter alia, holding the claim to be time barred. All issues are left open, to be raised and decided by the learned Arbitrator. The scope of interference of a referral court is limited. The invocation was done within a few months from disposal of the suit and this application has also been filed within time.

13. Reference is made to the decision of the Hon'ble Apex Court in ***Aslam Ismail Khan Deshmukh vs ASAP Fluids Private Limited and Another*** reported in ***(2025) 1 SCC 502***. The relevant part is quoted below:-

“50. As evident from the aforesaid discussion and especially in light of the observations made in *Krish Spg. [SBI General Insurance Co. Ltd. v. Krish Spg., (2024) 12 SCC 1 : 2024 SCC OnLine SC 1754]* , this Court cannot conduct an intricate evidentiary enquiry into the question of when the cause of action can be said to have arisen between the parties and whether the claim raised by the petitioner is time-barred. This has to be strictly left for the determination by the Arbitral Tribunal. All other submissions made by the parties

regarding the entitlement of the petitioner to 4,00,000 and 2,00,010 equity shares in Respondent 1 company are concerned with the merits of the dispute which squarely falls within the domain of the Arbitral Tribunal.

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.

52. In order to balance such a limited scope of judicial interference with the interests of the parties who might be constrained to participate in the arbitration proceedings, the Arbitral Tribunal may direct that the costs of the arbitration shall be borne by the party which the Tribunal ultimately finds to have abused the process of law and caused unnecessary harassment to the other party to the arbitration.”

14. 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. 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 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.”

15. Under such circumstances, the Court appoints Mr. Shuvasish Sengupta, (Mob. No. 9830855276), as the Arbitrator, to arbitrate upon the dispute between the parties. This appointment is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996.
16. The learned Arbitrator shall fix his own remuneration as per the Schedule of the Arbitration and Conciliation Act.
17. All points including point of limitation are left open to be decided by the learned Arbitrator.
18. AP-COM 534 of 2025 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)