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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.03.2025

CORAM

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

Arb.O.P.(Com. Div.) No.448 of 2024

M/s.FIVE STAR BUSINESS FINANCE LIMITED

(Formerly known as M/s.Five Star Business Credits Ltd.)

Rep. by its Authorized Signatory,

Mrs.J. Saraswathi W/o.Karthick R,

New No.27, Old No.4, Taylor's Road,

Kilpauk, Chennai - 600 010.

... Petitioner

Vs.

1. R.O. Palanisamy

2. P. Kanammal

3. P. Tharanidharan

... Respondents

PRAYER: Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint a sole arbitrator to adjudicate the dispute between the petitioner and the respondents and to direct the respondents to pay the cost.

For Petitioner : Mr. R. Ganesan
Mr. M. Ajmal Azzath

For Respondents : Mr. M.S. Sampath
for Ms. Meera Gnanasekar



ORDER

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This petition has been filed under Section 11 of the Arbitration and Conciliation Act, seeking for appointment of an arbitrator by this Court.

2. Earlier, the very same petitioner had initiated arbitration against the respondents as per the arbitration clause contained in the loan contract, which is the subject matter of the dispute between the parties. The sole arbitrator appointed by the petitioner had also passed an arbitral award in favour of the petitioner against the respondents. Aggrieved by the same, the respondents challenged the arbitral award before this Court by filing an application under Section 34 of the Arbitration and Conciliation Act in O.P.Nos.241 and 252 of 2017. By order dated 05.01.2021, the learned Single Judge set aside the arbitral award dated 21.10.2016 passed in favour of the petitioner against the respondents.

3. According to the petitioner, the aforesaid arbitral award was not passed on merits. According to them, the learned Single Judge, while setting aside the arbitral award on 05.01.2021, had set aside the arbitral award only



on the ground that exorbitant interest was levied by the petitioner. Instead of preferring an appeal against the order dated 05.01.2021 passed in O.P.Nos.241 and 252 of 2017, the petitioner has once again initiated fresh arbitration. Prior to the filing of this petition under Section 11 of the Arbitration and Conciliation Act, seeking for appointment of an arbitrator by this Court, the petitioner had issued once again notices to the respondents on 24.06.2022 and 27.12.2022, calling upon the respondents to consent for arbitration.

4. The petitioner also claims that subsequent to the order dated 05.01.2021 passed in O.P.Nos.241 and 252 of 2017, the petitioner had approached an Arbitral institution for appointment of an arbitrator and the arbitrator was also appointed by the said institution. According to the petitioner, despite receiving notice from the arbitrator, appointed by the said institution, the respondents failed to participate in the said arbitration. Only under those circumstances, the petitioner claims that they have been constrained to file this petition under Section 11 of the Arbitration and Conciliation Act, seeking for appointment of an arbitrator by this Court.



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5. A counter has been filed by the respondents to this petition filed under Section 11 of the Arbitration and Conciliation Act, stating as follows:

a) The petition filed under Section 11 of the Arbitration and Conciliation Act is hopelessly barred by law of limitation;

b) In the order dated 05.01.2021, passed by the learned Single Judge of this Court in O.P.Nos.241 and 252 of 2017, through which the earlier arbitral award passed in favour of the petitioner against the respondents was set aside, leave was not granted for the petitioner to initiate fresh arbitration;

c) Order dated 05.01.2021 passed by the learned Single Judge of this Court in O.P.Nos.241 and 252 of 2017, setting aside the earlier arbitral award passed in favour of the petitioner against the respondents, is an order passed on merits and therefore, this petition amounts to *res judicata*.

6. Heard Mr. R. Ganesan and Mr. M. Ajmal Azzath, learned counsels for the petitioner and Mr. M.S. Sampath representing Ms. Meera Gnanasekar, learned counsel for the respondents.

7. Learned counsel for the petitioner drew the attention of this Court



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to the order of the learned Single Judge dated 05.01.2021 passed in O.P.Nos.241 and 252 of 2017 through which the earlier arbitral award was set aside and would submit that as seen from paragraph No.25 of the said order, there is a reference to a decision rendered by the Honourable Supreme Court in the case of ***McDermott International Inc. Vs. Burn Standard Co. Ltd.***, reported in ***(2006) 11 SCC 181***. According to the petitioner, as per the said judgment, if an arbitral award is set aside in case of fraud or bias by the arbitrators, violations of natural justice, etc., the parties are at liberty to seek for fresh arbitration. According to him, since the learned Single Judge while deciding O.P.Nos.241 and 252 of 2017 on 05.01.2021, has followed the decision of ***McDermott International Inc. Vs. Burn Standard Co. Ltd.***, ***(2006) 11 SCC 181*** referred to supra, an implied leave has been granted to the petitioner to initiate fresh arbitration.

8. Learned counsel for the petitioner would submit that as per Article 141 of the Constitution of India, the law declared by the Honourable Supreme Court is the law of the land and therefore, it is clear that an implied leave has been granted to the petitioner to initiate fresh arbitration.



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9. Learned counsel for the petitioner also drew the attention of this Court to the following authorities:

i. Shree Ram Mills Ltd., Vs. Utility Premises (P) Ltd., reported in MANU/SC/1999/2007;

ii. Aakash Educational Services Ltd., Vs. Lotus Education and Others reported in 2024 SCC Online Del 1223;

iii. GOQII Technologies Private Ltd., Vs. Sokrati Technologies Pvt. Ltd. reported in 2025 (2) SCC 192.

10. The aforesaid decisions have been relied upon to support the following propositions:

a) Limitation is a mixed question of fact and law. Therefore, once there exists an arbitration clause in the subject matter of the contract, this Court while deciding an application under Section 11 of the Arbitration and Conciliation Act, has to necessarily appoint an arbitrator as this Court will have to only look into the *prima facie* existence of arbitration clause;

b) The primary intention behind amending Section 11 of the Arbitration and Conciliation Act is to reduce the extent of judicial



intervention with the exception of situations in which there appears to be no legitimate arbitration agreement. While deciding an application under Section 11 of the Arbitration and Conciliation Act, the referral Court cannot delve into the issue of limitation as the same can be agitated before the arbitral tribunal.

c) The scope of Section 11 (6) is limited. There is no necessity for the referral Court to adjudicate on merits by undertaking a detailed examination of the factual matrix.

11. Relying upon the aforesaid decisions, the learned counsel for the petitioner would submit that both the limitation issue as well as the issue raised by the respondents that no leave was granted by the learned Single Judge while passing the order dated 05.01.2021 can be reserved for the arbitrator to decide.

12. On the other hand, the learned counsel for the respondents would submit that the petition filed before this Court under Section 11 of the Arbitration and Conciliation Act is hopelessly barred by the law of limitation. He would submit that the order setting aside the earlier arbitral



award passed in favour of the petitioner under Section 34 of the Arbitration and Conciliation Act was passed on 05.01.2021. However, this petition was filed under Section 11 of the Arbitration and Conciliation Act only on 26.04.2024 beyond the period of three years from the date of the said order passed by the learned Single Judge, setting aside the arbitral award under Section 34 of the Arbitration and Conciliation Act.

13. Learned counsel for the respondents would also submit that the dispute as raised by the petitioner arose in the year 2014 itself, when the petitioner had invoked arbitration by issuing notice to the respondents to comply with the requirement of Section 21 of the Arbitration and Conciliation Act. According to him, even though the petitioner had sent one more notice to the respondents, subsequent to the arbitral award being set aside by the learned Single Judge of this Court, the said notice has no bearing for the facts of the instant case since the cause of action for filing the arbitral claim against the respondents arose in the year 2014 itself. According to him, issuance of fresh notice invoking arbitration in the year 2022 by the petitioner will not save limitation.



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14. Learned counsel for the respondents also submitted that in the order dated 05.01.2021 passed by the learned Single Judge by this Court, setting aside the arbitral award, no leave was granted for the petitioner to initiate fresh arbitration. He would submit that the reference to the ***McDermott International Inc. Vs. Burn Standard Co. Ltd., (2006) 11 SCC 181*** decision rendered by the Honourable Supreme Court in the order dated 05.01.2021 passed by the learned Single Judge of this Court will not imply that leave was granted to the petitioner to initiate fresh arbitration. He would also submit that the order dated 05.01.2021 passed by the learned Single Judge of this Court setting aside the earlier arbitral award passed in favour of the petitioner against the respondents is an order passed on merits. However, the same is disputed by the learned counsel for the petitioner. According to the learned counsel for the respondents since the order was passed on merits, the present petition filed under Section 11 of the Arbitration and Conciliation Act, seeking for appointment of an arbitrator by this Court will amount to *res judicata*.

15. Learned counsel for the respondents drew the attention of this



Court to the following authorities:

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a) A decision of the Honourable Supreme Court in the case of ***M/s.ARIF Azim Co. Ltd. Vs. M/s.APTECH Ltd. reported in AIR 2024 SC 1347***. Relying upon the aforesaid decision, the learned counsel for the respondents would submit that the referral Court under Section 11(6) of the Arbitration and Conciliation Act 1996 is empowered to dismiss the petition under Section 11 of the Arbitration and Conciliation Act if the claim of the petitioner is barred by limitation. In particular, he referred to paragraph No.89 of the aforesaid decision of the Honourable Supreme Court, wherein the Honourable Supreme Court has made it clear that the referral Courts should satisfy themselves on two aspects by employing a two-pronged test viz., (a) whether the petition under Section 11(6) of the Arbitration and Conciliation Act is barred by limitation; and (b) 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. According to the learned counsel for the respondents, the Honourable Supreme Court has held that 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.



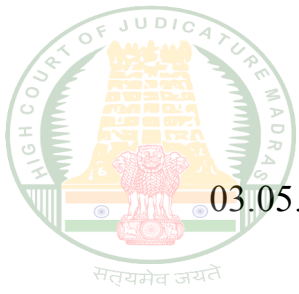
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16. Learned counsel for the respondents also relied upon a decision rendered by the Delhi High Court in the case of *Tarun Kumar Jain Vs. Municipal Corporation of Delhi (MCD) reported in 2011 (2) Arbitration LR 397*. According to the learned counsel for the respondents, as seen from the said decision it is clear that the petitioner ought to have approached this Court within a period of three years from the date of the order passed by the learned Single Judge of this Court, setting aside the earlier arbitral award passed against the petitioner. Having filed this petition only on 26.04.2024, beyond the period of three years, this petition has to be dismissed on the ground of limitation.

17. Discussion:

The following are the undisputed facts:

- a) The cause of action for initiating arbitration against the respondents by the petitioner arose in the year 2014 itself;
- b) The petitioner had earlier invoked arbitration in accordance with the arbitration clause contained in the contract, which is the subject matter of the dispute between the parties by appointing a sole arbitrator in the year 2014 itself through its arbitration invocation notice which is dated



03.05.2014;

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c) The sole arbitrator appointed by the petitioner also passed an arbitral award against the respondents on 21.10.2016, directing the respondents to pay certain sums of money to the petitioner which was found to be due under the loan contract, which is the subject matter of the dispute between the parties;

d) The respondents challenged the arbitral award dated 21.10.2016 by filing an application under Section 34 of the Arbitration and Conciliation Act before this Court through O.P.Nos.241 and 252 of 2017;

e) By order dated 05.01.2021, a learned Single Judge of this Court allowed O.P.Nos.241 and 252 of 2017 filed by the respondents by setting aside the arbitral award dated 21.10.2016;

f) No appeal was filed by the petitioner as against the order dated 05.01.2021 passed in O.P.Nos.241 and 252 of 2017;

g) Earlier, the petitioner had invoked arbitration when the cause of action for the dispute arose by issuing notice to the respondents on 03.05.2014 to comply with the requirements of Section 21 of the Arbitration and Conciliation Act, 1996;

h) A second arbitration invocation notice, subsequent to the passing



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of the order dated 05.01.2021 passed by the learned Single Judge through which the earlier arbitral award was set aside, was sent by the petitioner to the respondents on 24.06.2022;

i) This petition was filed under Section 11 of the Arbitration and Conciliation Act seeking for appointment of an arbitrator only on 26.04.2024, which is beyond the period of 3 years from the date of the order passed by the learned Single Judge of this Court, i.e., on 05.01.2021 setting aside the earlier arbitral award passed in favour of the petitioner against the respondents.

18. In this petition, the petitioner has stated through their averments that leave was obtained from the learned Single Judge of this Court through the order dated 05.01.2021 passed in O.P.Nos.241 and 252 of 2017 for initiating fresh arbitration. However, as seen from the order dated 05.01.2021 passed by the learned Single Judge, no leave was granted by the learned Single Judge to initiate fresh arbitration.

19. As seen from the aforesaid facts, it is clear that this petition has been filed beyond the period of 3 years from the date of the order passed by



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the learned Single Judge of this Court, setting aside the earlier arbitral award passed in favour of the petitioner. The cause of action for initiating arbitration by the petitioner against the respondents arose in the year 2014 itself. The petitioner had also invoked arbitration earlier by issuing notice to the respondents in the year 2014 itself (03.05.2014), as per the provisions of Section 21 of the Arbitration and Conciliation Act. Pursuant to the same, the petitioner had also appointed an arbitrator unilaterally and the said arbitrator had also passed an arbitral award in favour of the petitioner against the respondents.

20. It is also seen from the order dated 05.01.2021 passed by the learned Single Judge of this Court, setting aside the earlier arbitral award, that no specific leave was granted for the petitioner to initiate fresh arbitration against the respondents. However, the learned counsel for the petitioner during the course of his submissions would submit that since the learned Single Judge has followed the decision rendered by the Honourable Supreme Court in *McDermott International Inc. Vs. Burn Standard Co. Ltd., (2006) 11 SCC 181* case, it is implied that leave was granted to the petitioner to initiate fresh arbitration.



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21. In ***McDermott International Inc. Vs. Burn Standard Co. Ltd., (2006) 11 SCC 181*** case which was relied upon by the learned Single Judge, while setting aside the arbitral award, it has also been made clear that only in few circumstances like, in case of fraud or bias, violation of natural justice, etc., the Court can quash the award, leaving the parties free to begin the arbitration again if it is desired. In the case on hand, the respondents categorically contends that the order dated 05.01.2021 passed in O.P.Nos.241 and 252 of 2017 is an order passed on merits. However, the same is disputed by the learned counsel for the petitioner. Eventhough the learned Single Judge of this Court while passing the order dated 05.01.2021 in O.P.Nos.241 and 252 of 2017 has followed ***McDermott International Inc. Vs. Burn Standard Co. Ltd., (2006) 11 SCC 181*** rendered by Honourable Supreme Court, no leave has been granted for the petitioner to initiate fresh arbitration.

22. As seen from the order dated 05.01.2021 passed by the learned Single Judge of this Court in O.P.Nos.241 and 252 of 2017, it is not a cryptic order. A detailed reasoning has been given by the learned Single



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Judge for setting aside the arbitral award passed in favour of the petitioner against the respondents. In the operative portion of the order dated 05.01.2021 passed in O.P.Nos.241 and 252 of 2017, the following observations have been made by the learned Single Judge, which will reveal that the order has been passed on merits and no leave was granted to the petitioner to initiate fresh arbitration:

"owing to the trajectory of the matter, this Court deems it appropriate to extract Paragraph 52 of McDermott case [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181], which reads as follows:

'52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is



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desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.'

Owing to the discussion and dispositive reasoning thus far both captioned OPs are allowed. To be noted, though the prayer talks about setting aside the awards on several grounds, it will suffice to say that this Court by saying that the OPs are allowed means that impugned awards are set aside. This shall be borne in mind while drafting process is done by Registry qua this order. Consequently A.Nos.1760 of 2017 and A.No.1821 of 2017 stand closed. Owing to the trajectory of the hearing today, there shall be no order as to costs.



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23. Being an order passed on merits, the petitioner instead of preferring an appeal against the said order, has chosen to initiate fresh arbitration that too belatedly beyond the period of limitation. This petition filed under Section 11 of the Arbitration and Conciliation Act, is hopelessly barred by the law of limitation due to the following reasons:

a) No leave was obtained by the petitioner from the learned Single Judge when he had set aside the earlier arbitral award through his order dated 05.01.2021 passed in O.P.Nos.241 and 252 of 2017 to initiate fresh arbitration. Neither did the petitioner seek such a leave.

b) The cause of action for the dispute arose in the year 2014 itself. Unless and until the petitioner was granted leave to initiate fresh arbitration, the question of calculating limitation from the date of the fresh arbitration invocation notice, subsequent to the order dated 05.01.2021 passed by the learned Single Judge in O.P.Nos.241 and 252 of 2017 i.e., in the year 2022, does not arise;

c) The cause of action for initiating arbitration arose in the year 2014 itself and the petitioner had also invoked arbitration by issuing notice to the respondents on 03.05.2014 itself in compliance with Section 21 of the



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Arbitration and Conciliation Act. Pursuant to the said notice, arbitration was also initiated and an arbitral award was also passed. However, the said arbitral award was set aside by a learned Single Judge of this Court. The period of limitation for filing an application under Section 11 of the Arbitration and Conciliation Act will commence from 03.05.2014 when the petitioner had invoked the arbitration clause. Since the arbitral award was set aside by a learned Single Judge of this Court, this Court is of the considered view that even if the said arbitral award was not passed on merits and an implied leave was granted to the petitioner to initiate fresh arbitration, the issuance of fresh arbitral invocation notices on 24.06.2022 and 27.12.2022 will not save limitation as the cause action for initiating arbitration arose in the year 2014 itself. Even if the time spent by the petitioner before the arbitral proceedings and before this Court which culminated in the arbitral award being set aside by a learned Single Judge of this Court on 05.01.2021 is excluded as per Section 14 of the Limitation Act for the purpose of saving limitation, the present petition is hopelessly barred by law of limitation since this petition was filed only on 26.04.2024 beyond the period of three years from 05.01.2021 as the cause of action for initiating arbitration arose in the year 2014 itself which was also initiated by



the petitioner through their arbitration invocation notice dated 03.05.2014.

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Fresh arbitration invocation notices sent by the petitioner subsequent to the order passed by the learned Single Judge on 05.01.2021 setting aside the arbitral award will not save limitation as the cause of action for invoking arbitration arose in the year 2014 itself and only the time spent in the earlier arbitration and the time spent before this Court in the Section 34 petition can be excluded for the purpose of saving limitation;

c) In this petition filed before this Court, an averment has been made that since the learned Single Judge has followed ***McDermott International Inc. Vs. Burn Standard Co. Ltd., (2006) 11 SCC 181*** the decision of the Honourable Supreme Court, leave has been granted to the petitioner to initiate fresh arbitration. However, as seen from the order dated 05.01.2021 passed by the learned Single Judge in O.P.Nos.241 and 252 of 2017, eventhough the learned Single Judge had followed ***McDermott International Inc. Vs. Burn Standard Co. Ltd., (2006) 11 SCC 181*** decision of the Honourable Supreme Court, he has thought it fit not to grant leave to the petitioner to initiate fresh arbitration. Orders of Courts cannot be interpreted through implication and if the said practice is followed, litigation will never attain finality. When the order of the learned Single



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Judge makes it clear that no leave was granted for the petitioner to initiate fresh arbitration, the matter ends there. Instead of challenging the order passed by the learned Single Judge, the petitioner for reasons best known to them have initiated fresh arbitration, which is also hopelessly barred by the law of limitation.

24. *McDermott International Inc. Vs. Burn Standard Co. Ltd., (2006) 11 SCC 181* decision also states that the parties will have to agree for fresh arbitration. In the instant case, the respondents have not agreed for initiation of fresh arbitration by the petitioner. Therefore, the contention of the respondents that no leave was granted for the petitioner to initiate fresh arbitration has to be accepted by this Court.

25. For a cause of action, which arose in the year 2014, the petitioner seeks to revive the claim by initiating fresh arbitration in the year 2022 and by filing this petition on 26.04.2024, beyond the period of 3 years from 05.01.2021 when the learned Single Judge of this Court through his order passed in O.P.Nos.241 and 252 of 2017 set aside the arbitral award, which was earlier passed in favour of the petitioner against the respondents.

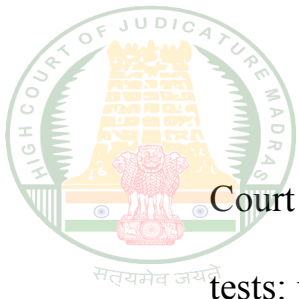


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26. The improper conduct of the petitioner is also to be taken note of.

The petitioner subsequent to the order dated 05.01.2021 passed in O.P.Nos.241 and 252 of 2017 had once again appointed another arbitrator through an Arbitral institution. They have also named an arbitrator. According to the petitioner, since the respondents had raised objections with regard to the appointment of the arbitrator by the Arbitral institution, they are constrained to file this petition under Section 11 of the Arbitration and Conciliation Act. They have chosen to file this petition under Section 11 of the Arbitration and Conciliation Act, which is hopelessly barred by the law of limitation for the reasons stated supra.

27. The Honourable Supreme Court in the case of ***M/s.ARIF Azim Co. Ltd. Vs. M/s.APTECH Ltd. reported in AIR 2024 SC 1347*** has held that a referral Court should satisfy itself that the petition is within the period of limitation and that the claim is not an *exfacie* dead claim. The Honourable Supreme Court in paragraph No.89 of the aforesaid decision has held that while considering the issue of limitation in relation to the petition under Section 11(6) of the Arbitration and Conciliation Act, the



Court should satisfy themselves on two aspects by employing two-pronged

tests: viz

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a) Whether the petition under Section 11 (6) of the Arbitration and Conciliation Act is barred by limitation;

b) Whether the claims sought to be arbitrated are *ex-facie* dead claims and are thus barred by limitation on the date of commencement of arbitral proceedings.

28. The Honourable Supreme Court has held that 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. The case on hand is a case, which is hopelessly barred by the law of limitation as seen from the discussion referred to supra. Therefore, when it is abundantly clear that the claim of the petitioner is hopelessly barred by the law of limitation, the need for appointment of an arbitrator by this Court does not arise.

29. The decisions relied upon by the learned counsel for the petitioner viz., *i. Shree Ram Mills Ltd., Vs. Utility Premises (P) Ltd., reported in MANU/SC/1999/2007;*



ii. Aakash Educational Services Ltd., Vs. Lotus Education and

Others reported in 2024 SCC Online Del 1223;

iii. GOQII Technologies Private Ltd., Vs. Sokrati Technologies Pvt.

Ltd. reported in 2025 (2) SCC 192

have no bearing for the facts of the instant case. Since those decisions did not deal specifically with an arbitral claim, which is hopelessly barred by the law of limitation, they are not applicable to the facts of the instant case, where the arbitral claim is hopelessly barred by law of limitation. Only when there is a doubt with regard to whether the claim of the petitioner is barred by limitation or not, an in-depth analysis need not be made by the referral Court and the said issue will have to be left open for the arbitrator to decide since the limitation issue will then become a mixed question of fact and law. The case on hand is a case where it is undoubtedly clear that the arbitral claim of the petitioner against the respondents is hopelessly barred by the law of limitation.

30. For the foregoing reasons, this Court does not find any merit in this petition since the petition is hopelessly barred by the law of limitation. However, the learned counsel for the petitioner would submit that the



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respondents had mortgaged their properties in favour of the petitioner to secure the loan and therefore, the petitioner's right to pursue a mortgage

claim against the respondents by filing a Civil Suit should not be defeated.

For a mortgage claim, the limitation is 12 years from the date when the cause of action arose. Mortgage claims are also non arbitrable disputes since the said claim is an action in rem. If so advised, the petitioner can approach a Civil Court to redress their mortgage remedy, if any. Therefore, liberty is granted to the petitioner to approach a Civil Court by filing a mortgage claim against the respondents. The respondents are also granted liberty to raise all objections as and when such a Civil Suit is filed by the petitioner which includes raising the defence of limitation.

31. Accordingly, this petition is dismissed. No Costs.

12.03.2025

Index : Yes/No
Speaking Order : Yes / No
Neutral Citation Case: Yes
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ABDUL QUDDHOSE. J.,

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