

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION APPLICATION NO.115 OF 2026

Vardhaman Builders

...Applicant

Versus.

Narendra Balasaheb Ghatge and Anr.

...Respondents

Mr. Kevic Setalvad, *Senior Advocate with Mr. Jehan Lalkaka, Ms. Poorva Garg, and Mr. Simon Mascarenhas i/b. M/s. Mulla & Mulla & Craigie Blunt & Caroe for the Applicant.*

Mr. Mayur Khandeparkar *i/b. Mr. Kevin Pereira for the Respondents.*

CORAM: SANDEEP V. MARNE, J.

Reserved On: 4 May 2026.

Pronounced On: 8 May 2026.

Judgment:

1) This is an Application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (**the Arbitration Act**) for adjudication of Applicant's claim for damages and losses arising out of termination of Development Agreement dated 27 August 2005. This is a second round of arbitration sought to be initiated by the Applicant. In the earlier round, Award dated 22 November 2011 was made rejecting the Applicant's claim for specific performance as well as for damages. In Section 34 Petition, this Court set aside the Award by order dated 8

February 2017. The Appeal against Section 34 order is pending before the Division Bench of this Court. Since the Award is set aside, the Applicant has sought fresh round of arbitration, this time confining its claim only to damages and losses on account of breach of the Development Agreement. The Application is opposed by the Respondents on various grounds.

2) Briefly stated, facts of the case are that Respondent No.1 and late Vasant Ghatge (father of Respondent No.2) executed Memorandum of Understanding (**MoU**) on 30 November 2003 for development of the property bearing TPS No.49/CTS No.323 situated at Mahadevbhai Desai Road, Borivali (E) (**subject property**) as a joint venture. On 27 August 2005, Respondents and the Applicant entered into MoU by which the 2003 MoU was modified and the property was to be developed exclusively by the Applicant by paying lump-sum consideration of Rs.1.50 crores to the Respondents in addition to two flats of 1000 sq.ft. free of cost and sale of one flat to Respondent No.1 at concessional rate. The Respondents terminated the MoU on 24 July 2006. The Applicant invoked arbitration under clause 18 of the 2005 Agreement by issuing notice dated 2 September 2006. This Court appointed the sole Arbitrator for adjudication of disputes relating to termination of the Agreement by order dated 19 July 2007. The learned Arbitrator made an Award dated 22 November 2011 rejecting the Applicant's claim for specific performance as well as the alternative claim for damages.

3) The Applicant filed Petition under Section 34 of the Arbitration Act challenging the arbitral Award dated 22 November 2011. The Petition was allowed by this Court vide order dated 8 February 2017 and the Award is set aside. The Respondents filed Appeal under Section 37 of the Arbitration Act before the Division Bench, which dismissed the Appeal by order dated 24 November 2017. The Applicant accordingly filed fresh Section 11 Application being Arbitration Application No.78 of 2018 for appointment of Arbitrator for conduct of fresh round of arbitration. However, by its order dated 6 April 2018 the Apex Court set aside the Appeal Court's order dated 24 November 2017 and remanded the Appeal for fresh decision by the Division Bench.

4) In view of the Supreme Court's order remanding the Appeal, the Applicant unconditionally withdrew Arbitration Application No.78 of 2018. The Arbitration Appeal No.257 of 2017 has been admitted by the Division Bench by order dated 7 January 2019.

5) In the meantime, Respondents entered into Development Agreement with another Developer for development of the subject property on 25 June 2018. The Applicant initially filed Interim Application in pending Appeal seeking interim stay against the new Developer, which was disposed of by order dated 24 April 2023 granting liberty to the Applicant to take out appropriate application, including Section 9 Petition. On 20 June 2023, the Applicant invoked arbitration and filed Commercial Arbitration Application No.165 of 2023 for appointment of Arbitrator. Parallely, Applicant also filed Commercial

Arbitration Petition No.321 of 2023 under Section 9 of the Arbitration Act seeking interim measures, which was dismissed by order dated 11 July 2023. The Division Bench set aside order dated 11 July 2023 and remanded Section 9 Petition for fresh adjudication.

6) The remanded Section 9 Petition and pending Section 11 Application were taken up for analogous hearing by the Single Judge of this Court. By order dated 19 April 2024, the learned Single Judge dismissed Section 11 Application as well as Section 9 Petition. The Applicant filed SLP (C) No. 13686 of 2024 challenging order dated 19 April 2024, which was dismissed by order dated 2 September 2024.

7) Applicant believed that it had the liberty to pursue claim for damages even after dismissal of its Section 11 Application (*165 of 2023*). The Applicant therefore filed a fresh application under Section 11 of the Arbitration Act (Commercial Arbitration Application No. 383 of 2024) seeking re-arbitration reference of disputes, which was disposed of by order dated 3 November 2025 granting liberty to the Applicant to issue fresh invocation notice to the Respondents in respect of claim for damages only and to file fresh Section 11 Application.

8) In pursuance of liberty granted to the Applicant by order dated 3 November 2025, it issued fresh arbitration invocation notice dated 9 January 2026 seeking damages and losses from the Respondents. Since Notice remained unresponsive, the Applicant has filed the present Application under Section 11 of the Arbitration Act.

9) The Application is opposed by the Respondents by filing affidavit in reply. The Application was heard by this Court on 10 March 2026. During the course of hearing, it was urged on behalf of the Respondents the order passed in Application 383 of 2024 was inconsistent with the order earlier passed in Application 165 of 2023. However, the Respondents had not challenged the Order passed in Application 383 of 2024. Realizing this and towards the end of the arguments, the Respondents expressed their desire to challenge order passed by the learned Single Judge on 3 November 2025 in Commercial Arbitration Application No.383 of 2024 before the Apex Court. Accordingly, following order was passed on 10 March 2026:

1. The arguments in the Application have commenced. I have heard Mr. Setalvad, the learned Senior Advocate appearing for the Applicant and Mr. Khandeparkar, the learned counsel appearing for the Respondents. While the arguments were at the last leg, Mr. Khandeparkar makes a statement that the Respondents would like to test the judgment dated 3 November 2025 passed in Commercial Arbitration Application No.383 of 2024 before the Hon'ble Supreme Court. He would therefore request that the hearing be interdicted at this stage and be deferred by a period of three weeks.

2. At the request of Mr. Khandeparkar, further hearing of the Application is deferred till 10 April 2026. List the Petition as part-heard on 10 April 2026 under the caption 'for directions'.

10) Accordingly, the Respondents filed SLP(C) No.21645 of 2026 before the Apex Court challenging the order passed by the learned Single Judge on 3 November 2025 in Commercial Arbitration Application No.383 of 2024. The SLP has been dismissed by order dated 30 April 2026. Accordingly, the hearing of the Petition resumed, and I have considered further submissions made on behalf of the parties.

11) Mr. Setalvad, the learned Senior Advocate appearing for the Applicant submits that Application is filed in pursuance of specific liberty granted by this Court by order dated 3 November 2025 passed in Commercial Arbitration Application No. 383 of 2024. That arbitration reference is now restricted to the claim of the Applicant for damages arising out of wrongful termination of the Development Agreement. He submits that the order passed by this Court on 19 April 2024 in Commercial Arbitration Application No.165 of 2023 does not come in the way of the Applicant seeking fresh reference in respect of the claim for damages as this Court had declined reference only in respect of prayer for specific performance observing that the Applicant's claim for damages can always await finality of decision of the Appeal. That in the subsequent order dated 3 November 2025, this Court has held that if the Applicant can invoke arbitration after disposal of the Appeal, it can also invoke the same during pendency thereof. He therefore submits that mere pendency of the Appeal cannot be a reason for not making fresh reference to arbitration. That this Court has already clarified that fresh arbitral proceedings would be subject to outcome of the pending appeal. He relies on judgment of this Court in **Edelweiss Financial Services Limited V/s. Percept Finserve Private Limited¹** in support of his contention that the Application is within limitation and that the issue of claim limitation needs to be left open to be decided by the Arbitral Tribunal. Even the claim is within the period of limitation since the Appeal against the Award is still pending. He accordingly prays for making the reference for appointment of an Arbitrator.

¹ COMMERCIAL ARBITRATION APPLICATION (L) NO.5187 OF 2026, decided on 9 March 2026

12) The Application is opposed by Mr. Khandeparkar, the learned counsel appearing for the Respondents. He submits that the Apex Court has left all the objections open while deciding the present application. That this Court has merely granted liberty to the Applicant to file fresh Section 11 Application by order dated 3 November 2025. That mere grant of liberty does not mean that application is *per se* maintainable in law. He submits that the Application is grossly barred by limitation. In support, he relies on judgment of the Apex Court in **HPCL Bio-fuels Ltd. Versus. Shahaji Bhanudas Bhad²**. That the Applicant can either rely on the factum of pendency of Appeal or can seek reference ignoring the position of filing of Appeal. That if former is true (*pendency of appeal*) the present application is premature. On the other hand, if the latter is proved (*right to invoke fresh arbitration regardless of pendency of appeal*) then Applicant must satisfy that application is within the period specified in Article 137 of the Limitation Act, 1963 (**Limitation Act**). In that case the cause of action would arise on 8 February 2017 when Section 34 Petition was allowed, and the Award was set aside. That the Applicant cannot seek to rely on pendency of Appeal to explain the delay while ignoring the same for the purpose of seeking reference during pendency of the Appeal. He would accordingly pray for dismissal of the Application.

13) Rival contentions urged on behalf of the parties now fall for my consideration.

14) It must be observed at the very outset that filing of multiple proceedings by the Applicant for getting its claims adjudicated relating to specific performance and damages due to termination of Development Agreement, has undoubtedly created a lot of confusion. One has to traverse through the maze of litigation undertaken by the Applicant for examining the issue of permissibility to grant prayer sought for in the present Application. The brief details of litigation undertaken by the Applicant are as under:

- (i) Applicant filed claim for specific performance and in the alternative for damages before the learned sole Arbitrator, which was rejected vide Award dated 22 November 2011.
- (ii) Arbitration Petition No.286 of 2012 was filed by Applicant under Section 34 of the Arbitration Act, which was allowed by the learned Single Judge of this Court by judgment dated 8 February 2017 by setting aside the Award.
- (iii) Arbitration Appeal No.257 of 2017 was filed by the Respondents under Section 37 of the Arbitration Act, which was initially dismissed by order dated 24 November 2017.
- (iv) Due to dismissal of Section 37 Appeal, the Applicant filed Application under Section 11 of the Arbitration Act (*Arbitration Application No.78 of 2018*) for recommencement of the arbitral proceedings.
- (v) Dismissal of the Arbitration Appeal was questioned by the Respondent before the Supreme Court and the order 24 November

2017 dismissing the Appeal was set aside and the Appeal was remanded for fresh decision by the Supreme Court by order dated 6 April 2018.

(vi) Due to order passed by the Apex Court restoring the Appeal, the Applicant withdrew Arbitration Application No.78 of 2018 since challenge to the order setting aside Award was restored by the Apex Court.

(vii) Due to appointment of new developer by the Respondents, the Applicant filed Petition under Section 9 (*Commercial Arbitration Petition No.321 of 2023*).

(viii) Applicant also filed Application under Section 11 (*Commercial Arbitration Application No.165 of 2023*) for appointment of Arbitrator pursuant to invocation notice dated 20 June 2023.

(ix) Section 9 Petition was dismissed on 11 July 2023, but the Division Bench set aside such dismissal and remanded Section 9 Petition for fresh adjudication by order dated 19 December 2023.

(x) Section 11 Application (*Commercial Arbitration Application No.165 of 2023*) was dismissed by the learned Single Judge by order dated 19 April 2024. By the same order, Section 9 Petition was also dismissed.

(xi) Supreme Court confirmed order dated 19 April 2024 dismissing Section 9 Petition and Section 11 Application.

(xii) Under a belief that it has right to get adjudicated the claim for damages, Applicant filed yet another Application under Section

11 (*Commercial Arbitration Application No.383 of 2024*) seeking re-arbitration reference in respect of claim for damages.

(xiii) By order dated 3 November 2025, Commercial Arbitration Application No.383 of 2024 was disposed of without making reference to Arbitral Tribunal, but granting liberty to issue fresh invocation notice and to file a fresh Section 11 Application.

(xiv) The present Application is filed under Section 11 in pursuance of liberty granted by order dated 3 November 2025.

15) What particularly stares the Applicant is the judgment and order dated 19 April 2024 passed in Commercial Arbitration Application No. 165 of 2023 denying reference on the ground that the claim is *ex-facie* barred by limitation. At the time of filing of Application No. 165 of 2023, Applicant was desirous of pressing relief both for specific performance as well as damages in *lieu* of performance. It had also file Section 9 Petition for seeking restraint order against the Respondents from proceeding ahead with the new developer for development of the subject property. This Court however rejected both Section 11 Application as well as Section 9 Petition on the ground that Section 11 application was *ex-facie* barred by limitation as appointment of Arbitrator was sought to be made in order to reiterate the claim of specific performance and the arbitration was invoked in the year 2006. This Court held in para-47 of the judgment as under:

47. Following the said principle, since Section 11 Application can be maintained, when I have considered the same, it is *ex-facie* barred by limitation, as the appointment of Arbitrator is sought to be made in

order to reiterate the claim of specific performance, where the arbitration has been invoked in the year 2006 itself and on its invocation the claim was preferred and rejected by the Tribunal. The Application, being barred by limitation, cannot be entertained.

16) Mr. Setalwad has however relied on certain observations made while dismissing Application No. 165 of 2023 in relation to alternative relief of damages/compensation. This Court held in the judgment dated 19 April 2024 as under:

It is not a case, where Vardhaman can avail no option than seeking specific performance, as on parting with the sum merely of Rs.22,00,000/-, which amount is also secured as it was deposited by the Respondents, **it can always be compensated in terms of money** and, therefore, the balance of convenience lies in favour of the owners, as the building stand demolished and it await the re-development alongwith the five tenants in the building, as against the claim of Vardhaman for enforcement of the MOUs executed in the year 2003/2005 and it is almost two decades, since the understanding was reached with the owners, who then intended to redevelop their property with the arrangement being worked out with Vardhaman.

(emphasis added)

17) Even while dismissing Section 9 Petition, this Court held in para-48 of the judgment as under:

48. For the reasons recorded above, CARBP/321/23, seeking interim measures, on consideration of merits deserve a dismissal as it is already recorded by me that Respondent No.3 claiming through and under Respondent Nos.1 and 2 has already progressed with the project from the year 2018 and on the guise of seeking specific performance of the Agreement against Respondent Nos.1 and 2, where the investment of Vardhaman is only to the tune of Rs.22,00,000/-, it cannot scuttle the arrangement entered between Respondent Nos.1 and 2 on one hand and Respondent No.3 on the other, when there are other stake bearers like tenants who are involved, and the building having been demolished, it cannot jump into the project, **as ultimately its claim for damages can always await the finality of the decision of the**

Appeal, which is pending before this Court. Accordingly, CARBP/321/23 stands dismissed.

(emphasis added)

18) It is thus sought to be suggested on behalf of the Applicant that the findings recorded by this Court about claim being barred by limitation applied only to the relief of specific performance and that the claim for damages/compensation was not held to be barred by limitation. It is contended that the Court has held in Application No. 165 of 2023 that the claim for damages can be adjudicated after decision of the pending Appeal.

19) However, it is not necessary for me to undertake the exercise of interpretation of findings recorded by this Court in judgment dated 19 April 2024 in Application No. 165 of 2023. This is because the exercise is already undertaken by this Court while dismissing subsequent Section 11 Commercial Arbitration Application No. 383 of 2024. The Applicant interpreted the Order passed in Commercial Arbitration Application 165 of 2023 to mean grant of liberty to have adjudicated the claim for damages and accordingly filed Commercial Arbitration Application No. 383 of 2024, this time restricting the adjudication of claim only to damages/compensation. While disposing of Commercial Arbitration Application No. 383 of 2024, this Court has held in paras-18 to 20 of the judgment as under:

18. Yet, one cannot lose sight of the fact that if Appeal 257 were to be rejected, it would follow that the Arbitral Award was always validly set aside. **That would lead to the arbitration agreement subsisting,**

warranting adjudication in arbitration from square one, indeed this time focussing solely on damages for wrongful termination, and not on specific relief. If one were to consider that the time to invoke arbitration has passed and it can never be invoked ever again, that would be in conflict with the aforesaid position.

19. It is because Vardhaman has made no change in its pleaded terms in the fresh Section 11 Application, that this Application cannot be allowed in its terms. **If Vardhaman can invoke arbitration after disposal of Appeal 257, it can invoke arbitration now too on the premise that the Arbitral Award, at present, is not in existence.** It was set aside by the Section 34 Court, and such setting aside was upheld by the Section 37 Court. The Supreme Court was not satisfied with the reasoning of the Section 37 Court and has remanded the matter back to the Learned Division Bench. Therefore, the stage at which the matter lies is that the Arbitral Award is not in existence and it is the decision in Appeal 257 that would lead to an outcome as to whether Arbitral Award would spring back to life.

20. Appeal 257 has been formally admitted on January 7, 2019 and is still pending. That apart, the record clearly shows that the Ghatges indeed participated in discussions on constituting an arbitral tribunal through 2018, and since the parties could not agree, it led to filing of Application 165, which in turn was rejected in the context of Vardhaman insisting on specific relief and in that context being regarded as time-barred. **Therefore, while it would not be possible to entertain yet another Application under Section 11 on the very same terms, relying merely on a statement made across the bar that specific performance is not being sought, one cannot ignore the fact that the arbitration agreement has not hit the end of the road. If the Learned Division Bench dismisses the Ghatges' appeal, it would follow that the Arbitral Award would remain quashed and set aside, which can only mean that the arbitration agreement that subsists, still has to run its course.**

(emphasis and underlining added)

20) The Court however did not allow Application No. 383 of 2024 by appointing the arbitrator based on earlier invocation notices dated 2 September 2006 and 20 June 2023 (*which contemplates adjudication of both the claims for specific damages*). This Court therefore granted liberty

to issue fresh invocation notice to the Applicant (*for damages only*). The operative directions in the order dated 3 November 2025 passed in Application No. 383 of 2024 reads thus:

22. Therefore, in my opinion this Section 11 Application i.e. Application 383 deserves to be disposed of in the following terms:-

a) Application 383 is disposed of without making a reference to an arbitral tribunal since it is yet another attempt under Section 11 of the Act, on precisely the very same terms as pleaded in Application 165, which has been emphatically dismissed by a Learned Single Judge of this Court in terms of the Earlier Rejection Order;

b) However, Vardhaman is given liberty to issue a fresh invocation notice to the Ghatges, putting them clearly to notice as to what precisely is sought to be pursued at this stage, and making it clear that there is no question of specific reliefs being sought, and that damages for wrongful termination of the Development Agreement alone are being pursued, in the terms articulated by the Learned Single Judge in the Earlier Rejection Order as being capable of pursuit;

c) Should the Ghatges not co-operate with constituting an arbitral tribunal, the cause of action to file a fresh application under Section 11, this time in terms of the fresh invocation notice that is different from the earlier invocation notices dated September 2, 2006 and June 20, 2023 would arise. Such application may then be filed; and

d) All of the aforesaid and any arbitration that commences pursuant to such renewed fresh invocation shall be subject to the outcome in the Appeal 257, which has been admitted and is pending before the Learned Division Bench.

23. This Application is therefore disposed of as not being maintainable in its terms on account of the earlier adjudication on the very same premises as ruled on in the Earlier Rejection Order, but with liberty being given as above. Indeed, Vardhaman cannot be left remediless in its pursuit for damages for wrongful termination in the teeth of the Section 34 Court having ruled that the Arbitral Award deserves to be set aside and the Supreme Court having remanded the matter to the Section 37 Court, and even the Earlier Rejection Order having held that a claim for damages may be pursued. Needless to reiterate, all such proceedings would be subject to the outcome in the Appeal 257, as articulated above, and any further appeal from such outcome.

21) It is the case of the Respondents that there are inconsistencies in the two orders passed by this Court in Commercial Arbitration Application No. 165 of 2023 and Commercial Arbitration Application No. 383 of 2023. While the order dated 19 April 2024 passed in Application No. 165 of 2023 dismissed the entire Section 11 Application without granting any liberty to file a fresh Application. The order dated 3 November 2025 passed in Application No. 383 of 2024 held that the Applicant has right to seek appointment of arbitrator *qua* adjudication of claim for damages even during pendency of the Appeal against the award. It is on account of the plea of alleged inconsistencies in the findings recorded in the orders dated 19 April 2024 and 3 November 2025 that this Court adjourned hearing of the present Application with a view to enable the Respondents to test Order dated 3 November 2025 passed in Commercial Arbitration Application No. 383 of 2024 before the Apex Court. The Special Leave Petition filed by the Respondents has been dismissed by the Apex Court by passing following order on 30 April 2026:

Having heard the learned senior counsel appearing for the parties at length and given the peculiar facts of this case, we are of the opinion that the High Court was justified in issuing the directions contained in paragraph 23 of the impugned judgment.

2. We are informed that, acting upon the liberty granted in the aforesaid paragraph, the respondent, Vardhaman Builders, filed a separate application, being Commercial Arbitration Application No. 115/2026, under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of an arbitrator. The said application is stated to be pending consideration before a learned Judge of the High Court.

3. We are also informed that Arbitration Appeal No. 257/2017, which was admitted in the year 2019, is still pending consideration before the

High Court. The said appeal was filed by the petitioners herein, under Section 37 of the 1996 Act.

4. Though, ordinarily, we would not have been in favour of both these proceedings continuing parallelly, we may note that the termination of the agreement inter se the parties dates back to the year 2006 and insofar as the respondent is concerned, its case still remains at square one.

5. Given this situation, we are not inclined to interfere with the impugned judgment passed by the High Court.

6. We would, however, request the High Court to expedite the hearing of Arbitration Appeal No. 257/2017 to the extent possible.

7. It would be open to the parties to make a request before the High Court for the listing and early disposal of the said appeal.

8. All contentions available to both parties in law are left open to be addressed before the learned Judge in the pending application, that is, Arbitration Application No. 115/2026.

9. The special leave petition is, accordingly, dismissed.

10. Pending application(s), if any, shall stand disposed of.

22) Thus, the liberty granted by this Court vide order dated 3 November 2025 passed in Application No. 383 of 2024 to issue fresh invocation notice and to file fresh Section 11 Application is upheld by the Apex Court. The Apex Court has permitted continuation of parallel proceedings viz. Appeal, as well as fresh arbitral proceedings meaning thereby that a reference to arbitration can be made for adjudication of claims of the Applicant for damages/compensation even during pendency of the Appeal.

23) Since Special Leave Petition filed against the order dated 3 November 2025 passed in Application No. 383 of 2024 is dismissed, I do

not see any difficulty in making a reference to arbitration for adjudication of claims relating to compensation, damages, losses etc. It is sought to be contended by Mr. Khandeparkar that since the Apex Court has left open all contentions to be adjudicated in the present application as per para-8 of its order dated 30 April 2026, the Respondents are entitled to raise the issue of limitation. No doubt the Respondents are entitled to raise the issue of limitation in filing the present Application. However, while raising the plea of limitation, Mr. Khandeparkar, conflates the concepts of 'period of limitation applicable for decision of claims' and 'period of limitation applicable for filing Section 11 Application'. This issue is no more *res-integra* and is squarely covered by judgment of this Court in ***Edelweiss Financial Services Ltd.*** (supra) in which this Court has held that a referral court exercising jurisdiction under Section 11(6) of the Arbitration Act cannot decide the issue of claim-limitation and all that needs to be examined is whether the application is filed within a period of 3 years from the date of accrual of cause of action. This Court has held in paras-17, 18, 19, 22, 27 and 28 of the judgments are as under :

17) There are two periods of limitations contemplated for arbitration proceedings viz., (i) limitation in respect of the claims, which are sought to be referred to arbitration and (ii) the time limit within which Application under Section 11(6) of the Arbitration Act is required to be filed. For the ease of reference, I treat the limitation in respect of the claims, which are sought to be referred to arbitration as 'the first aspect of limitation' and the time limit within which Application under Section 11(6) of the Arbitration Act is required to be filed as 'the second aspect of limitation'.

18) Section 43(4) of the Arbitration Act uses the expression 'for the commencement of the proceedings (including arbitration) with respect

to the dispute so submitted'. Section 21 of the Arbitration Act deals with 'commencement of arbitration proceedings' and provides thus:-

Section 21. Commencement of arbitral proceedings. – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

19) Thus, notice issued under Section 21 for reference of dispute to arbitration commences the arbitral proceedings. The limitation provided in Section 43(4) of the Arbitration Act applies to 'commencement of arbitral proceedings'. This essentially mean that the limitation exclusion provision under Section 43(4) of the Arbitration Act refers to the first aspect of limitation discussed above viz. to the period of limitation in respect of claims sought to be referred to arbitration. It does not apply to the second aspect of limitation viz. the period of limitation in filing application under Section 11(6) of the Arbitration Act.

22) Reverting to the controversy at hand, this Court is exercising mere referral jurisdiction under Section 11 of the Arbitration Act where limited remit of inquiry ought to be about prima facie existence of arbitration agreement. At this stage, this Court cannot decide the issue whether the claim itself is time barred by conducting inquiry into the first aspect of limitation. Thus, first aspect of limitation qua the claim would be outside the remit of inquiry at this stage. However, the inquiry into the second aspect of limitation viz. about period of limitation in filing of Section 11 application as applicable under Article 137 of the Limitation Act, needs to be conducted. This is dealt with in greater details by examining the development of law through latest judgments of the Apex Court in latter part of the judgment. Suffice it to observe at this juncture that the limitation contemplated under Section 43(4) is not the second aspect of limitation i.e. limitation for filing application under Section 11(6) of 3 years from the date of invocation notice.

27) Thus, the law enunciated by the judgments in Re: Interplay, Arif Azim Co. Ltd., SBI General Insurance Company Limited and Managing Director Bihar State Food and Civil Supply Corporation Limited (supra) is that referral court exercising power under Section 11(6) of the Arbitration Act has a duty to determine whether the application filed under Section 11(6) of the Arbitration Act is within the period of limitation prescribed under Article 137 of the Limitation Act. The Court however, cannot conduct intricate evidentiary enquiry into the question as to whether the claims sought to be arbitrated are time barred or not and should leave the question for determination by the arbitrator. Thus the referral court can conduct inquiry into second aspect of limitation,

but not into the first aspect of limitation. In short, referral court needs to adopt 'hands off' approach so far as the issue of limitation in respect of the claim sought to be arbitrated is concerned and same needs to be left open to be determined by Arbitral Tribunal.

28) Applying above principles to the facts of the present case, it is seen that the present Application is within the period of prescribed limitation under Article 137 of the Limitation Act since it is filed within three years of invocation of notice dated 25 November 2025. However, whether claim sought to be arbitrated by the Applicant is within limitation or not is something which Arbitral Tribunal needs to decide. This Court is not going into the issue as to whether the word 'Court' appearing in Section 43(4) of the Arbitration Act would mean only Section 34 Court or also Appeal Court under Section 37 of the Arbitration Act and Hon'ble Supreme Court. This Court, at this juncture, is also not determining whether the time spent by the Respondents in preferring appeal and SLP would be excluded under Section 43(4) of the Arbitration Act. That issue will have to be decided by the Arbitral Tribunal, while determining the issue whether the claims sought to be arbitrated by the Applicant are within limitation or time barred.

24) Therefore, while making reference to arbitration, this Court need not decide the issue as to whether the claim for damages/compensation is within limitation and this Court would adopt hands-off approach and make a reference to arbitration by leaving open the issue of limitation to be decided by the Arbitral Tribunal. In the present case, notice under Section 21 of the Arbitration Act has been issued on 9 January 2026 and therefore the present application filed on 30 January 2026 is well within limitation. However, this does not mean that this Court has ruled on the aspect of limitation *qua* the claim for damages/compensation and the said issue needs to be decided by the Arbitral Tribunal.

25) The contention of Mr. Khandeparkar that the application is premature is again without any substance. The application is thus sought to be branded as premature on the ground that the Appeal against the Award is still pending. However, in para-19 of the judgment dated 3 November 2025 passed in Application No. 383 of 2024, this Court has specifically observed that *‘if Applicant can invoke arbitration after disposal of the Appeal, it can invoke arbitration now also on the premise that the arbitral award, at present, is not in existence’*. The Apex Court has refused to interfere in the said observations. The Respondent therefore cannot be permitted to raise the issue of impermissibility to invoke arbitration during pendency of the Appeal.

26) Considering the overall conspectus of the case, in my view, a case is made out for exercise of referral jurisdiction by this Court under Section 11(6) of the Arbitration Act. The Award seeking specific performance and damages is set aside by Section 34 Court. Therefore, the Applicant is entitled to have the claims re-adjudicated in fresh arbitral proceedings. This time, the claim is restricted only in respect of damages/compensation and the Applicant has given up the prayer for specific performance. Leaving open the issue of limitation for deciding the claim relating to compensation/damages, in my view, reference to arbitration can be made. In that view of the matter, it would be just and proper to constitute Arbitral Tribunal comprising of a sole Arbitrator for adjudication of disputes and differences between the parties relating to damages, compensation, losses resulting out of termination of the Development Agreement.

27) I accordingly proceed to pass the following order:

(A) Mr. Justice M.S. Sanklecha, former Judge of this Court, is appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of Development Agreement dated 27 August 2005 referred to above. The contact details of the learned Arbitrator are as under:

Office Address :- 311, Churchgate Chambers, 5, Sir Vithaldas Thackersey Marg, New Marines Lines Churchgate, Mumbai-400 020

Email ID :- manojssanklecha@gmail.com

Mobile No.:- [9820065338](tel:9820065338)

(B) A copy of this order be communicated to the learned sole Arbitrator by the Advocate for the Petitioner/Applicant within a period of one week from the date of uploading of this order. The Petitioner/Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal alongwith a copy of this order.

(C) The learned sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of 2 weeks from receipt of a copy of this order.

(D) The parties shall appear before the learned sole Arbitrator on such date and at such place as indicated by her, to obtain

appropriate direction with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc.

(E) The fees of the Arbitrator shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to cost.

28) All contentions of parties on merits of dispute including the issue of limitation, are expressly kept open to be decided by the Arbitral Tribunal. With the above directions the Application is **allowed** and disposed off.

[SANDEEP V. MARNE, J.]

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