2024 INSC 849

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 20 OF 2019

ASLAM ISMAIL KHAN DESHMUKH …PETITIONER

VERSUS

ASAP FLUIDS PVT. LTD. & ANR. …RESPONDENTS

WITH

ARBITRATION PETITION NO. 22 OF 2019

J U D G M E N T

J. B. PARDIWALA, J.:

1. Since the captioned petitions raise analogous issues between the same parties, those were taken up together and are being disposed of by this common judgment and order.

2. The petitioner has filed the present two petitions in terms of Section 11(6) read with Section 11(12)(a) of the Arbitration & Conciliation Act, 1996 (for short **"the Act, 1996"**), seeking appointment of an arbitrator for the adjudication of disputes and claims in terms of Clause 13.10 of the Shareholders Agreement dated 25.07.2011 entered into between the petitioner and the respondents.

I. FACTUAL MATRIX

3. Aslam Ismail Khan Deshmukh (hereinafter referred to as the **"petitioner"**) is a Non-Resident Indian, who is currently residing and working in Dubai, UAE, having experience and expertise in the drilling fluid industry.

4. ASAP Fluids Pvt. Ltd. (hereinafter referred to as the **"respondent no.1"**) is an Indian private limited company engaged in providing drilling fluids services to the oil and gas industry, whereas Gumpro Drilling Fluids Pvt. Ltd.

(hereinafter referred to as the **"respondent no. 2"**) is a private limited company that specializes in oil field services and offers mud services.

5. A Shareholders Agreement dated 25.07.2011 (hereinafter referred to as **"Shareholders Agreement"**) was executed by and among the petitioner, respondent no.1, respondent no.2, Mr. Robert Wayne Pantermuehl, and Mr. Sunil B. Shitole. In terms of the said Shareholders Agreement, the petitioner was to hold 4,00,000 equity shares of respondent no. 1 and also participate in the management of respondent no.1 company. The relevant clauses from the same are reproduced hereinbelow:

> **"4. *RIGHT OF PRE-EMPTION FOR ISSUE OF NEW DILUTION INSTRUMENTS OR DILUTION OF SHAREHOLDING***
>
> *Present issued, subscribed and paid up share capital of the Company is Rs.2,64,00.000/- divided into 26,40,000 equity shares of INR 10 each which is held by the members as mentioned below:*
>
> a. *Gumpro holding 18,00,000 equity shares of Rs. 10/- each in the Company.*
> b. *Bob currently holding only 40,000 equity shares of Rs. 10/- each and shall be allotted additional 360,000 equity shares subject to getting the approval of Foreign Investment Promotion Board (FIPB). Ministry of' Finance and Reserve Bank of India or such other approval as may be required as per Indian Law.*
> c. *Aslam Khan holding 400,000 equity shares of Rs. 10/- each in the Company and*
> d. *Sunil Shitole holding 400,000 equity shares of Rs. 10/- each in the Company.*

On allotment of further 360,000 equity shares to Bob, the issued, subscribed and paid up share capital of the Company will be Rs. 3 Crores divided into 30,00,000 equity shares of Rs. 10/- each which will be held as follow:

a. *Gumpro 18,00,000 equity shares of Rs. 10/- each in the Company*
b. *Bob 400,000 equity shares of Rs. 10/- each in the Company*
c. *Aslam Khan 400,000 equity shares of Rs. 10/- each in the Company and*
d. *Sunil Shitole 400,000 equity shares of Rs. 10/- each in the Company·*

Gumpro has provided Rs.4,58,39,200 Crores as unsecured Loan (as on 31st March 2011) and Gumpro will additionally raise Rs.6.6 Crores for the Company from private equity fund or venture capital fund and advance it to the Company as secured loan against the security of equipments of the Company.

General. Subject to the terms and conditions specified in Section 4.3, the affirmative approval provisions contained in Section 9 and applicable Indian law, in the event that the Company proposes to issue any Dilution Instruments, the Company shall first offer such Dilution Instruments to all the Shareholders on rights basis, in proportion to their shareholding ratio in the Company on the date immediately prior to such further issue, in accordance with the procedure set forth in Section 4.2. It is clarified that the shareholding pattern of the Company as stated in Clause 4.1 shall be maintained at all times, save and except in the circumstances specified in Clause 4.2 below. It is agreed and understood by all the Parties to this Agreement that any Shares offered/ issued or subscribed by the Other Shareholder will be under lock -in period of 3 (Three) years from the date of its allotment. The Board shall prior to undertaking any such issue appoint any reputed investment banker/ Chartered accountant to carry out a valuation of the Company. The Board shall ensure that the capital shall be raised at valuation no lower than the valuation set forth in the report of such investment banker/ Chartered Accountant.

xxx *xxx* *xxx*

5 RESTRICTIONS ON TRANSFER OF SHARES AND PROVISIONS RELATING TO TRANSMISSION OF SHARES

5.1 Other Shareholder Share Sale Restriction. Notwithstanding anything contained elsewhere in this Shareholder's Agreement, the Other Shareholder agree that they shall not, whether collectively or individually, directly or indirectly, Transfer any part of their shareholding in the Company in whatever form, or any legal or beneficial interest therein, until the earlier of: (a) Gumpro ceasing to hold a minimum of two percent (2%) of its shareholding in the Company and (b) the completion of a Qualified Public Offering, except in compliance with this Shareholders' Agreement, particularly Section 6. Without prejudice to the generality of the foregoing. The Other Shareholder shall not Transfer any part of their individual shareholding until the expiry of three (03) years from the date of issue of such shares. It has been clearly understood and agreed that the shares of the Other Shareholder are locked-in for a period of three years from the date of its issuance or conversion of it into equity shares.

xxx *xxx* *xxx*

6. RIGHT OF FIRST REFUSAL AND RIGHT OF CO-SALE

*6.1 General. Subject to the provisions of Section 5, the Other Shareholder (for this Section "**Selling Shareholder**") hereby unconditionally and irrevocably grants to Gumpro a right (the "**Right of First Refusal**") to purchase all or a portion of the Shares that such Selling Shareholder may propose to Transfer ("**Sale Shares**").”*

6. Mr. Anand Gupta, the Managing Director of respondent no.2 informed the petitioner, *vide* letter dated 22.09.2011, that 2,00,010 equity shares of respondent no.1 which belong to the petitioner were being held by respondent no.2 in its name. It was stated therein that this arrangement was made to provide comfort to the potential investors in respondent nos.1 and 2 respectively. It was further clarified that the abovementioned shares held by respondent no.2 would be governed by the Shareholders Agreement dated 25.07.2011 and that those shall not be pledged or sold at any time without the written consent of the petitioner. At the time of sale of respondent no.1, it was confirmed that the value of these shares net of taxes would be paid to the petitioner or his nominee.

7. Subsequently, the respondent no.1 along with its Dubai subsidiary company, ASAP Fluids DMCC (hereinafter referred to as the "**Dubai subsidiary**") entered into a **Service Agreement** dated 18.10.2011 (hereinafter referred to as, the "**Service Agreement**") with the petitioner. By the Service Agreement, the petitioner was appointed as a Director of respondent no.1 and its Dubai subsidiary. Among his responsibilities in relation to respondent no.1, the petitioner was also required to carry on the responsibilities of the full operations of the Dubai subsidiary. He was obligated to hold office for an initial period of 3 years w.e.f. 01.01.2011. The Service Agreement provided

for the remuneration and benefits that the petitioner was entitled to. The relevant clauses from the same are reproduced hereinbelow:

> *"**3. TERM***
>
> *3.1 The Director shall hold the office for a period of three years commencing from _____ subject to the determination thereof as hereinafter provided.*
>
> *xxx xxx xxx*
>
> ***10. TERM AND TERMINATION***
>
> *[...]*
>
> *10.2 Aslam Khan shall not for a period of three (3) years from the Effective Date (**Initial Term**), terminate this Agreement. In case if he terminates his employment prior to Initial Term, he shall transfer all the equity shares held by him in favour of the Promoter of the Company at zero consideration implying his outstation from the register of members of the Company."*

8. On the same day, i.e., on 18.10.2011, the petitioner signed an Agreement for Transfer of Commercial Expertise (hereinafter referred to as **"Commercial Expertise Agreement"**) with respondent nos. 1 and 2 respectively, agreeing to the transfer of all his commercial expertise, knowledge and experience in the field of getting approvals from the government, and handling administrative and legal aspects of the business to respondent no. 1. In return, respondent no. 1 agreed to issue 4,00,000 equity shares of Rs. 10/- each to

the petitioner for consideration other than cash. The relevant recitals and clauses from the same are reproduced hereinbelow:

> *" **WHEREAS***
> *[...]*
> *3. The Parties have agreed before starting this venture that the Transferor shall transfer all his commercial expertise knowledge and experience in the field of getting the approvals of government. handling administrative and legal aspects of the Business ("Commercial Expertise·') to the Transferee and the Transferee shall issue him 400,000 equity shares of Rs.10/- each in the Transferee Company for the consideration other than cash for transferring such Commercial Expertise to the Transferee and continuing with the transferee Company for minimum period of three (3) years and the such shares allotted to him shall be under lock in for three years.*
>
> *xxx xxx xxx*
>
> ***3. TRANSFER OF COMMERCIAL EXPERTISE AND ISSUE OF SHARES***
>
> *3.1 It is hereby agreed by and between the parties hereto that all the Commercial Expertise of the Transferor pertaining to or referable to all expertise in the management of the Business and its related activities including Administration, ensuring smooth performance, high efficiency and productivity along with knowledge on tender participations etc. shall be transferred to and unto the transferee and the Transferor shall work for a minimum period of 3 years for the Transferee or its affiliate or group company either in India or Overseas effective from 1st January 2011 and the Transferee shall issue and allot 400,000 Equity Shares of Rs. 10/- each at par in the Transferee Company in lieu thereof by way of consideration for transfer of such Commercial Expertise as mentioned above and holding such shares under lock in for minimum period of 3 years. The Transferor shall then assign and transfer all the Transferor's right, title and interest in all the Commercial Expertise for the entire world*

and for entire period during which this Commercial Expertise subsists to and unto the Transferee absolutely.

xxx *xxx* *xxx*

4. COVENANTS OF THE TRANSFEROR

4.1 The Transferor ensures that he shall continue in the employment of the Transferee for minimum period of three years effective from 1st January 2011.

[...]

4.3 If at any time after a minimum period of 3 years as locking of shares the transferee wish to sell his share to the transferee he must first offer for sale to management, all (and not only some unless management agrees otherwise) of the shares owned by him ("the Sale Shares") at a price as mutually agreed with him and the management at the relevant time."

xxx *xxx* *xxx*

10. TERM OF THE AGREEMENT

[...]

10.2 The term for this Agreement will start on Allotment of Shares by the Transferee to the Transferor and the such allotted Shares will be under Lock in for a period of three years from the date of its Allotment and the Transferor shall not leave the services with the Transferee for a period of three years from the date of Allotment of Shares in the Company as per terms of this Agreement"

(Emphasis supplied)

9. Upon certain other issues arising between the parties, the petitioner tendered his resignation as the Director in respondent no. 1 and its Dubai subsidiary. The resignation was accepted by the Dubai subsidiary *vide* Director's Resolution dated 18.07.2013.

10. The petitioner was concerned with the failure of respondent no.2 in transferring 2,00,010 shares in respondent no.1 which belonged to the petitioner despite confirmation of the same *vide* letter dated 22.09.2011 and also the non-issuance of the share certificates evidencing allotment of additional 2,00,010 shares in the name of the petitioner by respondent no. 1. The petitioner further contended that despite holding 4,00,000 equity shares in respondent no.1 as per the Shareholders Agreement, respondent no.1 failed to issue duly stamped, signed and sealed share certificates evidencing such an allotment to the petitioner.

11. It is the case of the petitioner that he had requested respondent no.1 on several occasions to either issue the share certificates evidencing allotment of 4,00,000 equity shares or in the alternate, return the amount equivalent to such shares. The petitioner alleged that, since the share certificates were not issued to him, he was unable to send an 'offer notice' to sell his portion of equity shares to respondent no.2 who has the "Right of First Refusal" under Clause 6 of the Shareholders Agreement.

12. The petitioner stated that since the respondents were not paying heed to his repeated requests for issuance of share certificates, the petitioner sent a Common Notice dated 23.01.2017 (hereinafter referred to as **"Arbitration**

Notice") to both the respondents, directing them to either issue the share certificates evidencing allotment of 2,00,010 and 4,00,000 shares respectively or in the alternate, to return the amount equivalent to those shares. The same was received by both the respondents on 24.01.2017. In the event of a dispute, the Arbitration Notice called upon the respondents to appoint arbitrators in terms of Clause 13.10 of the Shareholders Agreement. The said clause is reproduced hereinbelow:

> "*13.10. Dispute Resolution. Any dispute, claim or controversy arising under or relating to this Agreement, including without limitation any dispute concerning the existence or enforceability hereof, shall be resolved by arbitration in Mumbai in accordance with the Arbitration and Conciliation Act, 1996. The dispute will be referred to the arbitrator, and Gumpro has right to appoint 2 (two) arbitrators and Other Shareholder have the right to appoint 1(one) arbitrator. All these three (03) arbitrators, will appoint one of them to act as umpire of the arbitral tribunal. The language of the arbitration shall be English. Any arbitration award by the arbitral tribunal shall be final and binding upon the Parties, shall not be subject to appeal, and shall be enforced by judgment of a court of competent jurisdiction*."

13. As there was no response from the respondents, the petitioner filed two separate applications dated 03.03.2017 under Section 11(6) of the Act, 1996, bearing Arbitration Application No. 50 of 2017 for adjudication of disputes pertaining to the 4,00,000 equity shares and Arbitration Application No. 51 of 2017 for adjudication of disputes pertaining to 2,00,010 equity shares,

before the High Court of Bombay, praying for the appointment of an arbitral tribunal.

14. After nearly 10 months from the date of the arbitration notice, on 07.11.2017, the respondents sent a reply denying and disputing all the claims and allegations made by the petitioner. Without prejudice to the contentions in the reply, the respondents appointed two arbitrators in terms of clause 13.10 of the Shareholders Agreement and called upon the petitioner to nominate the third arbitrator. It was asserted that the alleged claim of 2,00,010 shares or the value thereof cannot be referred to arbitration as it does not fall within the remit of the dispute resolution clause of the Shareholders Agreement.

15. The High Court of Bombay *vide* Judgment and final order dated 22.02.2019 held that the petitioner is a Non-Resident Indian who habitually resides and works in Dubai. The proceedings would constitute an "international commercial arbitration" and therefore, the Section 11 applications filed before it were not maintainable.

16. In light of the above and upon the dismissal of the Section 11 applications by the High Court, the petitioner has filed the present petitions before this Court i.e., Arbitration Petition No.20 and Arbitration Petition No. 22 under Section 11(6), for appointment of an arbitral tribunal, to adjudicate the disputes under

the Shareholders Agreement pertaining to 2,00,010 shares and 4,00,000 shares respectively.

II. SUBMISSIONS ON BEHALF OF THE PETITIONER

17. Mr. Kunal Cheema, the learned counsel appearing for the petitioner, submitted that both the arbitration petitions arise out of disputes under the Shareholders Agreement. Clause 13.10 of the agreement provides for the arbitration clause and the same has not been disputed by the parties.

18. It was submitted that the petitioner was entitled to be allotted 4,00,000 equity shares of Rs. 10 each in respondent no.1 company under the Shareholders Agreement. In addition, as per the letter dated 22.09.2011, respondent no.2 further confirmed that 2,00,010 equity shares in respondent no.1 which belonged to the petitioner, were being held by respondent no.2. Despite repeated reminders to both the respondents, the share certificates of the aforementioned shares were not issued to the petitioner.

19. The counsel submitted that the respondents have raised two broad contentions - *one*, with respect to the merits of the dispute; and *two*, that the claims made in the petitions are not maintainable as they are barred by limitation. As regards the first aspect, it was submitted that the merits of the

dispute can be looked into by the arbitral tribunal and arguments on merit can be made after the parties file their pleadings and lead evidence therein.

20. On the issue of limitation, it was submitted that under the Shareholders Agreement, there was no time frame within which the share certificates were to be issued to the petitioner. On a reading of the letter dated 22.09.2011, the value of the share was to be paid to the petitioner at the time of sale of respondent no.1 company. As far as the petitioner is aware, such a sale has not been made, at least till the issuance of notice dated 23.02.2017. Hence, there is no specific date/day on which it can be ascertained that the cause of action had arisen.

21. The counsel submitted that it is the case of the respondents that certain correspondence was exchanged between the parties in the period between 06.08.2015 and 15.10.2015. Therefore, the Arbitration Notice dated 23.01.2017 was sent within 3 years from 15.10.2015 which is the date of the last legal notice sent by the respondents to the petitioner. Thereafter, the petitioner filed two arbitration applications on 03.03.2017 before the High Court of Bombay which were ultimately dismissed on 22.02.2019. Immediately thereafter, on 09.04.2019, the present petitions were filed before this Court. Therefore, the arbitration petitions cannot be said to be ex-facie time barred and the implication or interpretation of the said correspondences

could be looked into by the arbitral tribunal while deciding the claim and its maintainability on the question of limitation and merits.

22. It was submitted that, without prejudice to the aforesaid contention, even if it is assumed that the "cause of action" had arisen at any specific point of time, there is a continuing breach of contract since the respondents failed to provide the share certificates and abide by the Shareholders Agreement and the letter dated 22.09.2011. Therefore, in view of Section 22 of the Limitation Act, 1963, a fresh period of limitation would begin to run at every moment of time during which the breach continues.

23. Another submission of the counsel was that the respondents, on 07.11.2017 had sent a reply to the Arbitration Notice dated 23.01.2017 wherein they appointed two arbitrators as per Clause 13.10 of the Shareholders Agreement. The same was sent after the applications under Section 11(6) were filed before the High Court of Bombay. In the said letter, the respondents have not contended that the claim is time barred.

24. It was further submitted that, in reply to the Arbitration Notice, the only case of the respondents is that the issue regarding the 2,00,010 shares cannot be referred to arbitration under clause 13.10 of the Shareholders Agreement and that the scope of arbitration should be confined only to the issue of the 4,00,000 shares. However, the letter dated 22.09.2011 clearly states that the

2,00,010 shares will be governed by the Shareholders Agreement. Therefore, this being a contentious issue should be considered by the arbitral tribunal.

25. The counsel finally submitted that, in the event the Court is inclined to allow the petition, then, considering the nature and low value of the claim, instead of a three-member tribunal, a sole arbitrator may be appointed.

III. SUBMISSIONS ON BEHALF OF THE RESPONDENTS

26. On the other hand, Ms. Jasmine Damkewala, the learned counsel appearing for the respondents submitted that the petitioner is seeking implementation of the Shareholders Agreement dated 25.07.2011. However, the petitioner has violated the Lock-in Period of 3 years, in as much as the petitioner's date of employment is 01.01.2011 and the date of acceptance of resignation *vide* the board resolution is 18.07.2013.

27. It was submitted that in terms of Clause 4 of the Shareholders Agreement, the petitioner was holding 4,00,000 equity shares in respondent no.1. Clause 5.1 of the said Shareholders Agreement specifically indicates that the petitioner shall not transfer any part of his individual shareholding until the expiry of 3 years from the date of issue of such shares. It was argued that there was a clear understanding which was agreed upon by the parties that the shares of the petitioner shall remain locked for a period of 3 years from

the date of their issuance or conversion of it into equity shares. However, any right over the said shares would accrue only if the petitioner remained in employment.

28. Clause 3 of the Service Agreement indicates that the Director shall hold office for a period of 3 years commencing from the date of employment (w.e.f. 01.01.2011) which is a Lock-in Period. Further Clause 10.2 of the Service Agreement states that the petitioner shall transfer all the equity shares held by him in favour of the Promoter of respondent no.1 at zero consideration if he terminates his employment prior to the Initial Term of 3 years. Accordingly, the petitioner would in any case, have no valid right or claim over the subject shares having terminated his employment before a period of 3 years.

29. It was submitted that as per Recital 3, and Clauses 3.1 and 4.1 respectively of the Commercial Expertise Agreement, for the petitioner to hold the shares, he ought to have worked for a period of 3 years. Since the petitioner resigned on 18.07.2013, he is not entitled to these shares. In any case, any claim regarding the 4,00,000 equity shares, howsoever misconceived, can arise only upon the date of resignation i.e., 18.07.2013 and the Arbitration Notice being issued on 23.01.2017 was clearly outside of limitation. Therefore, the present petition is stale, belated and misconceived.

30. The counsel, in the last, submitted that Section 43 of the Act, 1996 lays down that the Limitation Act, 1963 is applicable to arbitrations. An arbitration commences upon issuing the notice of invocation of arbitration in accordance with the arbitral clause i.e., Clause 13.10 of the Shareholders Agreement. Accordingly, where the petitioner seeks enforcement of the letter dated 22.09.2011, the Notice for Invocation of Arbitration was served 6 years later i.e., on 23.01.2017 and is hopelessly outside of limitation. For the sake of argument and without admitting, even if limitation for the claim of the petitioner with respect to the 2,00,010 shares is calculated from the date when he ceased to be in employment, i.e., from 18.07.2013, the claim is still clearly time-barred.

IV. ANALYSIS

31. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the short question that falls for our consideration is whether we should decline to make a reference under Section 11(6) of the Act, 1996 by examining whether the substantive claims of the petitioner are *ex facie* and hopelessly time barred?

32. A three-judge bench of this Court in ***Vidya Drolia & Ors v. Durga Trading Corporation*** reported in **(2021) 2 SCC 1** while dealing with the scope of

powers of the referral court under Sections 8 and 11 respectively, endorsed the *prima facie* test and opined that Courts at the referral stage can interfere only in rare cases where it is manifest that the claims are *ex facie* time-barred and dead, or there is no subsisting dispute. Such a restricted and limited review was considered necessary to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The relevant observations are reproduced hereinbelow:

> *"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 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 Nafta Products 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.*
>
> *xxx* *xxx* *xxx*

> ***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."*
>
> (Emphasis supplied)

33. In ***Bharat Sanchar Nigam Limited and Another v. Nortel Networks India Private Limited*** reported in **(2021) 5 SCC 738**, the notice invoking arbitration was issued 5 ½ years after the cause of action arose, i.e., rejection of the claims of Nortel by BSNL and the claim was therefore held to be *ex facie* time-barred. This Court clarified that the period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to substantive claims made in the underlying commercial contract. By placing reliance on ***Vidya Drolia*** *(supra)* it was held that, a referral court exercising its jurisdiction under section 11 may decline to make the reference in a very limited category of

cases, where there is not even a vestige of doubt that the claim is *ex facie* time-barred. The relevant observations are reproduced hereinbelow:

> *"44. The issue of limitation which concerns the "admissibility" of the claim, must be decided by the Arbitral Tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties.*
>
> *xxx xxx xxx*
>
> *47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.*
>
> *48. Applying the law to the facts of the present case, it is clear that this is a case where the claims are ex facie time-barred by over 5½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 4-8-2014. The notice of arbitration was invoked on 29-4-2020. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation.*
>
> *49. The present case is a case of deadwood/no subsisting dispute since the cause of action arose on 4-8-2014, when the claims made by Nortel were rejected by BSNL. The respondent has not stated any event which would extend the period of limitation, which commenced as per Article 55 of*

> *the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the final bill by making deductions."*
>
> (Emphasis supplied)

34. This very Bench in ***Arif Azim Company Limited v. Aptech Limited*** reported in **(2024) 5 SCC 313** was concerned with the following two issues while deciding an application for the appointment of an arbitrator under Section 11(6) of the Act, 1996 – *first,* whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Act, 1996?; and *second*, whether the Court may decline to make a reference under Section 11 of the Act, 1996 where the claims are *ex-facie* and hopelessly time barred.

35. On the first issue in ***Arif Azim*** *(supra),* it was observed that Section 11(6) of the Act, 1996 would be covered by Article 137 of the Limitation Act, 1963 which prescribes a limitation period of 3 years from the date when the right to apply accrues. The limitation period for filing an application seeking appointment of an arbitrator was held to commence only after a valid notice invoking arbitration had been issued by one of the parties to the other party and there had been either a failure or refusal on the part of the other party to comply with the requirements of the said notice.

36. On the second issue in ***Arif Azim*** *(supra)*, which is identical to the issue raised in the present petitions, it was observed that, 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. The findings on both the issues were summarized as thus:

> *"92. 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 1996 Act, the Courts should satisfy themselves on two aspects by employing a two-pronged test — first, whether the petition under Section 11(6) of the 1996 Act 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."*
>
> (Emphasis supplied)

37. However, subsequently, very pertinent observations were made by a seven-judge Bench of this Court in ***Interplay between Arbitration Agreements Under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899, In Re,*** reported in **2023 INSC 1066** regarding the scope of judicial interference at the Section 11 stage with a view to give complete meaning to the legislative intention behind the insertion of Section 11(6-A) of the Act, 1996. This Court referred to the Statement of Objects and Reasons of the

2015 Amendment Act and opined that the same indicated that the referral courts shall "examine the existence of a *prima facie* arbitration agreement and **not other issues**" at the stage of appointment of an arbitrator. These "other issues" would include the examination of any other issue which has the consequence of unnecessary judicial interference in the arbitral proceedings. The relevant observations are reproduced hereinbelow:

> *"208. The Statement of Objects and Reasons of the 2015 Amendment Act are as follows:*
>
> > *"(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days.*
> >
> > *(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues."*
>
> *209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and not other issues". These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage […]"*
>
> (Emphasis supplied)

38. In light of the aforesaid observations, the ratio of ***Arif Azim*** *(supra)* was reconsidered by this very Bench in ***SBI General Insurance Co. Ltd. v. Krish Spinning*** reported in **2024 SCC OnLine SC 1754.** The position of law was clarified as thus:

> *"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.*
>
> *xxx xxx xxx*
>
> *132. Insofar as our observations on the second issue are concerned, we clarify that the same were made in light of the observations made by this Court in many of its previous decisions, more particularly in Vidya Drolia (supra) and NTPC v. SPML (supra). However, in the case at hand, as is evident from the discussion in the preceding parts of this judgment, we have had the benefit of reconsidering certain aspects of the two decisions referred to above in the light of*

> *the pertinent observations made by a seven-Judge Bench of this Court in In Re : Interplay (supra).*
>
> *133. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the Act, 1996, the referral court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in Arif Azim (supra). As a natural corollary, it is further clarified that the referral courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in In Re : Interplay (supra).*
>
> *134. The observations made by us in Arif Azim (supra) are accordingly clarified. We need not mention that the effect of the aforesaid clarification is only to streamline the position of law, so as to bring it in conformity with the evolving principles of modern-day arbitration, and further to avoid the possibility of any conflict between the two decisions that may arise in future. These clarifications shall not be construed as affecting the verdict given by us in the facts of Arif Azim (supra), which shall be given full effect to notwithstanding the observations made herein."*
>
> (Emphasis supplied)

39. Therefore, while determining the issue of limitation in the exercise of powers under Section 11(6) of the Act, 1996, the referral court must only conduct a limited enquiry for the purpose of examining whether the Section 11(6) application has been filed within the limitation period of three years or not. At this stage, it would not be proper for the referral court to indulge in

an intricate evidentiary enquiry into the question of whether the claims raised by the petitioner are time barred. Such a determination must be left to the decision of the arbitrator. After all, in a scenario where the referral court is able to discern the frivolity in the litigation on the basis of bare minimum pleadings, it would be incorrect to assume or doubt that the arbitral tribunal would not be able to arrive at the same inference, especially when they are equipped with the power to undertake an extensive examination of the pleadings and evidence adduced before them.

40. As observed by us in ***Krish Spinning*** *(supra)*, the power of the referral court under Section 11 must essentially be seen in light of the fact that the parties do not have the right of appeal against any order passed by the referral court under Section 11, be it for either appointing or refusing to appoint an arbitrator. Therefore, if the referral court delves into the domain of the arbitral tribunal at the Section 11 stage and rejects the application of the claimant, we run a serious risk of leaving the claimant remediless for the adjudication of their claims. Moreover, the Courts are vested with the power of subsequent review in which the award passed by the arbitrator may be subjected to challenge by any party to the arbitration. Therefore, the Courts may take a second look at the adjudication done by the arbitral tribunal at a later stage, if considered necessary and appropriate in the circumstances.

41. In view of the above discussion, we must restrict ourselves to examining whether the Section 11 petitions made before us are within limitation. The petitioner herein issued a notice invoking arbitration on 23.01.2017 and the same was delivered to both the respondents on 24.01.2017. However, the respondents failed to reply to the said notice within a period of 30 days i.e. within 23.02.2017. Therefore, the period of limitation of three years, for the purposes of a Section 11(6) petition, would begin to run from 23.02.2017 i.e., the date of failure or refusal by the other party to comply with the requirements mentioned in the notice invoking arbitration. The present petitions under Section 11(6) were filed on 09.04.2019. Even including the period during which the parties proceeded before the Bombay High Court which ultimately held that the applications before it were not maintainable i.e., 03.03.2017 to 22.02.2019, these petitions are well within the bounds of limitation.

42. The primary issue that has been canvassed by the respondents is that the substantive claims of the petitioner are *ex-facie* time barred and therefore, incapable of being referred to arbitration. The respondents contend that, with respect to the issue relating to the 2,00,010 equity shares, the petitioner has sought enforcement of the letter dated 22.09.2011 but has however, served a notice invoking arbitration 6 years later on 23.01.2017. Further, with respect

to the 4,00,000 equity shares, it was contended that the claim can only arise upon the date of resignation i.e., 18.07.2013 and the claim would, therefore, again be time-barred. Conversely, the case of the petitioners is that the date of 15.10.2015 i.e., the date of the last legal notice sent by the respondents to the petitioner, can be considered as the date of cause of action for the purposes of limitation. In the alternative, they assert that there is no specific date or day on which it can be ascertained that the cause of action had arisen since there is a continuous breach of contract on part of the respondents. As evident from the aforesaid discussion and especially in light of the observations made in ***Krish Spinning*** *(supra)*, 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.

43. All other submissions made by the parties regarding the entitlement of the petitioner to 4,00,000 and 2,00,010 equity shares in the respondent no.1 company are concerned with the merits of the dispute which squarely falls within the domain of the arbitral tribunal.

44. 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. 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.

V. CONCLUSION

45. The existence of the arbitration agreement as contained in Clause 13.10 of the Shareholders Agreement is not disputed by either of the parties. The

submissions as regard the claim of the petitioner being *ex-facie* time barred may be adjudicated upon by the arbitral tribunal as a preliminary issue.

46. In view of the aforesaid, the present petitions are allowed. Taking into consideration the fact that an arbitral tribunal comprising of a sole arbitrator, Mr. Mayur Khandeparkar (Advocate, High Court of Judicature at Bombay) has already been constituted for the adjudication of disputes between the same parties in relation to the Service Agreement dated 18.10.2011, it would be desirable to constitute an arbitral tribunal comprising of the same sole arbitrator for adjudication of the present disputes pertaining to the Shareholders Agreement dated 25.07.2011. The fees of the arbitrator including other modalities shall be fixed in consultation with the parties.

47. In the facts of the present case, it would be apposite to observe that, in the event the arbitral tribunal ultimately finds the present claims of the petitioner to be time-barred, it may direct that the costs of the arbitration pertaining to these claims be borne solely by the petitioner herein.

48. It is made clear that all the other rights and contentions of the parties are left open for adjudication by the learned arbitrator.

49.Pending applications(s), if any, shall stand disposed of.

…….CJI.

(Dr. Dhananjaya Y. Chandrachud)

…….J.

(J.B. Pardiwala)

…….J.

(Manoj Misra)

New Delhi;
7th November, 2024.