2024:BHC-OS:13029

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

INTERIM APPLICATION (LODG.) NO. 23757 OF 2024
IN
COMM. ARBITRATION APPLICATION (L.) NO. 17767 OF 2023

Universal Builders ... Applicant

In the matter between :

Vascon Engineers Limited ... Original Applicant

Versus

Universal Builders ... Original Respondent

Mr. Prateek Pai *a/w. Pratik Karande, for Applicant/Original Respondent in IAL-**23757 of 2024**.*

Mr. Aditya Mehta *a/w. Anuj Jhaveri and Mihir Modi i/b Mihir Modi, for Applicant.*

CORAM : SOMASEKHAR SUNDARESAN, J.

Reserved on : August 7, 2024

Pronounced on : August 27, 2024

JUDGEMENT :

Background and Context:

1. This Interim Application has been filed by the Original Respondent, seeking a review or a recall of an order dated June 20,

2024[1] ("***Subject Order***") by which a Learned Sole Arbitrator was appointed under Section 11 of the Arbitration and Conciliation Act, 1996 ("***the Act***"), to adjudicate disputes and differences between the parties in connection with a Work Contract Agreement dated November 26, 2014 ("***Agreement***"). This Application has been filed after the commencement of the arbitration proceedings before the Learned Sole Arbitrator. The Original Respondents states that its participation in the preliminary meeting was without prejudice to its right to file and pursue this Application.

2. For convenience, in this judgement, the parties are referred to in their original capacities as set out in Commercial Arbitration Application (Lodging) No. 17767 of 2023 ("***Arbitration Application***"). The Arbitration Application came to be listed on various dates. An affidavit in reply dated January 16, 2024 ("***Reply Affidavit***") was filed by the Original Respondent. Eventually, the matter came to be listed on June 20, 2024, on which date, none appeared on behalf of the Original Respondent. On that date, after perusing the record including the Arbitration Application and the Reply Affidavit, and hearing the

[1] *The order appointing the Learned Sole Arbitrator was in fact, passed on June 25 2024, as is seen from the date on which the order was uploaded on this Court's website. However, the date typed on that order is erroneously and inadvertently set out as June 20, 2024. This is now corrected through an order of today's date speaking to the minutes of the order, on this Court's own motion.*

Learned Counsel for the Original Applicant, liberty was granted to the Original Applicant to file a short note dealing with the objections that had been raised by the Original Respondent in the Reply Affidavit. It was ordered that upon a perusal of the submission, this Court would decide upon whether, to stand over the matter to a future date in order to hear the Respondent, or to proceed with dealing with the Arbitration Application on the basis of the record.

3. Thereafter, a written note on submissions came to be filed on June 24, 2024, upon a review of which, the Subject Order appointing a Learned Sole Arbitrator was passed on June 25, 2024, and was uploaded on the same date.

4. Put differently, after appreciation of the material brought on record, and the pleadings and submissions made by the parties, this Court had come to the view that it would not be necessary to list the matter again for another date for deciding whether to refer the disputes to arbitration. The following extracts from the Subject Order are noteworthy :

> *4. It is apparent that the arbitration was invoked by the Applicant on 23rd February, 2023.*
>
> *5. In response, on 5th April, 2023, **the Respondent denied that any payment was due and asserted that the Respondent too has a right to claim***

damages. It was also alleged that the claims of the Applicant were barred by limitation. The arbitrator suggested by the Applicant was rejected.

6. In these proceedings before this Court, the Respondent has filed an affidavit-in-reply dated 23rd January, 2024. In a nutshell, the key contentions of the Respondent are that the dispute sought to be referred to arbitration is time barred since invoices have been raised since 2014 and refusal to pay had become clear in October 2018. According to the Respondent, the Applicant withdrew works from the site citing non-payment of dues, which caused damage to the Respondent. Since the arbitration was invoked only on 23rd February, 2023, the Respondent would argue, the same is barred by limitation. It is also contended that the Agreement was not appropriately stamped and consequently it was invalid and could not be acted upon.

7. On 20th June, 2024, when the matter was called out, the Learned Counsel for the Applicant appeared. None appeared for the Respondent on that date. The Learned Counsel for the Applicant was requested to file a brief note on submissions with the crux of contentions of both sides to enable the Court to review the record and take a view on whether reference to arbitration would be made based on the material on record or if there is a need to call for another hearing.

8. Upon a review of the material on the record, and the pleadings of both sides, it is apparent that at the heart of the dispute between the parties lies a claim by the Applicant demanding payment under the Agreement, and potential claims by the Respondent seeking damages from the Applicant. At the core of the Respondent's objection to the appointment of the Arbitrator under Section 11 of the Act are two contentions, namely, that the agreement is insufficiently stamped and that the claim is barred by limitation. Both these facets are eminently capable of being dealt with by the Arbitral Tribunal, which the parties have indeed agreed to constitute to resolve their disputes.

9. While the Respondent has asserted that any claim in arbitration would be time-barred, the Applicant has submitted that the period between 15th March, 2020 and 20th February, 2022 is meant to be excluded from computing the limitation period. According to the Applicant, if this period is ignored, the invocation of arbitration is not time-barred.

*10. As regards the objection relating to inadequate stamping, while the affidavit in reply asserts that the agreement is inadequately stamped, the basis of such assertion is not clear. **The law on the effect of inadequate stamping has been well declared by the Hon'ble Supreme Court in Curative Petition (C) No.44/2023 titled Interplay between Arbitration Agreements under the Arbitration And Conciliation Act, 1996 and the Indian Stamp Act, 1899 – (2023) SCC OnLine SC 1666**. In any case, the objection as regards adequacy of stamping is not for this Court to determine, and such objection too may well be agitated before the Arbitral Tribunal.*

*11 **All these facets of the matter are for the Arbitral Tribunal to determine and the parties are free to agitate these points before the Arbitral Tribunal**. We make it clear that the reference to arbitration would necessarily be followed by the Arbitral Tribunal applying its mind to the Respondent's contention relating to limitation. **If the Arbitral Tribunal finds that any claim is barred by limitation, it would obviously deal with such finding in accordance with law**. That exercise is for the Arbitral Tribunal to conduct rather than for this Court to undertake when exercising its jurisdiction under Section 11 of the Act. **The scope of review by the Court at the time of make appointing an Arbitrator is quite narrow. Unless it appears that there is a manifest bar of limitation evident on the face of the record, there is no cause for the Court to refuse appointing an Arbitral Tribunal to deal with all facets of the disputes between the parties, including the facet of limitation, and the effect, if any, of inadequate stamping**.*

*[**Emphasis Supplied**]*

Review and Recall Application:

5. In the Interim Application (Lodging) No. 23757 of 2024, the Original Respondent primarily assailing the Subject Order, seeking the following reliefs:

*b) That this Hon'ble Court **be pleased to recall and set aside***

the said First Order and/or Second Order/ Order of Appointment, both dated 20th June, 2024, passed in the Section 11 Application.

*c) In the alternative to prayer clause (b) above, this Hon'ble Court **be pleased to review** the said First Order and/or Second Order/ Order of Appointment, both dated 20th June, 2024, passed in the Section 11 application.*

*[**Emphasis Supplied**]*

6. Pending the hearing and disposal of this Interim Application, the Original Respondent has sought a stay of the arbitral proceedings.

7. A praecipe dated August 5, 2024 was filed to mention the captioned Interim Application. The matter was taken up in Chambers on August 7, 2024, when Learned Counsel for the Original Respondent and for the Original Applicant made their submissions. The Original Applicant raised an objection about the inherent lack of jurisdiction in this Court to consider a review of an order passed under Section 11 of the Act. Learned Counsel for the Original Respondent submitted that regardless of the review, this Court has inherent power to direct a recall of the Subject Order. The Original Respondent's grievance was two-fold, namely, that the arbitration proceedings were barred by limitation and that the Original Respondent had not been represented on June 20, 2024 when the Arbitration Application under Section 11 was heard by

this Court, to effectively impress this Court with oral arguments on how the arbitration was barred by limitation. Both parties were granted leave to file a short note on propositions, which they have done.

8. Upon hearing the parties and upon consideration of their written arguments on this Review and Recall Application, it is clear that the Original Respondent has fairly conceded that prayer clause (c) seeking a review of the Subject Order is not being pressed. Consequently, it is not necessary to deal with the preliminary objection about whether an order passed under Section 11 of the Act can be reviewed. Instead, it has been made clear by the Original Respondent that it is a recall and setting aside of the Subject Order that is being sought.

9. The Original Respondent is aggrieved that his oral arguments were not available to this Court on the point of limitation, at the time the Subject Order was passed. The appointment of an arbitrator is purported to be an adverse order. Consequently, the Original Respondent claims, it would have to undergo the rigour of extensive and time-consuming arbitration proceedings, which would have been avoided if it's oral arguments had been available to this Court before

passing the Subject Order. In a nutshell, the grievance is one of alleged denial of natural justice.

10. For an explicit reproduction of the core submissions of the Learned Counsel for the Original Respondent, the following extracts from the written note on arguments filed pursuant to the order dated August 7, 2024 are noteworthy:-

> ***Contentions of the Applicant/Orig. Respondent :***
>
> *1) At the outset, it is respectfully submitted that for the reasons set out hereinafter,* ***Universal is not pressing prayer clause (c) of the present IA viz. the review of the Impugned Orders****. However, Universal is* ***seeking its primary relief in the present IA being the recall and setting aside of the Impugned Orders****.*
>
> *2) It is respectfully submitted that the Impugned Orders, which* ***have been passed without affording an opportunity of hearing to Universal, have and will continue to have a significant adverse impact on Universal as it will now require to undergo extensive and time-consuming arbitration proceedings in view of the appointment of the Learned Arbitrator*** *by this Hon'ble Court.*
>
> *3) It is respectfully submitted that* ***the Impugned Orders have severe or drastic consequences, inasmuch as Universal is now required to undergo the rigors of arbitration proceedings****. This could have been avoided* ***had the principles of natural justice been adhered to and an opportunity been granted to Universal to present its case before this Hon'ble Court****. This is particularly so* ***having regard to Universal's case on merits which it could have placed for the consideration of this Hon'ble Court****; however, this Hon'ble Court only had the benefit of hearing Vascon on that date.*

*4) It is well settled that **no adverse orders should be passed against a party without hearing the party or when the party was not represented; and an order of recall ought to be passed in such circumstances**[2]. This is squarely applicable in the present case since the Impugned Orders have a severe and adverse impact which is inimical to Universal's interests.*

*5) With the greatest respect if is submitted that the authority sought to be relied on by Vascon viz. Sri Budhia Swain & Ors. v/s. Gopinath Deb & Ors.[3] does not assist its case and is distinguishable, having regard to the peculiar facts and circumstances of the present matter. **It is respectfully submitted that this Hon'ble Court has the jurisdiction and power / authority to recall the Impugned Orders particularly in a circumstance where Universal was unable to present its case for this Hon'ble Court's consideration** for the reasons set out hereinabove[4].*

*[**Emphasis Supplied**]*

11. Learned Counsel for the Original Respondent submits that the listing of the matter on June 20, 2024, was not to the knowledge of the Original Respondent, which led to the absence at the hearing. Therefore, he would submit, the Subject Order has been passed without affording the Original Respondent an opportunity of being heard. The Original Respondent has submitted that it has been diligent in defending against the Arbitration Application and has even filed the

[2] *See (i) Asit Kumar Kar v/s. State of West Bengal & Ors., (2009) 2 SCC 703 @ Paras 4, 6 and 7; (ii) Ajoy Kumar Rit v/s. Iswar Dharma Thakur & Ors., 1995 SCC Online Calcutta 115 @ Paras 3 and 10-14; and (iii) In Re: CAN 2805 of 2014, 2014 SCC Online Calcutta 15698 @ unnumbered Paras 5, 6 and 8.*
[3] *[1999] 2 SCR 1189.*
[4] *See MCGM & Anr. v/s. Pratibha Industries Limited & Ors., (2019) 3 SCC 203 @ Para 10.*

Reply Affidavit.

12. It has been fairly conceded by the Original Respondent that the name of its Advocates was indeed mentioned in the causelist for June 20, 2024. However, in the absence of pressing urgency of the matter, its "cogent case on merits" based on which it "dispute(s) the grant of relief in the S.11 Application" was not placed before the Court for its consideration. On this ground, the Original Respondent would like the Subject Order appointing the Learned Sole Arbitrator recalled.

13. In response to a specific query from this Court, Learned Counsel of the Original Respondent submits that the usual intimation of listing of the matters on the causelist, by email and SMS had not been received. In contrast, the Advocates for the Original Applicant provided a copy of a print-out of the system-generated email intimating them of the matter being listed.

14. In support of the contention that this Court has the power to recall its order, the Original Respondent relies on *Municipal Corporation of Greater Mumbai & Another Vs. Pratibha Industries Limited and Others* [5] ("***MCGM***"), paragraph 10, which is extracted

[5] *(2019) 3 SCC 203*

Shraddha Talekar

below :

> *10 Insofar as the High Courts' jurisdiction to recall its own order is concerned, the **High Courts are courts of record, set up under Article 215 of the Constitution of India.** Article 215 of the Constitution of India reads as under:-*
>
> > *"215. High Courts to be courts of record.— Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."*
>
> ***It is clear that these constitutional courts, being courts of record, the jurisdiction to recall their own orders is inherent by virtue of the fact that they are superior courts of record.** This has been recognized in several of our judgments.*
>
> *[**Emphasis Supplied**]*

15. The Original Respondent also relied on a judgment of the Supreme Court in *Asit Kumar Kar Vs. State of West Bengal and Others*[6], ("***Asit Kumar Kar***") and in particular, Paragraphs 4, 6 and 7 thereof, to emphasise the importance of the principle of natural justice and the opportunity of being heard. The Original Respondent has also sought to press into service two judgments of the Calcutta high Court, namely *Ajoy Kumar Rit Vs. Iswar Dharma Thakur & others* [7] ("***Ajoy Kumar Rit***"), in particular, Paragraphs 10 to 14 thereof; as also in *Re: CAN 2805 of 2014 of 2014 (For Restoration)*[8] ("***CAN 2805***"), in particular, unnumbered Paragraphs 5, 6 and 8 thereof.

[6] *(2009) 2 SCC 703*
[7] *1995 SCC OnLine Cal 115*
[8] *2014 SCC OnLine Cal 15698*

16. In contrast, the Original Applicant strongly resists the captioned Interim Application seeking a review or recall of the Subject Order. According to Learned Counsel for the Original Applicant, it is now settled law that a review of an order passed under Section 11 of the Act is not maintainable. As for recall of the Subject Order, it is his submission that no case for recall of the order has been made out. The submissions made by the Original Applicant are extracted below :

> *2. At the outset, it is submitted that* ***an application for review of an order passed under Section 11 of the Act is not maintainable. [Sarda Constructions Vs. Bhupendra Pramanik and Ors. (2023 SCC OnLine Cal. 342)]***
>
> *3 Further, it is submitted that* ***no case for recall of the order has been made out in the Application.*** *As laid down in* ***Sri Budhia Swain and Ors. vs. Gopinath Deb and Ors. ([1999] 2 S.C.R.] an order can only be recalled by a Court if such order*** *:*
>
> > *(i)* ***suffered from inherent lack of jurisdiction*** *and such lack of jurisdiction was* ***patent****;*
> >
> > *(ii) there existed* ***fraud or collusion in obtaining the judgment****; or*
> >
> > *(iii)* ***there had been a mistake of court prejudicing a party or a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented****.*
>
> *The present Application is devoid of any such grounds which would necessitate this Hon'ble Court to recall the First Order and the Second Order.*
>
> *4. Universal has raised a* ***grievance that it was not afforded an***

opportunity of being heard. There is no merit in this contention :

> *(i) Universal had engaged an advocate who had filed a Vakalatnama.*
>
> *(ii) Universal had filed its Affidavit in Reply on 16.01.2024 and the grounds raised therein have been considered in the Impugned Order.*
>
> *(iii) The Arbitration Application was listed for hearing on 20.06.2024 before the Hon'ble Court. It is pertinent to note that the Causelist for 20.06.2024 was published / uploaded on this Hon'ble Court's website on 18.06.2024 and reflected the name of Universal and its advocate. Thus, Universal could have remained present on 20.06.2024.*
>
> *(iv) Universal has raised a grievance that it did not receive an email/SMS that the matter was listed. In this regard, even assuming that this allegation is true, it is submitted that the email/SMS notification is provided as an additional benefit/convenience and where the matter is listed on causelist and the advocate's name is reflected, it is not open to a party to contend that it was not afforded an opportunity of a hearing.*
>
> *(v) Universal having chosen to remain absent, cannot now complain that it was not afforded an opportunity of hearing.*
>
> *[Emphasis Supplied]*

Analysis and Findings:

17. I have given considerable thought to the contentions of the parties. I am not persuaded to recall the Subject Order. The Subject Order has taken into consideration the arguments and pleadings by

both parties and has explicitly dealt with them. Each of the specific objections raised by the Original Respondent, namely, that the dispute is barred by limitation, and that the Agreement has not been duly stamped, has been considered and ruled upon, leaving the contentions on merits entirely open for the Learned Arbitral Tribunal to adjudicate on it. Even at this stage, upon having heard the Learned Counsel for the Original Respondent, both on the power of recall and on merits, I find that the objections to the appointment of the Arbitral Tribunal are without merit, and no case for a recall of the Subject Order is made out. I have no hesitation in reiterating the Subject Order.

18. Since, the Original Respondent is no longer pressing prayer clause (c) seeking a review of the Subject Order, I am not dealing with the submissions of either party on whether or not a Section 11 Court would have the power to review its orders appointing Arbitrators. Such an exercise has been rendered academic once the Original Respondent has fairly withdrawn the prayer for a review of the Subject Order.

19. The prayer for a recall of the Subject Order is based on the ground that it is an adverse order which will require the Original Respondent to "undergo extensive and time consuming arbitration

proceedings". The grounds on which the Original Respondent has opposed the Arbitration Application is specific – that the claims sought to be adjudicated in arbitration were barred by limitation; and that the agreement was inadequately stamped. The objection to the dispute being arbitrable on the ground of the Agreement being invalid owing to allegedly inadequate stamping is not tenable at all any longer in view of the law declared by the seven-judge bench of the Supreme Court in *Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899* [9] ("***Curative Arbitration Judgement***"). In any case, the Subject Order has kept open the ground of inadequate stamping and its implications on the adjudication of the dispute clearly for adjudication by the Arbitral Tribunal.

20. The second objection, on the ground of claim being barred by limitation, also does not persuade me to recall the Subject Order. One can understand if the material brought on record is such that it discloses on the face of it, that the claim constitutes dead wood, which must be cut, preventing an unnecessary and wasteful expenditure of costs on arbitration proceedings that are patently and *ex facie* time barred. In the case at hand, it is apparent that even in the Reply Affidavit, the

[9] *(2023) SCC OnLine SC 1666*

Original Respondent has asserted on oath that the refusal to make the payment demanded by the Original Applicant took place in October 2018, thereby, the right to sue first accruing in October 2018. Of course, the Original Respondent has based its reference to October 2018 on the claim of the Original Applicant, but it is not the Original Respondent's case that the actual refusal to pay took place even prior to October 2018.

21. The Original Respondent has asserted that the time computation for the period of limitation began to run from October 2018. Consequently, according to the Original Respondent, arbitration ought to have been invoked within three years i.e., by October 2021. Paragraph 3 (e) of the Reply Affidavit is extracted below :

> *3(e) **Since it is evident from the Applicant's case, including in its pleadings in the Arbitration Application that the right to sue, according to the Applicant, first accrued in October, 2018, the Applicant ought to have invoked arbitration within three years therefrom, i.e. by October, 2021**. The Applicant failed to do so and invoked arbitration only on 23 rd February, 2023, around 5 years from the date the right to sue first accrued.*
>
> *[**Emphasis Supplied**]*

22. The ***Curative Arbitration Judgement*** itself, also makes it clear, that the role played by the Section 11 Court is required to be one of minimal interference and that the Court must not conduct a trial of facts at that stage. The Supreme Court has gone so far as to say that the

Court must restrict itself to the case made out in the material on record and not embark upon its own exercise of conducting a mini-trial to decide when all it has to do is determine whether an arbitrator must be appointed. Indeed, if the stale nature of a claim is manifest from the material on record, sending parties to arbitration would be improper and unnecessary and this is the dead wood that should be cut at the Section 11 stage, but applying that principle to the facts of the case at hand, such a position does not manifest itself from the material on record. It would be understandable if the Original Respondent had asserted on oath that its refusal to pay had occurred well prior to October 2018 (the date of refusal claimed by the Original Applicant). However, the Original Respondent has merely hedged that such date is as asserted by the Original Applicant, but has not come up in its sworn Reply Affidavit with any competing earlier date of refusal to pay. On the contrary, the Reply Affidavit asserts that the Original Respondent too would have its own claims to make against the Original Applicant.

23. The *ad idem* position of the parties to have their disputes and differences adjudicated by reference to arbitration is a decision explicitly taken and contained in the arbitration agreement. The Section 11 Court is required to examine whether the parties indeed have

executed a binding arbitration agreement and whether disputes and differences (that are not *ex facie* stale and barred by limitation) indeed exist between the parties and fall within the scope of the arbitration agreement.

Case Law Analysis:

24. Indeed, in *Elfit Arabia & Anr. Vs. Concept Hotel Barons Limited & Ors.*[10] ("***Elfit Arabia***"), the Supreme Court has stated that whether a claim is barred by limitation ordinarily lies within the domain of the Arbitral Tribunal, but the Court exercising jurisdiction under Section 11(6) of the Act may reject claims that are *ex facie* non-arbitrable or dead, to protect the counter-party from being drawn into protracted arbitration that is bound to eventually fail. The Supreme Court ruled that the Court must cut the dead wood by refraining from appointing an arbitrator when the claims are *ex facie* time barred and dead, or if there is no subsisting dispute. In the case at hand, the claims are not ex facie time barred and the disputes are not dead since the Original Respondent asserts that it would have its own claims too against the Original Applicant.

[10] *Arbitration Petition (Civil) NO. 15 of 2023 dated July 09, 2024*

25. In the ***Curative Arbitration Judgement***, dealing with outlining the principle of minimum judicial interference, the Supreme Court has declared the law in the following words :

> *74* ***One of the main objectives of the Arbitration Act is to minimize the supervisory role of Courts in the arbitral process. Party autonomy and settlement of disputes by an Arbitral Tribunal are the hallmarks of arbitration law.*** *Section 5 gives effect to the true intention of the parties to have their disputes resolved through arbitration in a quick, efficient and effective manner by minimizing judicial interference in the arbitral proceedings. Parliament enacted Section 5 to minimize the supervisory role of Courts in the arbitral process to the bare minimum, and only to the extent "so provided" under the Part I of Arbitration Act. In doing so, the legislature did not altogether exclude the role of Courts or judicial authorities in arbitral proceedings, but limited it to circumstances where the support of judicial authorities is required for the successful implementation and enforcement of the arbitral process. The Arbitration Act envisages the role of Courts to "support arbitration process" by providing necessary aid and assistance when required by law in certain situations.*
>
> *75.* ***Section 5 begins with the expression "notwithstanding anything contained in any other law for the time being in force****." The nonobstante clause is Parliament's addition to the Article 5 of the Model Law. It is of a wide amplitude and* ***sets forth the legislative intent of limiting judicial intervention during the arbitral process. In the context of Section 5, this means that the provisions contained in Part I of the Arbitration Act ought to be given full effect and operation irrespective of any other law for the time being in force. It is now an established proposition of law that the legislature uses nonobstante clauses to remove all obstructions which might arise out of the provisions of any other law, which stand in the way of the operation of the legislation which incorporates the nonobstante clause****.*
>
> ***
>
> *81 One of the main objectives behind the enactment of the Arbitration Act was to minimize the supervisory role of Courts in the arbitral process by confining it only to the circumstances stipulated by the legislature. For instance, Section 16 of the Arbitration Act provides that the Arbitral Tribunal may rule on its own jurisdiction "including ruling on any objection with*

> *respect to the existence or validity of the arbitration agreement". The effect of Section 16, bearing in view the principle of minimum judicial interference, is that judicial authorities cannot intervene in matters dealing with the jurisdiction of the Arbitral Tribunal. Although Sections 8 and 11 allow Courts to refer parties to arbitration or appoint arbitrators, Section 5 limits the Courts from dealing with substantive objections pertaining to the existence and validity of arbitration agreements at the referral or appointment stage. **A Referral Court at Section 8 or Section 11 stage can only enter into a prima facie determination. The legislative mandate of prima facie determination ensures that the Referral Courts do not trammel the Arbitral Tribunal's authority to rule on its own jurisdiction**.*
>
> *82. **Section 5 is of aid in interpreting the extent of judicial interference under Sections 8 and 11 of the Arbitration Act. Section 5 contains a general rule of judicial non-interference. Therefore, every provision of the Arbitration Act ought to be construed in view of Section 5 to give true effect to the legislative intention of minimal judicial intervention**.*
>
> ***[Emphasis Supplied]***

26. Taking into account the aforesaid state of the law, and applying the same to the facts on record, it is clear to me that no case has been made out for a recall of the Subject Order. A *prima-facie* determination of facts should show that the claims are manifestly stale and barred by limitation. On that count, yet another facet is writ large on the face of the record. If the time to compute the period of limitation commenced in October 2018, arguably, the effect of the suspension of limitation as stipulated by the Supreme Court in *Suo-Motu Writ Petition (C) No. 3 of 2020* in the wake of the Covid-19 pandemic needs consideration. By these proceedings, the period between March 15,

2020 and February 28, 2022 was to be excluded from the computation of limitation periods. It appears, again *prima-facie,* that the Original Respondent had not factored in the impact of the suspension of limitation in computing the limitation period, whereas the Original Applicant seeks to press into service the aforesaid suspension of limitation period. Needless to say, the Subject Order made it abundantly clear that all these facets too eminently fall within the domain of the Arbitral Tribunal when deciding if the claims are indeed barred by limitation.

27. The case law cited by the Original Respondent, to my mind does not advance the case for a recall of the Subject Order. The two orders of the Calcutta High Court invoked the unexceptional principle that High Courts would have the power to recall their own orders should the circumstances so warrant. Where the power to recall was called into question, the Court held that it indeed had power to do so. In the case of ***Ajoy Kumar Rit***, the Court took a view that it had originally passed an *ex-parte* order dismissing revisional proceedings, because the counsel for that party had been caught up in another Court.. However, those facts are not of any assistance in the matter at hand. In my opinion, in the absence of a manifest time-barring, it would not even be appropriate

to assert that the Subject Order is an order adverse to a party that itself asserts entitlement to counter-claims, and that too when such party has not factored in the suspension of limitation in view of the Covid-19 pandemic in its assertions of the counterparty's claims being time-barred.

28. Despite the absence of any advocate for the Original Respondent, the submissions made in the Reply Affidavit (which contains arguments and not mere assertions of facts) were indeed considered and dealt with in the Subject Order. There is no grievance that such submissions not being considered. The grievance, instead, is about the counsel not having been physically present when the matter was called out for him to make oral submissions on the contents of the Reply Affidavit. It is seen from the material tendered by the Original Applicant that a computer-generated email had indeed been sent out from the office of Registrar/Prothonotary and Senior Master of this Court to the parties in question. The Original Applicant has submitted the print out of email received by its Advocates for the hearing scheduled for June 20, 2024. Therefore, there should be no reason for a similar email not having gone out to the Advocates for the Original Respondent as well. Be that as it may, while one may embark upon an

exercise as to whether such intimation indeed went out, the outcome of such an exercise would be of no value for a decision as to whether the Subject Order must be recalled.

29. The Subject Order does not adjudicate or rule on the merits of case of either party. All that the Subject Order does is appoint an Arbitrator (in itself a course of action that the parties had consciously agreed to) and refers all disputes and differences, including disputes about limitation for consideration of the Arbitral Tribunal. From the Reply Affidavit, it is apparent that the purported time-barred nature of the claim is not manifest. Seen from the prism of the ***Curative Arbitration Judgement***, in the facts of the instant case there is no scope to exercise the power of this Court to recall the Subject Order.

30. The judgment of the Supreme Court in the case of ***MCGM*** is also of no assistance to the Original Respondent. It is noteworthy that the decision in ***MCGM*** was in fact rendered in the case of a dispute over arbitration proceedings. In doing so, Paragraph 10 of the said judgment simply declares that High Courts being Courts of record, the jurisdiction to recall their own orders is inherent in the High Courts. There can be no quarrel about this proposition. Whether for exercise of such

jurisdiction to recall orders, the Original Respondent has made out a case to justify a recall is what is to be determined in the matter at hand. As stated above, I am of the view that the Original Respondent has not made out a case to justify a recall of the Subject Order. Purely as an aside, it may be noted that in the case of ***MCGM***, the Supreme Court in fact noted that no party had invoked Section 11 of the Act to appoint an Arbitrator in accordance with the clauses of the contract to which they were a party. That case entailed an application under Section 9 of the Act in disposal of which, a retired High Court Judge came to be appointed as an arbitrator. The dispute at hand was whether the clauses in question were actually arbitration agreements, and whether appointment of an arbitrator while disposing of a Section 9 Application was worthy of a recall. Be that as it may, for the reasons stated above, in the matter at hand, I am not convinced that a case for recall of the Subject Order has been made out.

31. Finally, ***Asit Kumar Kar*** too is evidently distinguishable. That was a case in which, the court was dealing with a party affected by a decision in *All Bengal Excise Licensees Association Vs. Raghabendra Singh & Ors.* [11], in which, in disposal of contempt proceedings relating to auction of licenses, the Supreme Court had accepted an apology from

[11] *(2007) 11 SCC 374*

the alleged contemners, but also directed the cancellation of licenses issued to various persons who had participated in the auction of licenses. In ***Asit Kumar Kar***, dealing with a subsequent writ petition filed under 32 of the Constitution of India by one of the auction-winning licensees complaining that an order as adverse as cancellation of license allotted to him had been passed by the Supreme Court without even hearing him, the Supreme Court agreed that there had been a breach of natural justice to his detriment. The Court treated the writ petition under Article 32 as a review and recall petition and held that the order passed cancelling the licenses was not an outcome of due process of natural justice and consequently recalled the direction cancelling the licenses. None of these facets are of any value or relevance to the case at hand where no adverse determination has been made against the Original Respondent. On the contrary, the entitlement of the Original Respondent to raise all these contentions before the Arbitral Tribunal has been highlighted in the Subject Order. The matter at hand involves a detailed perusal and consideration of the Reply Affidavit while in ***Asit Kumar Kar***, it was an evident case of a non-joinder of a party that would be manifestly and adversely affected by the order cancelling the licenses.

32. Having consciously signed a binding arbitration agreement, I

find it inappropriate on the part of the Original Respondent to state that a direction to participate in such agreed arbitration proceedings, with the right to present all contentions (including the assertion of limitation and inadequate stamping) being preserved, is an onerous direction that will have a "significant adverse impact" on the Original Respondent.

33. For the sake of completeness, it would be profitable to notice the latest observations of the Supreme Court on the role of the Section 11 Court when presented with an argument on a claim being time-barred. In the words of the Supreme Court, the Section 11 Court should only ascertain if the application under Section 11(6) of the Act had been made within the limitation period of three years, and leave the rest to the Arbitral Tribunal. This is precisely what the Subject Order had done. In *SBI General Insurance Co. Ltd. Vs. Krish Spinning*[12], the Supreme Court felt the need to clarify and reiterate the declaration of the law contained in the ***Curative Arbitration Judgement***. The Supreme Court felt the need to clarify and reiterate the position, with particular regard to the articulation contained in the case of *Arif Azim Co. Ltd. Vs. Aptech Ltd.* [13] (decided after the Curative Arbitration Judgement), in the following words :-

[12] *2024 INSC 532*
[13] *2024 INSC 155 / (2024) 5 SCC 313*

126. **Before, we close the matter, it is necessary for us to clarify the dictum as laid in Arif Azim Co. Ltd. v. Aptech Ltd. reported in 2024 INSC 155, so as to streamline the position of law and prevent the possibility of any conflict between the two decisions that may arise in future**.

127. **In Arif Azim (supra)**, while deciding an application for appointment of arbitrator under Section 11(6) of the Act, 1996, **two issues had arisen for our consideration:**

> i. **Whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6)** of the Arbitration and Conciliation Act, 1996? If yes, **whether the petition filed by M/s Arif Azim was barred by limitation?**
>
> ii. **Whether the court may decline to make a reference under Section 11 of Act, 1996 where the claims are ex-facie and hopelessly time- barred?**

128. On the first issue, it was observed by us that **the Limitation Act, 1963 is applicable to the applications filed under Section 11(6)** of the Act, 1996. Further, we also held that **it is the duty of the referral court to examine that the application under Section 11(6) of the Act, 1996 is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963, i.e., 3 years from the date when the right to apply accrues in favour of the applicant**. To determine as to when the right to apply would accrue, we had observed in paragraph 56 of the said decision that "**the limitation period for filing a petition under Section 11(6) of the Act, 1996 can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice**."

129. Insofar as the first issue is concerned, we are of the opinion that the observations made by us in Arif Azim (supra) do not require any clarification and should be construed as explained therein.

130. **On the second issue it was observed by us in paragraph 67 that the referral courts, while exercising their powers under Section 11 of the Act, 1996, are under a duty to "prima-facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time- consuming and costly arbitration process."**

131. Our findings on both the aforesaid issues have been summarised in

paragraph 89 of the said decision thus: -

> *89. Thus, from an exhaustive analysis of the position of law on the issues, **we are of the view that while considering the issue of limitation in relation to a petition under Section 11(6) of the Act, 1996, the courts should satisfy themselves on two aspects by employing a two-pronged test – first, whether the petition under Section 11(6) of the Act, 1996 is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex-facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration, the court may refuse to appoint an arbitral tribunal."***

*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]***

Conclusion :

34. With no error in the *prima facie* appreciation of facts and no demonstration of lack of attention to any material fact contained in the record being shown in the Subject Order, the Interim Application (Lodging) No. 23757 of 2024 in Commercial Arbitration Application (Lodging) No. 17767 of 2023 is hereby disallowed and ***disposed of*** finally.

35. Needless to reiterate, but out of abundant caution, it is clarified that nothing contained in this judgement is meant to be an expression of an opinion on the merits of the case. The Learned Sole Arbitrator, I am sure, will deal with all contentions of the parties, on merits and uninfluenced by any inference from the contents of this judgement.

An End-Note :

36. Ordinarily, every Court is most reluctant to dispose of

matters on an *ex-parte* basis. However, it is a matter of fact that applications under Section 11 of the Act routinely languish in the courts, with the ability to merely commence the first step of getting an arbitral tribunal constituted being routinely frustrated and delayed. It must be remembered that the very jurisdiction of Section 11(6) of the Act is attracted only after constitution of the arbitral tribunal as contracted, is elusive. It is routinely found that resort to arbitration is rendered ineffective, with the very first stage of having an arbitral tribunal constituted itself taking years. It is in this backdrop that, courts should also have regard to the material on record and the pleadings of the parties to see if the absence of a party on a date the application is listed and called out, should be a ground to further postpone a decision on the very appointment of an arbitrator. Proceedings to enforce the right to have an arbitrator appointed under Section 11(6) too, would benefit from a personal hearing of all parties, but when the existence of an arbitration agreement and the arbitrability of the dispute disclosed in the pleadings of the parties, is writ large on the face of the record, and indeed when there is no evidence that the dispute is inexorably and manifestly stale and barred by limitation, it would be unnecessary for an application under Section 11, where pleadings are complete and all facets of all contentions are available in writing, to not be considered

and disposed of, if feasible to do so.

37. Nothing further need be said, except to note that no prejudice or adversity is visited upon the party refusing to submit to contracted arbitration, when the material on record including the sworn affidavit of such party does not show that the dispute is manifestly stale and time-barred. All facets, including examining the argument on limitation, being left to the jurisdiction of the Arbitral Tribunal, is in itself a vital safeguard for the Section 11 Court to not further procrastinate disposal of the application. The duty of the Section 11 Court is to enable an expedited commencement to the dispute resolution, particularly in commercial disputes, when all it does is to simply hold the parties to the mutual promises made in the arbitration agreement, and merely nudges the proceedings to the next stage, handing over the entire matter to the arbitral tribunal.

38. This judgement will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN, J.]

Shraddha Talekar