M/S Arif Azim Co. Ltd. vs M/S Aptech Ltd. on 1 March, 2024

Author: Dhananjaya Y. Chandrachud

Bench: Dhananjaya Y. Chandrachud

2024 INSC 155

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
ARBITRATION PETITION NO. 29 OF 2023

M/S ARIF AZIM CO. LTD.

VERSUS

M/S APTECH LTD.

JUDGMENT

J. B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts: -

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, "the Act, 1996") filed at the instance of a company based in Kabul, Afghanistan and engaged in the business of providing training to desirous students in computer education, English language, information technology, etc. praying for the appointment of an arbitrator for the adjudication of disputes and claims arising from the Contract dated 21.03.2013 entered into between the petitioner and the respondent.

A. FACTUAL MATRIX

2. The petitioner, M/s Arif Azim Co. Ltd., is a company based in Afghanistan, having its registered office at 1st Floor, Zarnigar Hotel, Mohammed Jan Khan Watt, Kabul, Afghanistan and is engaged in the business of providing training in computer education, information technology, English language, etc.

3. The respondent, M/s Aptech Limited, is a company having its registered office at Aptech House, A-65, MIDC Marol, Andheri (E), Mumbai – 400093, Maharashtra, India and is engaged in the business of providing training and education in information technology through its network in India and abroad.

4. On 21.03.2013, three separate franchise agreements were entered into between petitioner/franchisee and the respondent/franchisor. As per the terms of the said agreements, the petitioner, as the franchisee, was granted a non-exclusive license, by the respondent to establish and operate businesses under the following trade names:

I. Aptech English Language Academy (for short, "AELA") II. Aptech Computer Education (for short, "ACE") III. Aptech Hardware and Networking Academy (for short, "AHNA")

5. The dispute in the present case pertains to the agreement entered into between the parties for the AELA. A perusal of the recitals of the said agreement reveals that the respondent company has the expertise in imparting training in information technology and had developed content and established programs for training in computer-based information. The programs developed by the respondent under the brand name AELA included the recurring use of trade names, trademarks, advertising and publicity, distinctive style and character of premises and furnishings, support and placement program for students, etc. The petitioner, desirous of establishing a centre for providing training in information technology in the courses conducted by the respondent with a view to train and educate students to enable them to appear and qualify in the said courses, had approached the respondent as a result of which the franchise agreements for AELA, ACE and AHNA were entered into between the parties.

6. The relevant clauses of the AELA franchise agreement are reproduced hereinbelow:

"1. GRANT OF LICENSE 1.01 The Franchisor hereby grants to the Franchisee for the duration of the term and upon the terms of this Agreement, an non-exclusive Licence ("the Licence") to establish and operate in the Territory, a business under the Trade Name "APTECH ENGLISH LEARNING ACADEMY" in accordance with the PROGRAM, on the terms and conditions hereinafter set forth ("the Licensed Business"), from the designated training centre located at First Floor, Zarnigar Hotel, Mohammad Jan Khan Watt, Kabul, Afghanistan (hereinafter the center)) set up in the designated territory, unless revoked otherwise by the Franchisor.

The Franchisor shall Licence to the Franchisee use of the Trade Name in the said territory for the purpose of running the said center. The Franchisee shall conduct only those courses as are mentioned in Schedule 2. The Franchisee shall be required to obtain the prior written permission of the Franchisor, if so directed by the Franchisor before commencing the licensed business from the said centre. However in respect of any additional training centers in the designated territory for carrying out the Licensed Business, the Franchisee shall be required to obtain such written permissions from the Franchisor from time to time.

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3. APPOINTMENT

Subject to the terms and conditions of this agreement the Franchisor appoints the franchisee as an independent non-exclusive partner with the right to market and train learners in the territory outlined in Schedule 1.

Each party is acting as an independent contractor and not as an agent, partner or joint venture with the other party for any purpose. The franchisee shall bear all costs relating to the marketing and promotion of the courses as outlined in Schedule 2.

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8. PAYMENTS AND PAYMENT PROCEDURE 8.01 In consideration of the Franchisor agreeing to grant the licence for the licensed business, in favour of the Franchisee for a period as mentioned in Clause 2 above and for the use of the technical Know- how, trade marks, trade names, service marks and logos of the Franchisor in relation to its business of computer education and the association of the Franchisee with the reputation and goodwill of the Franchisor, the Franchisee agrees to pay to the Franchisor a Non refundable sum of US$ 30,000 (US Dollars Thirty Thousand only) as initial lumpsum fees.

8.02 If the Franchisee fails to pay the aforesaid lumpsum fees within the aforesaid period, the Franchisor shall be entitled to terminate this Agreement with immediate effect and shall have the right to forfeit the fees, if any, already paid by the Franchisee. 8.03 Additionally, in consideration of the License and other rights granted, and assistance agreed to be provided hereunder, the

Franchisee shall pay to the Franchisor recurring royalty fees as under.

I. The recurring royalty payment shall be on the gross collection, to be paid as given below:

• 10% of the gross collections received in the 1st Year. • 10% of the gross collections received in the 2nd year. • 12.5% of the gross collections received in the 3rd Year. • 15% of the gross collections received in the 4th year. • 17.5% of the gross collections received in the 5th year.

Gross collections means the total gross collections, which have accrued to the Franchisee (irrespective of whether realized or not) from the conduct of licensed business of Aptech in the designated territory.

Amounts payable as Recurring Franchisee Fees will be remitted on or before 10th of the subsequent month for the preceding calendar month e.g. Recurring Franchisee Fees for the gross collections received during the period 1st April to 30th April will be remitted on or before May 10th Such recurring payments shall be made on monthly basis accompanied by the statement of course fees for each Course for the relevant month and also for the total period for which Franchisee's financial year relates. The Franchisee shall use a format supplied by the Franchisor for such statements duly supported with requisite documentation.

II. All the payments to be made by the Franchisee to the Franchisor shall be by way of Telegraphic Transfer / Demand Draft.

III. Any and all statutory tax on the payment as above as per local laws, any other taxes, incidental taxes, incremental taxes, duties or any other charges whether statutory or otherwise in respect of the payments to the Franchisor shall be borne and paid by the Franchisee alone during the term of this agreement.

IV. In case the payments under this agreement are not received by the due date the Franchisor shall be entitled to levy monthly compound interest @ 24% p.a. on such late payments notwithstanding the other remedies available under the laws of the land.

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12. RENEWAL

Not less than one hundred eighty days before the expiry of this Agreement (whether or not it has previously been renewed under the provisions of this Clause) the Franchisee may apply to the Franchisor for renewal of this Agreement for further period(s). Provided that the Franchisee has complied fully with the terms and conditions of this Agreement, the Franchisor shall have option to renew this Agreement on the terms and conditions for such mutually agreed period. However in case the renewal documents and renewal fees are not received in time as stipulated

by the Franchisor, the Franchisor has the absolute right to charge monthly compound interest @ 24% p.a. on the late renewal fees from the due date of such payment, notwithstanding the right to terminate the renewal of this agreement.

13. FORCE MAJEURE Neither party to this agreement shall be liable for any failure or delay to perform any of its obligations under this agreement if the performance is prevented, hindered or delayed by a Force Majeure Event which is beyond reasonable control of either party and in such a case its obligations shall be suspended for so long as the Force Majeure event continues. Each party shall promptly inform the other in writing of the existence of a Force Majeure Event and shall consult together to find a mutually acceptable solution. "Force Majeure Even" means any event due to any cause beyond reasonable control of parties to this agreement viz. unavailability of any communication systems, breach or virus in the processes, fire, storm, earthquake, Flood. Explosion, Act of God, Civil commotion, strikes, or industrial action of any kind, riots, rebellion, war wreck, epidemic failure, statutory laws, regulations or other Government action, computer hacking, unauthorized access to computer data, etc. The affected party shall promptly upon the occurrence of any such cause so inform the other party in writing and thereafter such party shall use reasonable endeavors to comply with the terms of this Agreement as fully and as promptly as possible.

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17. STATUS OF AGREEMENT

17.01 Nothing in this Agreement shall constitute a partnership between the parties hereto or constitute the Franchisee an agent of the Franchisor for any purpose whatsoever and the Franchisee shall have no authority or power to bind the Franchisor or to pledge its credit.

17.02 This Agreement shall not be deemed to confer any right on the Franchisee and the license granted by this Agreement shall be personal to the Franchisee only and shall not be capable of being or be assigned by the Franchisee to any other person.

17.03 This Agreement shall in no way create a contractual relationship between the students and the Franchisor and the Franchisee shall, at all times, be wholly liable and responsible for any claims related to and arising out of the Licensed Business and the conduct of the Courses. The Franchisee undertakes to ensure that the students are made aware at the time of enrolling in the Course that Franchisee is entirely responsible for the conduct of the Courses and, that the students shall have no claim whatsoever against the Franchisor.

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21. ARBITRATION AND GOVERNING LAWS In the event of any dispute or difference arising between the parties hereto, including the events of termination, the

same shall be settled through conciliation between the parties. In the event the parties are unable to arrive at a settlement, the matter will be referred to arbitration. The party raising the dispute shall serve a notice upon the other party advising that a dispute or difference has arisen and nominate on that notice its own arbitrator. The party receiving the notice shall, within 30 days after receiving such notice, nominate its arbitrator by advising the party raising the dispute and the name of the arbitrator appointed by the other party. The arbitrators so appointed shall appoint a third arbitrator. The award of the majority arbitrators shall be final, conclusive and binding upon the parties hereto. The venue of arbitration shall be MUMBAI and the arbitration proceedings shall be conducted in accordance with the UNCITRAL Model Rules. If arbitration process fails both the parties shall submit to the jurisdiction of the Mumbai courts.

22. This Agreement shall be construed in accordance with and governed by the Indian laws."

7. Pursuant to the signing of the aforesaid agreement, proposals were invited by the Indian Council for Cultural Relations, Azad Bhavan, Indraprastha Estate, New Delhi – 110002 (for short, "the ICCR") in 2016 for the execution of a short-term course for training in English for students from Afghanistan who were selected to pursue degree courses in Indian Universities in the academic year 2017-18 under the scholarship scheme of the Government of India (for short, "the course"). The proposal of the respondent was accepted by the ICCR vide Sanction Order No. SSSAN-2017-18 dated 10.10.2016. The sanction order prescribed the schedule for the conduct of the course, submission of progress report to the Embassy of India in Kabul (for short, "EOI, Kabul") etc. and also approved the training fees at Rs 5,000/- + service tax per student per month.

The order also stipulated that the payments for the course would be released to the respondent by the ICCR at the end of every month after getting an endorsement from the EOI, Kabul.

8. After securing the aforesaid sanction order, the respondent vide email dated 17.10.2016 addressed to the petitioner Company informed about the sanction order and stated that the respondent would speak to the petitioner for the implementation of the said order once the expectations of the ICCR for the course were understood.

9. Subsequently, a series of emails were exchanged between the petitioner and the respondent regarding the details of the course including the syllabus, learning outcomes, class schedule, qualifications, salary and number of trainers, etc.

10. The EOI, Kabul vide email dated 24.12.2016, informed the petitioner that although the applications of Afghan students were already sent to the Indian Universities, yet the Universities had not started granting admissions to them and thus it was suggested by the ICCR that the course should begin from the last week of January/ First week of February, 2017.

11. The course was executed by the petitioner at its centre in Kabul from February to April, 2017 for 440 Afghan students. The same was certified by the EOI, Kabul vide its letter no. KAB/327/05/2016-17 dated 30.07.2017.

12. Vide letters dated 04.08.2017 and 14.08.2017 respectively addressed to the EOI, Kabul, the program director for the ICCR requested for month-wise details/number of students who attended the course so as to process the payments for the course to the respondent.

13. Meanwhile disputes arose between the parties in relation to the renewal and payment of royalties for all the three franchise agreements entered into by the parties in March, 2013. Vide email dated 20.03.2018 addressed to the petitioner, the respondent issued a recovery notice for non-payment of royalty/renewal fees. The email stated that due to the non-payment of outstanding royalty, the portal operations for AELA and ACE would be shut by 21.03.2018 and by the month- end for the AHNA portal.

14. The petitioner replied to the aforesaid recovery notice vide email dated 23.03.2018, however the contents of the same have not been placed on record. The respondent replied to the reply email of the petitioner vide email dated 27.03.2018 stating that despite having sent the invoices for pending royalties, nothing had been received by the respondent. Responding to the issue of non- payment for the course conducted by the petitioner, the respondent stated in the said email that they had not received the full amount from the ICCR, which had officially held back 22% of the payment for deductions of quality. The respondent also called upon the petitioner to urgently address, inter-alia, the issue of renewal of the franchise agreements.

15. Responding to the above referred email on the very same day, i.e., 27.03.2018, the petitioner stated that it had hired 7 Indian and 4 local English trainers for executing the course and since the course had been executed in Afghanistan, it was entitled to receive 90% of the payments received by the respondent from Aptech India. The petitioner further requested the respondent to share the details of the amount received from the ICCR after the 22% deduction to enable them to make the calculations and finalise the payment accordingly.

16. The respondent vide an email dated 28.03.2018 replied to the above email of the petitioner stating that it had received only 61.5% of the claimed amount from the ICCR after quality and TDS deductions. The respondent further mentioned that it was entitled to 15% royalty as opposed to the 10% stated by the petitioner and that it had incurred some incidental expenses for the project. The respondent also stressed on the issue of payment of outstanding royalty and renewal, calling upon the petitioner to address them first.

17. The petitioner replied to the above email on the same day disputing the percentage of royalty fee to which the respondent was entitled. The petitioner further stated that it had no issues regarding the quality deductions made by the ICCR, however it needed to know the exact amount disbursed by the ICCR to the respondent so that it could calculate its share from the same and adjust them towards the pending dues.

18. From the email exchanges placed on record, it is clear that the discussions regarding the non-payment of the amount received from the ICCR came to a halt between the parties on 28.03.2018, however the discussions regarding the renewal of the agreements continued. Finally, on 23.04.2018, the petitioner informed the respondent of its decision to not renew the franchise agreements for the ACE and AELA in light of the dispute regarding the payment for the course executed by the petitioner. However, the agreement for AHNA was renewed and the respondent acknowledged the same vide an email on the same day.

19. After about nine months, the petitioner once again sent an email to the respondent on 29.12.2018, raising the issue of the non-payment of the dues for the ICCR project. Although the said email refers to some phone calls and WhatsApp communication regarding the payment for the course, nothing has been placed on record by the petitioner to that effect. Vide the said email, the petitioner once again requested the respondent to provide accounting details for the expenses incurred and payment received from the ICCR for the course. The petitioner also mentioned that it had incurred expenses amounting to $ 60,000/- on salary, lodging and food for the trainers.

20. As it appears from the record, it is only after a gap of around three years that the petitioner again took up the issue of non-payment of dues for the ICCR project with the respondent, vide a legal notice dated 26.08.2021. Through the notice, the petitioner called upon the respondent to pay Rs 73,53,000/- with 18% interest compounded monthly w.e.f. 01.11.2017 within 15 days of the receipt of the notice. The notice further stated that in the event of the respondent failing to comply with the aforesaid demand, the petitioner would file appropriate proceedings before the competent courts including a suit for settlement of accounts for recovery and also by way of damages or otherwise for breach of trust and breach of contract.

21. Again, after about 10 months, the petitioner invoked a pre-institution mediation before the Main Mediation Centre, Bombay High Court on 05.07.2022 in accordance with Section 12A of the Commercial Courts Act, 2015 making the respondent and the ICCR as party respondents. Notice was issued in the said mediation proceedings and 12.08.2022 was scheduled as the date for appearance of the parties. Upon failure of the parties to be present on the said date, 24.08.2022 was fixed as the next date for appearance. However, on the said date, the opposite parties submitted letters refusing to go into mediation and thus a non-starter report dated 24.08.2022 was issued under Rule 3(4) of the Commercial Courts (Pre- Institution Mediation and Settlement) Rules, 2018.

22. After the failure of mediation as aforesaid, the petitioner sent notice for invocation of arbitration to the respondent on 24.11.2022. Vide the notice, the petitioner called upon the respondent to pay an amount of Rs 1,48,31,067/- inclusive of interest of Rs 82,13,367/- and nominated Mr V. Giri and Mr M.L. Verma, Senior Advocates practicing in this Court as its nominee arbitrators.

23. The respondent replied to the aforesaid notice vide letter dated 05.04.2023 denying all the claims raised by the petitioner in the notice dated 24.11.2022. It further stated that notwithstanding the merits, the claims were barred by limitation. The respondent also stated that the mediation proceedings initiated before the Bombay High Court were under Section 12A of the Commercial Courts Act, 2015 which is a mandatory requirement before filing a commercial suit, and thus it was

not open to the petitioner to link it to the conciliation as envisaged in the clause 21 of the franchise agreement for AELA as extracted hereinbefore.

24. The present petition then came to be filed by the petitioner on 19.04.2023 before this Court after the failure of the respondent in nominating an arbitrator as per the mutually agreed upon procedure in response to notice for invocation of arbitration.

B. SUBMISSIONS ON BEHALF OF THE PETITIONER

25. Mr. R. Sathish, the learned counsel appearing for the petitioner submitted that this Court has the requisite jurisdiction to take necessary measures for the constitution of an arbitral tribunal under Section 11(6) of the Act, 1996 as the case at hand pertains to an "international commercial arbitration" within the meaning of Section 2(f) of the Act, 1996. Further, clause 21 of the AELA agreement provides for appointment of a three-membered arbitral tribunal in case a dispute arises and cannot be resolved through conciliation between the parties.

26. The counsel submitted that the petitioner, as an independent non-exclusive partner of the respondent, is entirely responsible for the conduct of the course as per clause 17.03 of the franchise agreement and is thus entitled to receive 90% of the payments received by the respondent from the ICCR after successful completion of the course.

27. The counsel argued that as the principal contract for the course was signed between the ICCR and the respondent, the grant in aid of Rs 73,53,000/- was transferred by the ICCR to the respondent on 03.10.2017 after the certificate of successful completion of the course was issued by the EOI, Kabul. However, since the course was executed in Afghanistan by the petitioner as the franchisee, it is entitled to received 90% of the amount received as per the AELA franchise agreement.

28. The counsel further submitted that the respondent had neither informed nor disclosed the amount received from the ICCR despite repeated requests made by the petitioner for settlement of accounts. The petitioner further contended that the experience of the respondent with the ICCR and Government of India cannot be a ground for withholding of the payments by the respondent.

29. The counsel argued that the cause of action first arose on 03.10.2017 when the respondent withheld the information of receipt of Rs 73,53,000/- from the ICCR. The cause of action further arose on 28.03.2018 when the respondent informed that cash-flow wise it had received only 61.5% of the claimed amount from the ICCR and that it had incurred some incidental expenses for the project.

30. The petitioner contended that since the respondent has failed to disclose the amount received from ICCR till date, it has resulted in a continuing cause of action as the petitioner couldn't quantify the total amount due along with interest as exact details of the amount received by the respondent from the ICCR were not disclosed.

31. The counsel submitted that as the cause of action for full and final settlement of claims was yet to accrue, the reliance placed by the respondent on the decision of this Court in M/s B and T AG v. Ministry of Defence reported in 2023 SCC OnLine SC 657 was misconceived.

32. The counsel submitted that a force majeure situation as per clause 13 of the AELA agreement was created due to the coming back of Taliban in Afghanistan in August, 2021. It was contended by the petitioner that this resulted in the break-down of all communication channels disabling the petitioner from approaching the courts on time despite of doing everything in its power.

33. The counsel further submitted that the petitioner is entitled to get the benefit of the extension of limitation period as directed by this Court in SMW(C) No. 03 of 2020 by which the period from 15.03.2020 to 28.02.2022 is liable to be excluded for the purposes of computing limitation.

34. The counsel submitted that upon failure of the respondent in replying to its claims and legal notice, it had approached the Bombay High Court Mediation Centre under Section 12A of the Commercial Courts Act, 2015 and had initiated pre-reference mediation in accordance with the terms of the arbitration clause in the AELA agreement. It was further submitted that in any view of the matter, the petitioner is not estopped from invoking arbitration under clause 21 of the AELA agreement after having invoked pre-litigation mediation under the Commercial Courts Act, 2015.

35. Finally, the counsel prayed for passing an order referring the dispute to arbitration with a view to adjudicate the differences between the parties as contemplated in clause 21 of the AELA agreement dated 21.03.2013.

C. SUBMISSIONS ON BEHALF OF THE RESPONDENT

36. At the outset, Mr. Rana Mukherjee, the learned senior counsel appearing on behalf of the respondent submitted that the disputes raised by the petitioner are not arbitrable as the claims made by the petitioner relate to the sanction letter dated 10.10.2016 issued by the ICCR to the respondent which is not a part of the AELA franchise agreement entered into between the parties on 21.03.2013. Thus, in the absence of any arbitration clause in the aforesaid sanction order, and it being unrelated to the AELA franchise agreement, the petitioner cannot invoke arbitration for the adjudication of the claims.

37. It was further submitted by him that on the contrary, as per the AELA franchise agreement, it was the respondent who was entitled to receive royalty fee from the petitioner at the rates prescribed in the franchise agreement, and there was no arrangement by which the petitioner was entitled to a 90% payment.

38. The learned Senior counsel vehemently argued that notwithstanding the merits of the claim, the same is hopelessly barred by limitation on the face of it by virtue of the applicability of Article 137 of the Limitation Act, 1963. The dispute, as per the legal notice dated 26.08.2021 issued by the petitioner to the respondent, arose on 01.11.2017 and thus the limitation period, even after considering the covid exclusion, had come to an end much prior to the date when the notice for

invocation of arbitration was issued by the petitioner on 24.11.2022. Further, the plea of a force-majeure event due to coming back of Taliban in Afghanistan, as raised by the petitioner is not bona-fide as most of the exchanges between the parties took place on email and the email facility was available to the petitioner even in the month of August, 2021. The counsel submitted that no effective steps were taken by the petitioner even after the covid period came to an end indicating that the petitioner was not vigilant in protecting its rights and hence the petition was liable to be dismissed as barred by limitation. The counsel contended that the mere exchange of letters would not extend the cause of action and the period of limitation for the purposes of filing the arbitration petition.

39. It was further submitted that the invocation of pre-litigation mediation proceedings before the Bombay High Court Mediation Centre by the petitioner was under Section 12A of the Commercial Courts Act, 2015 which is a mandatory pre-condition before institution of a commercial suit under the said Act and the petitioner should not be allowed to change course by invoking arbitration after having previously submitted to the jurisdiction of the Commercial Courts Act, 2015. Further, the petitioner made the ICCR as a party in the mediation proceedings before the High Court and the ICCR also participated in the said proceedings. Thus, it is evident that the dispute arising out of the tripartite arrangement between the petitioner, respondent and the ICCR has no nexus with the arbitration clause of the AELA franchise agreement.

40. An objection was raised by the learned counsel towards the identity of the Deponent to the affidavit in support of the present arbitration petition on the ground that no Power of Attorney or Letter of Authority could have been executed by the petitioner in favour of the Deponent to the Affidavit.

41. One another submission made by the counsel was that the notice for invocation of arbitration sent by the petitioner was not a valid notice as per clause 21 of the franchise agreement being contrary to the arbitration clause which provides for appointment of three arbitrators, the notice mentions appointment of a sole arbitrator and proposes names of two arbitrators, and on this ground too, the petition is liable to be dismissed.

42. Placing reliance on the judgment of this Court in M/s B and T AG (supra) the learned senior counsel submitted that the present petition squarely falls within the dictum laid down in the said judgment and is thus hopelessly barred by limitation.

D. ANALYSIS

43. Having heard the learned counsel appearing for the parties and having perused the material on record, the following two questions fall 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 present petition is barred by limitation?

II. Whether the court may refuse to make a reference under Section 11 of Act, 1996 where the claims are ex-facie and hopelessly time-barred?

i. ISSUE NO. 1: 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 present petition is barred by limitation?

44. The basic premise behind the statutes providing for a limitation period is encapsulated by the maxim "Vigilantibus non dormientibus jura subveniunt" which translates to "the law assists those who are vigilant and not those who sleep over their rights". The object behind having a prescribed limitation period is to ensure that there is certainty and finality to litigation and assurance to the opposite party that it will not be subject to an indefinite period of liability. Another object achieved by a fixed limitation period is to only allow those claims which are initiated before the deterioration of evidence takes place. The law of limitation does not act to extinguish the right but only bars the remedy.

45. The plain reading of Section 11(6) of the Act, 1996, which provides for the appointment of arbitrators, indicates that no time-limit has been prescribed for filing an application under the said section. However, Section 43 of the Act, 1996 provides that the Limitation Act, 1963 would apply to arbitrations as it applies to proceedings in court. The aforesaid section is reproduced hereinbelow:

"43. Limitations.—(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred to in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted."

46. Since none of the Articles in the Schedule to the Limitation Act, 1963 provide a time period for filing an application under Section 11(6) of the Act, 1996, it would be covered by Article 137 of the Limitation Act, 1963 which is the residual provision and reads as under:

Description of Application	Period of Time	from which limitation period begins to run
137. Any other application for which no period of limitation is provided elsewhere in this Division	Three years	When the right to apply accrues.

47. In his authoritative commentary, "International Commercial Arbitration, Wolters Kluwer, 3rd Edition, pp. 2873-2875", Gary B. Born has observed that as a general rule, limitation statutes are applicable to arbitration proceedings. The relevant extract is as follows:

> "Most nations impose limitation or prescription periods within which civil claims must be brought. Of course, statutes of limitation differ from country to country. As discussed below, statutes of limitations are virtually always applicable in international arbitration proceedings, in the same way that they apply in national court proceedings. Choosing between various potentially- applicable statutes of limitations in international arbitration raises significant choice-of-law questions.
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> xxx xxx xxx Conflict of laws issues also arise as to the date that the statute of limitations period is tolled. The issue can be addressed by national laws, as well as by institutional arbitration rules. Unfortunately, inconsistencies can arise between institutional rules and one or more potentially-applicable national laws (which may also apply in a mandatory fashion). For counsel in a particular dispute, of course, the only safe course is to satisfy the shortest potentially-applicable limitations period." (emphasis supplied)

48. A seven-Judge Bench of this Court in SBP & Co. v. Patel Engineering Ltd. and Another reported in (2005) 8 SCC 618 held that the issue of limitation being one of threshold importance, it must be decided at the pre-reference stage, so that the other party is not dragged through a long-drawn arbitration, which would be expensive and time consuming.

49. A three-Judge Bench of this Court in Geo Miller and Company Private Limited v. Chairman, Rajasthan Vidyut Utpadan Nigam Limited reported in (2020) 14 SCC 643 observed as follows:

> "14. Sections 43(1) and (3) of the 1996 Act are in pari materia with Sections 37(1) and (4) of the 1940 Act. It is well-settled that by virtue of Article 137 of the First Schedule to the Limitation Act, 1963 the limitation period for reference of a dispute to arbitration or for seeking appointment of an arbitrator before a court under the 1940 Act (see State of Orissa v. Damodar Das [(1996) 2 SCC 216]) as well as the 1996 Act (see Grasim Industries Ltd. v. State of Kerala [(2018) 14 SCC 265 : (2018) 4 SCC (Civ) 612]) is three years from the date on which the cause of action or the claim which is sought to be arbitrated first arises.

15. In Damodar Das [(1996) 2 SCC 216], this Court observed, relying upon Russell on Arbitration by Anthony Walton (19th Edn.) at pp. 4-5 and an earlier decision of a two-Judge Bench in Panchu Gopal Bose v. Port of Calcutta [(1993) 4 SCC 338], that the period of limitation for an application for appointment of arbitrator under Sections 8 and 20 of the 1940 Act commences on the date on which the "cause of arbitration" accrued i.e. from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned.

16. We also find the decision in Panchu Gopal Bose [(1993) 4 SCC 338] relevant for the purpose of this case. This was a case similar to the present set of facts, where the petitioner sent bills to the respondent in 1979, but payment was not made. After an interval of a decade, he sent a notice to the respondent in 1989 for reference to arbitration. This Court in Panchu Gopal Bose [(1993) 4 SCC 338] observed that in mercantile references of this kind, it is implied that the arbitrator must decide the dispute according to the existing law of contract, and every defence which would have been open to the parties in a court of law, such as the plea of limitation, would be open to the parties for the arbitrator's decision as well. Otherwise, as this Court observed : (SCC p. 344, para 8) "8. ... a claim for breach of contract containing a reference clause could be brought at any time, it might be 20 or 30 years after the cause of action had arisen, although the legislature has prescribed a limit of three years for the enforcement of such a claim in any application that might be made to the law courts."

17. This Court further held as follows: (Panchu Gopal Bose case [(1993) 4 SCC 338] , SCC pp. 345-46, paras 11-12) "11. Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of civil actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

12. In Russell on Arbitration....

At p. 80 it is stated thus:

> 'An extension of time is not automatic and it is only granted if "undue hardship" would otherwise be caused. Not all hardship, however, is "undue hardship"; it may be proper that hardship caused to a party by his own default should be borne by him, and not transferred to the other party by allowing a claim to be reopened after it has become barred.' " (emphasis supplied)
>
> 50. Having traversed the statutory framework and case law, we are of the clear view that there is no doubt as to the applicability of the Limitation Act, 1963 to arbitration proceedings in general and that of Article 137 of the Limitation Act, 1963 to a petition under Section 11(6) of the Act, 1996 in particular. Having held thus, the next question that falls for our determination is whether the present petition seeking appointment of an arbitrator is barred by limitation.

> 51. The determination of the aforesaid question is an exercise involving both law and facts. As is evident from Article 137 of the Limitation Act, 1963, the limitation period for making an application under Section 11(6) of the Act, 1996 is three years from the date when the right to apply accrues. Thus, to determine whether the present petition is barred by limitation, it is necessary to ascertain when the right to file the present petition under Section 11(6) of the Act, 1996 accrued in favour of the petitioner.

a. When does the right to apply under Section 11(6) accrue?

52. It has been held in a catena of decisions of this Court that the limitation period for making an application seeking appointment of arbitrator must not be conflated or confused with the limitation period for raising the substantive claims which are sought to be referred to an arbitral tribunal. The limitation period for filing an application seeking appointment of arbitrator commences only after a valid notice invoking arbitration has been issued by one of the parties to the other party and there has been either a failure or refusal on part of the other party to make an appointment as per the appointment procedure agreed upon between the parties.

53. O.P. Malhotra in The Law & Practice of Arbitration and Conciliation, 3rd Edition, pp. 688-689 has summarised the position of law on the limitation period for a Section 11(6) petition thus:

> "There is no specific period of limitation prescribed for making the request under Section 11(6) to the Chief Justice or his designate, to take the necessary measure for appointing an arbitrator. Therefore, Article 137 of the Limitation Act, 1963, which provides the limitation period of three years for filing any other application for which no period of limitation is provided elsewhere in the third division of the Schedule of the Act from the day when the right to apply accrues. It is the residuary article in regard to the applications, and it can only be applied if no other article is applicable. It would only apply to an application where it is required by law to be made. It is restricted to applications for the exercise of the Acts and powers which the court is not bound to perform suo motu. Therefore, the period of limitation for making a request under Section 11(6) is three years, and the limitation is to be counted from the date on which 30 days from the date of notice by one party to the other for appointing arbitrator expires. The question whether the claims/disputes made in reference to arbitration was valid is a question to be decided by the arbitrator, and not by the appointing authority of the arbitrator under Section 11(6) of the Act. The appointing authority is certainly required to ascertain whether the application under Section 11(6) of the Act was barred by time." (emphasis supplied)

54. Dr. P.C. Markanda in Law Pertaining to Arbitration and Conciliation, 9th Edition, LexisNexis, pp. 550-551 has discussed on the applicability of law of limitation to a petition under Section 11(6) of the Act, 1996 as follows:

> "For the purpose of examining the right of the petitioner to apply under sub section (6) for calculating the period of limitation, it is necessary to establish, in the first

> instance, the relevant date when the right to apply accrued in favour of the petitioner. It is the date on which the right to apply accrues that determines the starting point. The starting point does not coincide with the date on which the cause of action for filing a suit arises. Whether the claims of a party are barred by limitation or not is for the arbitrator to see, but it is the duty of the court to see whether the application filed in the court is within limitation or not. Limitation for filing application under sub-section (4) would commence only from the expiry of 30 days from the receipt of request mentioned in sub-section (4)(a) or
>
> (b) and the limitation for an application under sub-section (6) would commence from the happening of the contingencies mentioned in sub-clauses (a) or (b) or (c) thereof. The procedure prescribed under this section is mandatory and Art. 137, Limitation Act providing for limitation shall apply.
>
> xxx xxx xxx It would be entirely wrong to mix the two aspects, namely whether there was any valid claim and secondly the claim to be adjudicated by the arbitrator was barred by time. As for the second matter, it is for the arbitrator to see whether the claim was within limitation or not and the court should confine itself to see whether the application made to the court is within limitation. An application made more than three years after the accrual of cause of action is palpably time barred and liable to be dismissed. Article 137 of the Limitation Act makes it obligatory for claims to be filed within 3 years of the rescission/termination of the contract. The right of action for the department starts from the date when the work is rescinded and not from the date when the balance work is got completed through another agency.

If the petitioner delays invocation of arbitration clause for months together for no justifiable cause after the period prescribed in the arbitration agreement had elapsed, the court would not come to the rescue of such a party seeking appointment of arbitrator and the abnormal delay of more than a year cannot be condoned." (emphasis supplied)

55. This Court in Bharat Sanchar Nigam Limited & Another v. Nortel Networks India Private Limited reported in (2021) 5 SCC 738 held thus:

> "15. It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days from issuance of the notice invoking arbitration. In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.
>
> 16. 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 the substantive claims made in the underlying commercial contract. The period of

> limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognised even under Section 20 of the Arbitration Act, 1940. Reference may be made to the judgment of this Court in J.C. Budhraja v. Orissa Mining Corpn. Ltd. [(2008) 2 SCC 444 : (2008) 1 SCC (Civ) 582] wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator. Para 26 of this judgment reads as follows : (SCC p. 460) "26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4-6-1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Act. Insofar as a petition under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition under Section 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in Inder Singh Rekhi v. DDA [(1988) 2 SCC 338], Panchu Gopal Bose v. Port of Calcutta [(1993) 4 SCC 338] and Utkal Commercial Corpn. v. Central Coal Fields Ltd. [(1999) 2 SCC 571] also make this position clear." (emphasis supplied)

56. The other way of ascertaining the relevant point in time when the limitation period for making a Section 11(6) application would begin is by making use of the Hohfeld's analysis of jural relations. It is a settled position of law that the limitation period under Article 137 of the Limitation Act, 1963 will commence only after the right to apply has accrued in favour of the applicant. As per Hohfeld's scheme of jural relations, conferring of a right on one entity must entail the vesting of a corresponding duty in another. When an application under Section 11(6) of the Act, 1996 is made before this Court without exhausting the mechanism prescribed under the said sub-section, including that of invoking arbitration by issuance of a formal notice to the other party, this Court is not duty bound to appoint an arbitrator and can reject the application for being premature and non-compliant with the statutory mandate. However, once the procedure laid down under Section 11(6) of the Act, 1996 is exhausted by the applicant and the application passes all other tests of limited judicial scrutiny as have been evolved by this Court over the years, this Court becomes duty-bound to appoint an arbitrator and refer the matter to an arbitral tribunal. Thus, the "right to apply" of the Applicant can be said to have as its jural corelative the "duty to appoint" of this Court only after all the steps required to be completed before instituting a Section 11(6) application have been duly completed. Thus, 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.

57. This Court in Utkal Commercial Corporation v. Central Coal Fields Ltd. reported in (1999) 2 SCC 571 while determining a similar question in relation to the Arbitration Act, 1940 held thus:

> "6. Therefore, the time for the purposes of limitation begins to run from the date when the right to make an application under Section 8 accrues. Section 8 of the Arbitration Act, which is relevant for our present purposes, is reproduced below:
>
> "8. Power of court to appoint arbitrator or umpire.—(1) In any of the following cases—
>
> (a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or
>
> (b)-(c)*** any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.
>
> (2) If the appointment is not made within fifteen clear days after service of the said notice, the court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."
>
> 7. Therefore, under Section 8, before an application can be made to the court under that section, the following requirements should be satisfied:
>
> (1) The arbitration agreement should provide for appointment of arbitrator/s by consent.
>
> (2) Parties do not concur in the appointment of an arbitrator. (3) One party serves notice on the other party to concur in the appointment.
>
> (4) No appointment is made within 15 days of the service of the notice.

8. Thereupon the court may, on the application of the party who gave the notice and after giving the other party an opportunity of being heard, appoint an arbitrator.

9. In view of the express language of Section 8, it is quite clear that unless a party who desires to apply has resorted to the process set out in Section 8, and has failed to secure the concurrence of the other party to the appointment of an arbitrator within the prescribed period, the court will not

intervene under Section 8. The right to apply under Section 8, therefore, would accrue when, within 15 clear days of the notice, the other parties do not concur in the appointment of an arbitrator." (emphasis supplied)

58. In Secunderabad Cantonment Board v. B. Ramachandraiah & Sons reported in (2021) 5 SCC 705, this Court while determining the issue of limitation in relation to a Section 11(6) petition under the Act, 1996 held thus:

> "19. Applying the aforesaid judgments to the facts of this case, so far as the applicability of Article 137 of the Limitation Act to the applications under Section 11 of the Arbitration Act is concerned, it is clear that the demand for arbitration in the present case was made by the letter dated 7-11-2006. This demand was reiterated by a letter dated 13-1-2007, which letter itself informed the appellant that appointment of an arbitrator would have to be made within 30 days. At the very latest, therefore, on the facts of this case, time began to run on and from 12-2-2007. The appellant's laconic letter dated 23- 1-2007, which stated that the matter was under consideration, was within the 30-day period. On and from 12-2-2007, when no arbitrator was appointed, the cause of action for appointment of an arbitrator accrued to the respondent and time began running from that day. Obviously, once time has started running, any final rejection by the appellant by its letter dated 10-11-2010 would not give any fresh start to a limitation period which has already begun running, following the mandate of Section 9 of the Limitation Act. This being the case, the High Court was clearly in error in stating that since the applications under Section 11 of the Arbitration Act were filed on 6-11-2013, they were within the limitation period of three years starting from 10-11-2020. On this count, the applications under Section 11 of the Arbitration Act, themselves being hopelessly time-barred, no arbitrator could have been appointed by the High Court." (emphasis supplied)

59. Similarly, in Bharat Sanchar Nigam Limited (supra), this Court after applying the settled position of law held as follows:

> "22. Applying the aforesaid law to the facts of the present case, we find that the application under Section 11 was filed within the limitation period prescribed under Article 137 of the Limitation Act. Nortel issued the notice of arbitration vide letter dated 29-4-2020, which was rejected by BSNL vide its reply dated 9-6-2020. The application under Section 11 was filed before the High Court on 24- 7-2020 i.e. within the period of 3 years of rejection of the request for appointment of the arbitrator." (emphasis supplied)

60. It's time now to apply the dicta laid down in the aforesaid judgments to the facts of the present case. The notice for invocation of arbitration was issued by the petitioner to the respondent on 24.11.2022, proposing the names of two learned arbitrators and calling upon the respondent to either release the allegedly withheld payment or nominate an arbitrator from their side within a

period of 30 days from the date of receipt of the notice. As per the record, the notice was delivered to the respondent on 29.11.2022. The relevant extracts from the said notice are extracted hereinbelow:

> "14. Thus disputes arose between the parties, one incorporated in a country other than India in relation to the Franchise Agreement dt. 21.3.2013, which would attract Section 2(1)(f)(ii) of the A&C Act.

Since every effort to resolve it amicably failed, our client is invoking Sec 11(6) read with Section 11(12)(a) of A & C Act before Hon'ble Supreme Court of India to seek appointment of a sole arbitrator in case M/s Aptech Ltd. is not heeding AACL request in this behalf.

15. Without prejudice to your rights, our client suggests the name of 2 persons, namely Sri. V. Giri, Sri. M L Verma, Senior advocates practicing in the Hon'ble Supreme Court subject to consent, or any Hon'ble former judges for enter into reference with consent of parties to decide all the disputes arising out of the Franchise Agreement dated 21.3.2013, between the parties, within the period as per Section 29A of the Act.

16. In case of failure on your part to return the illegally withheld money or if the above request for appointment of a sole Arbitrator from the panel suggested or any other name suggested from your side within 30 days of from the receipt of this notice, our clients will be constrained to file appropriate legal proceedings as stated in Para 14 of this notice for which M/s Aptech Ltd. will be fully responsible for all costs, risks, responsibilities, expenses and consequences thereof. Please note. Copy Retained."

61. The respondent replied to the said notice on 05.04.2023. The relevant parts from the aforesaid reply are extracted hereinbelow:

> "5. My clients submit that the notice addressed by you on behalf of your clients is defective, unjustified, without any basis, documents, material and is contradictory and inconsistent with the stand taken by your clients in the mediation proceedings filed before the Hon'ble High Court.
>
> 6. My client states that your clients have misinterpreted the clause of the Arbitration under the Franchise Agreement dated 21.3.2013 i.e., the conciliation/mediation process and are linking the same to the proceedings of mediation filed before the Hon'ble Bombay High Court. My client states that the mediation proceedings filed before the Hon'ble Bombay High Court was filed under section 2(1)(c) of the Commercial Court Act which is mandatory provision before instituting the Commercial Suit. Therefore, my clients therefore state that the invocation of arbitration clause under the Franchise Agreement dated 21.3.2013 and your notice dated 24.11.2022 is illegal, invalid, non-est and unjustified and is liable to be withdrawn forthwith.

> 7. My clients state that in view of the aforesaid position, there is no cause of action for referring any dispute to the Arbitration and your notice is defective, illegal and invalid. Therefore, there is no question of my clients consenting to the invocation of the arbitration clause and/or appointment of an Arbitrator.
>
> 8. My clients state that despite having conveyed the above should your client insists in initiating any legal proceedings, the same shall be defended entirely at your client's risk as to costs and consequences. My clients reiterate that nothing contained in your notice and not specifically dealt with herein shall in any manner be treated as an admission due to non traverse and in fact shall be treated as denial."

62. A perusal of the above shows that the request for appointment of an arbitrator was first made by the petitioner vide notice dated 24.11.2022 and a time of one month from the date of receipt of notice was given to the respondent to comply with the said notice. The notice was delivered to the respondent on 29.11.2022. Hence, the said period of one month from the date of receipt came to an end on 28.12.2022. Thus, it is only from this day that the clock of limitation for filing the present petition would start to tick. The present petition was filed by the petitioner on 19.04.2023, which is well within the time period of 3 years provided by Article 137 of the Limitation Act, 1963. Thus, the present petition under Section 11(6) of the Act, 1996 cannot be said to be barred by limitation. ii. ISSUE NO. 2: Whether the court may refuse to make a reference under Section 11 of the Arbitration and Conciliation Act, 1996 where the claims are ex-facie and hopelessly time-barred?

63. As discussed above, the present petition filed by the petitioner is not barred by limitation. Thus, the next question that falls for our consideration is whether the claims sought to be arbitrated by the petitioner are ex-facie barred by limitation, and if so, whether the court may refuse to refer them to arbitration?

a. Jurisdiction versus Admissibility

64. There are two categories of issues that may be raised against an application for appointment of arbitrator under Section 11(6) of the Act, 1996. The first category is of the issues pertaining to the power and authority of the arbitrators to hear and decide a case and are referred to as the "jurisdictional issues/objections". Objections to the competence of arbitrators to adjudicate a dispute, existence/validity of arbitration agreement, absence of consent of the parties to submit the disputes to arbitration, dispute falling out of the scope of the arbitration agreement are some examples of jurisdictional or maintainability issues.

65. The second category is of those issues which are related to the nature of the claim and include challenges to procedural requirements, viz. a mandatory requirement for pre-reference mediation; claim or a part thereof being barred by limitation, etc. This category is referred to as the "admissibility issues/objections".

66. This Court in Bharat Sanchar Nigam Limited (supra), explained the difference between the aforesaid two category of objections and held that the issue of limitation is essentially an

admissibility issue and is not a challenge to the jurisdiction of the arbitrator to decide the claim. While placing reliance on decision of the Singapore Court of Appeal in Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho reported in (2019) 1 SLR 263, this Court explained the "tribunal v. claim" test thus:

> "43. Applying the "tribunal v. claim" test, a plea of statutory time bar goes towards admissibility as it attacks the claim. It makes no difference whether the applicable statute of limitations is classified as substantive (extinguishing the claim) or procedural (barring the remedy) in the private international law sense.
>
> 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."

67. 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.

68. In Mustiu and Boyd's Commercial Arbitration (1982 Ed., pp. 436) under the heading "Hopeless Claims" in Chapter 31 it is stated thus in relation to the jurisdiction of an arbitral tribunal adjudicating commercial disputes:

> "Two situations must be distinguished. The first, which is very rare, exists when the claimant not only appreciates, but will if pressed be prepared to acknowledge, that his claim is ill-founded in law. In effect, he asserts that his claim has commercial and moral merit; that if the law gives him no remedy, there is a defect in the law; and that a commercial arbitrator ought to award him something in recognition of the true merits.
>
> Here, we believe that there is undoubtedly jurisdiction to interfere by way of injunction to prevent the respondent from being harassed by a claim which can never lead to valid award, for example in cases where claim is brought in respect of the alleged arbitration agreement which does not really exist, or which has ceased to exist. So also where the dispute lies outside the scope of the arbitration agreement. By parity of reasoning, the Court should be prepared to intervene where the claimant and the respondent are at one as to the absence of legal merits, so that it can be said that there is no real dispute.
>
> The respondent might also seek to protect himself by recourse to the arbitrator. He cannot ask the arbitrator to rule that there is no dispute, since this would be a matter affecting his own jurisdiction. An alternative would be to invite the arbitrator summarily to dismiss the claim. It would appear safer, however, to leave the matter to the court."

69. The scope of this primary examination has been carefully laid down by a three-Judge Bench of this Court in Vidya Drolia and Others v. Durga Trading Corporation reported in (2021) 2 SCC 1 as follows:

> "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)

70. The aforesaid decision in Vidya Drolia (supra) was relied upon and reaffirmed in another decision of this Court in NTPC Ltd. v. SPML Infra Ltd. reported in (2023) 9 SCC 385 wherein the "Eye of the Needle" test was explained as follows:

> "Eye of the needle

25. The abovereferred precedents crystallise the position of law that the pre-referral jurisdiction of the Courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the Referral Court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

26. As a general rule and a principle, the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the Referral Court may reject claims which are manifestly and ex facie non-arbitrable [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 154.4: (2021) 1 SCC (Civ) 549]. Explaining this position, flowing from the principles laid down in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 :

(2021) 1 SCC (Civ) 549], this Court in a subsequent decision in Nortel Networks [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738 : (2021) 3 SCC (Civ) 352] held [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738, para 45.1 : (2021) 3 SCC (Civ) 352] : (Nortel Networks case [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738 : (2021) 3 SCC (Civ) 352], SCC p. 764, para 45) “45. ... 45.1. ... While exercising jurisdiction under Section 11 as the judicial forum, the Court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere “only” when it is “manifest” that the claims are ex facie time-barred and dead, or there is no subsisting dispute.”

27. The standard of scrutiny to examine the non-arbitrability of a claim is only prima facie. Referral Courts must not undertake a full review of the contested facts; they must only be confined to a primary first review [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 134 : (2021) 1 SCC (Civ) 549] and let facts speak for themselves. This also requires the Courts to examine whether the assertion on arbitrability is bona fide or not. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable. [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738, para 47 : (2021) 3 SCC (Civ) 352] On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 154.4 : (2021) 1 SCC (Civ) 549] .

28. The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the Referral Court to protect the parties from being

> forced to arbitrate when the matter is demonstrably non-arbitrable [Ibid.]. It has been termed as a legitimate interference by Courts to refuse reference in order to prevent wastage of public and private resources [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 139 : (2021) 1 SCC (Civ) 549]. Further, as noted in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549], if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 139 : (2021) 1 SCC (Civ) 549]. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator, as explained in DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd. [DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd., (2021) 16 SCC 743, paras 22, 26 : 2021 SCC OnLine SC 781, paras 18, 20]" (emphasis supplied)

71. In Geo Miller (supra) where the cause of action for bringing the claim arose in 1983, this Court refused to appoint an arbitrator as the application seeking appointment of arbitrator was filed much later in 2003, that is after a delay of almost twenty years. The relevant part of the said judgment is extracted hereinbelow:

> "21. Applying the aforementioned principles to the present case, we find ourselves in agreement with the finding of the High Court that the appellant's cause of action in respect of Arbitration Applications Nos. 25/2003 and 27/2003, relating to the work orders dated 7-10- 1979 and 4-4-1980 arose on 8-2-1983, which is when the final bill handed over to the respondent became due. Mere correspondence of the appellant by way of writing letters/reminders to the respondent subsequent to this date would not extend the time of limitation.
>
> Hence the maximum period during which this Court could have allowed the appellant's application for appointment of an arbitrator is 3 years from the date on which cause of action arose i.e. 8-2-1986. Similarly, with respect to Arbitration Application No. 28/2003 relating to the work order dated 3-5-1985, the respondent has stated that final bill was handed over and became due on 10-8-1989. This has not been disputed by the appellant. Hence the limitation period ended on 10-8-1992. Since the appellant served notice for appointment of arbitrator in 2002, and requested the appointment of an arbitrator before a court only by the end of 2003, his claim is clearly barred by limitation." (emphasis supplied)

72. In Bharat Sanchar Nigam Limited (supra), this Court while observing that although the arbitration petition was not barred by limitation, yet the cause of action for the underlying claims having arisen much earlier, the claims were clearly barred by limitation on the day notice for arbitration was invoked. Relevant paragraphs are extracted hereinbelow:

"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.

50. In the notice invoking arbitration dated 29-4-2020, it has been averred that:

"Various communications have been exchanged between the petitioner and the respondents ever since and a dispute has arisen between the petitioner and the respondents, regarding non-payment of the amounts due under the tender document."

51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, [S.S. Rathore v. State of M.P., (1989) 4 SCC 582 : 1990 SCC (L&S) 50; Union of India v. Har Dayal, (2010) 1 SCC 394; CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., (2020) 5 SCC 185] or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions.

Section 9 of the Limitation Act makes it clear that:"where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it." There must be a clear notice invoking arbitration setting out the "particular dispute" [Section 21 of the Arbitration and Conciliation Act, 1996.] (including claims/amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail.

52. In the present case, the notice invoking arbitration was issued 5½ years after rejection of the claims on 4-8-2014. Consequently, the notice invoking arbitration is ex facie time-barred, and the disputes between the parties cannot be referred to arbitration in the facts of this case." (emphasis supplied)

73. This Court, in M/s B and T AG (supra), to which two of us, the Chief Justice, Dr. D.Y. Chandrachud and Justice J.B. Pardiwala, were members of the Bench, had the occasion to ascertain in the facts of the said case whether an application for appointment of arbitrator under Section 11(6) of the Act, 1996 was barred by limitation. The facts of the said case were that disputes had arisen between the parties in relation to the alleged wrongful encashment of warranty bond by the respondent therein vide its letter dated 16.02.2016. Even after the amount got credited in the bank account of the respondent, the parties continued to engage in bilateral discussions. It was the case of the petitioner therein that the 'breaking point' was reached sometime in September, 2019 and not in 2016 as negotiations had continued to take place between the parties. This Court rejected the contention of the petitioner and held that the encashment of bank guarantee was a positive action on part of the respondent which had crystallised the right of the petitioner to seek reference of the dispute to arbitration and mere writing of letters would not extend the cause of action. It was held that the notice for invoking arbitration having been issued almost six years after the cause of action for raising the claims had arisen, the claims were ex-facie dead and time-barred and hence dismissed the application. Relevant extracts from the judgment are as follows:

> "65. On a conspectus of all the aforesaid decisions what is discernible is that there is a fine distinction between the plea that the claims raised are barred by limitation and the plea that the application for appointment of an arbitrator is barred by limitation.
>
> xxx xxx xxx
>
> 76. At the cost of repetition, we state that when the bank guarantee came to be encashed in the year 2016 and the requisite amount stood transferred to the Government account that was the end of the matter. This "Breaking Point" should be treated as the date at which the cause of action arose for the purpose of limitation.
>
> 77. Negotiations may continue even for a period of ten years or twenty years after the cause of action had arisen. Mere negotiations will not postpone the "cause of action" for the purpose of limitation.

The Legislature has prescribed a limit of three years for the enforcement of a claim and this statutory time period cannot be defeated on the ground that the parties were negotiating.

xxx xxx xxx

80. The case on hand is clearly and undoubtedly, one of a hopelessly barred claim, as the petitioner by its conduct slept over its right for more than five years. Statutory arbitrations stand apart." (emphasis supplied)

74. The learned senior counsel appearing for the respondent has strongly relied on the judgment in M/s B and T AG (supra) to argue that the facts of the present case are squarely covered by the dicta laid down in the said judgment. However, we are of the view that the said judgment is of no avail to the respondent.

75. The respondent, relying upon the legal notice dated 26.08.2021 issued by the petitioner, submitted that the cause of action arose on 01.11.2017. The relevant part of the said notice is extracted here:

> "10. Our client is entitled to receive 90% of the amount certified by the Embassy in Kabul. While reserving our rights without prejudice and subject to settlement of accounts illegally withheld, this notice is issued calling upon you to pay Rs. 73,53,000/- with interest compounded monthly @18% w.e.f. 1st November 2017 within 15 days of from the receipt of this notice, under intimation to us, failing which our client has given instructions to file appropriate legal proceedings before competent courts in India including a suit for settlement of accounts for recovery of money and also by way of damages or otherwise for, breach of trust, breach of contract. In default, Aptech will be fully responsible for all costs, risks, responsibilities, expenses and consequences thereof."

76. From the email communications placed on record, it appears that due to the pre-existing disputes between the parties in relation to the franchise agreements, the respondent sent a demand notice to the petitioner seeking payment of royalty and renewal fees from the petitioner. It appears that in reply to the said notice dated 23.03.2018, the petitioner raised the issue of payment of dues relating to the ICCR project. Some more emails were exchanged between the parties on the issue however it can be seen that vide email dated 28.03.2018, the respondent clearly showed unwillingness to continue further discussions regarding payments related to the ICCR project. Thus, it can be said that the rights of the petitioner to bring a claim against the respondent were crystallised on 28.03.2018 and hence the cause of action for invocation of arbitration can also said to have arisen on this date. This position has also been admitted in the Written Submission dated 05.02.2024 wherein the petitioner has submitted as follows:

> "4. The limitation for claiming the due amount would expire on 27.03.2021...." b. When does the Cause of Action arise?
>
> 77. We are not impressed with the submission canvassed on behalf of the respondent that the cause of action for raising the claims arose on 01.11.2017 and thus the limitation period for invoking arbitration should commence from the said date. The petitioner has alleged that the respondent received the payment for the course from the ICCR on 03.10.2017. However, the perusal of the communication exchanged between the parties indicates that it is only on 28.03.2018 that the right of the petitioner to bring a claim against the respondent could be said to have been crystallised. The position of law is settled that mere failure to pay may not give rise to a cause of action. However, once the applicant has asserted its claim and the respondent has either denied such claim or failed to reply to it, the cause of action will arise after such denial or failure.
>
> 78. In M/s B and T AG (supra) three principles of law came to be enunciated by this Court regarding the manner in which the point in time when the cause of action arose

may be determined. First, that the right to receive the payment ordinarily begins upon completion of the work. Secondly, a dispute arises only when there is a claim by one side and its denial/repudiation by the other and thirdly, the accrual of cause of action cannot be indefinitely postponed by repeatedly writing letters or sending reminders. It was further emphasised by this Court that it was important to find out the "breaking point" at which any reasonable party would have abandoned the efforts at arriving at a settlement and contemplated referral of the dispute to arbitration. Such breaking point would then become the date on which the cause of action could be said to have commenced.

79. This Court in Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority reported in (1988) 2 SCC 338 held as follows:

"4. Therefore, in order to be entitled to order of reference under Section 20, it is necessary that there should be an arbitration agreement and secondly, difference must arise to which this agreement applied. In this case, there is no dispute that there was an arbitration agreement. There has been an assertion of claim by the appellant and silence as well as refusal in respect of the same by respondent. Therefore, a dispute has arisen regarding non-payment of the alleged dues of the appellant. The question is for the present case when did such dispute arise. The High Court proceeded on the basis that the work was completed in 1980 and therefore, the appellant became entitled to the payment from that date and the cause of action under Article 137 arose from that date. But in order to be entitled to ask for a reference under Section 20 of the Act there must not only be an entitlement to money but there must be a difference or dispute must arise. It is true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on February 28, 1983 and there was non-payment, the cause of action arose from that date, that is to say, February 28, 1983. It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Act. See Law of Arbitration by R.S. Bachawat, first edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case." (emphasis supplied)

80. In Geo Miller (supra), this Court held thus:

> "28. Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. The Court upon careful consideration of such history must find out what was the "breaking point" at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This "breaking point" would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim.

29. Moreover, in a commercial dispute, while mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. It does not lie to the applicant to plead that it waited for an unreasonably long period to refer the dispute to arbitration merely on account of the respondent's failure to settle their claim and because they were writing representations and reminders to the respondent in the meanwhile." (emphasis supplied)

81. The petitioner completed the course sometime in April and a letter to this effect was issued on 30.07.2017 by the EOI, Kabul. Allegedly, the ICCR made payment to the respondent on 03.10.2017. However, the right of the petitioner to raise the claim could only be said to have accrued after the petitioner made a positive assertion in March, 2018 which was denied by the respondent vide email dated 28.03.2018. Another reminder through email was given by the petitioner on 29.12.2018, however, mere giving reminders and sending of letters would not extend the cause of action any further from 28.03.2018 on which date the rights of the petitioner could be said to have been crystallised.

82. Thus, in ordinary circumstances, the limitation period available to the petitioner for raising a claim would have come to an end after an expiry of three years, that is, on 27.03.2021. However, in March 2020, the entire world was taken under the grip of the deadly Covid-19 pandemic bringing everyday life and commercial activity to a complete halt across the globe. Taking cognisance of this unfortunate turn of events, this Court vide order dated 23.03.2020 passed in Suo Motu Civil Writ Petition No. 03/2020 directed the period commencing from 15.03.2020 to be excluded for the purposes of computation of limitation. The said extension of limitation was extended from time to time by this Court in view of the continuing pandemic. As a result, the period from 15.03.2020 to 28.02.2022 was finally determined to be excluded for the computation of limitation. It was provided that the balance period of limitation as available on 15.03.2020 would become available from 01.03.2022. Operative part of the order dated 10.01.2022 is extracted hereinbelow:

> "5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:
>
> I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi judicial proceedings.

II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.

IV. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings."

83. The operation and effect of the aforesaid order was considered and explained by a two-Judge Bench of this Court in Prakash Corporates v. Dee Vee Projects Ltd., reported in (2022) 5 SCC 112 as follows:

> "28. As regards the operation and effect of the orders passed by this Court in SMWP No. 3 of 2020, noticeable it is that even though in the initial order dated 23-3-2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 : (2021) 3 SCC (Cri) 801], this Court provided that the period of limitation in all the proceedings, irrespective of that prescribed under general or special laws, whether condonable or not, shall stand extended w.e.f. 15-3-2020 but, while concluding the matter on 23-9-2021 [Cognizance for Extension of Limitation, In re, (2021) 18 SCC 250 : 2021 SCC OnLine SC 947], this Court specifically provided for exclusion of the period from 15-3-2020 till 2-10-2021. A look at the scheme of the Limitation Act, 1963 makes it clear that while extension of prescribed period in relation to an appeal or certain applications has been envisaged under Section 5, the exclusion of time has been provided in the provisions like Sections 12 to 15 thereof. When a particular period is to be excluded in relation to any suit or proceeding, essentially the reason is that such

> a period is accepted by law to be the one not referable to any indolence on the part of the litigant, but being relatable to either the force of circumstances or other requirements of law (like that of mandatory two months' notice for a suit against the Government [Vide Section 15 of the Limitation Act, 1963.]). The excluded period, as a necessary consequence, results in enlargement of time, over and above the period prescribed." (emphasis supplied)

84. The effect of the above-referred order of this Court in the facts of the present case is that the balance limitation left on 15.03.2020 would become available w.e.f. 01.03.2022. The balance period of limitation remaining on 15.03.2020 can be calculated by computing the number of days between 15.03.2020 and 27.03.2021, which is the day when the limitation period would have come to an end under ordinary circumstances. The balance period thus comes to 1 year 13 days. This period of 1 year 13 days becomes available to the petitioner from 01.03.2022, thereby meaning that the limitation period available to the petitioner for invoking arbitration proceedings would have come to an end on 13.03.2023.

c. When is Arbitration deemed to have commenced?

85. Section 21 of the Act, 1996 provides that the arbitral proceedings in relation to a dispute commence when a notice invoking arbitration is sent by the claimant to the other party.

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

86. In Milkfood Ltd. v. GMC Ice Cream (P) Ltd. reported in (2004) 7 SCC 288, it was observed thus:

> "26. The commencement of an arbitration proceeding for the purpose of applicability of the provisions of the Indian Limitation Act is of great significance. Even Section 43(1) of the 1996 Act provides that the Limitation Act, 1963 shall apply to the arbitration as it applies to proceedings in court. Sub-section (2) thereof provides that for the purpose of the said section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in Section 21.
>
> 27. Article 21 of the Model Law which was modelled on Article 3 of the UNCITRAL Arbitration Rules had been adopted for the purpose of drafting Section 21 of the 1996 Act. Section 3 of the 1996 Act provides for as to when a request can be said to have been received by the respondent. Thus, whether for the purpose of applying the provisions of Chapter II of the 1940 Act or for the purpose of Section 21 of the 1996 Act, what is necessary is to issue/serve a request/notice to the respondent indicating that the claimant seeks arbitration of the dispute.
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> xxx xxx xxx

> 29. For the purpose of the Limitation Act an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other a notice requiring the appointment of an arbitrator. This indeed is relatable to the other purposes also, as, for example, see Section 29(2) of (English) Arbitration Act, 1950.
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> xxx xxx xxx
>
> 49. Section 21 of the 1996 Act, as noticed hereinbefore, provides as to when the arbitral proceedings would be deemed to have commenced. Section 21 although may be construed to be laying down a provision for the purpose of the said Act but the same must be given its full effect having regard to the fact that the repeal and saving clause is also contained therein. Section 21 of the Act must, therefore, be construed having regard to Section 85(2)(a) of the 1996 Act. Once it is so construed, indisputably the service of notice and/or issuance of request for appointment of an arbitrator in terms of the arbitration agreement must be held to be determinative of the commencement of the arbitral proceeding." (emphasis supplied)

87. Similarly, in Bharat Sanchar Nigam Limited (supra), it was held by this Court thus:

> "51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, [S.S. Rathore v. State of M.P., (1989) 4 SCC 582 : 1990 SCC (L&S) 50; Union of India v. Har Dayal, (2010) 1 SCC 394; CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., (2020) 5 SCC 185] or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that:"where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it." There must be a clear notice invoking arbitration setting out the "particular dispute" [Section 21 of the Arbitration and Conciliation Act, 1996.] (including claims/amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail." (emphasis supplied)

88. In the present case, the notice invoking arbitration was received by the respondent on 29.11.2022, which is within the three-year period from the date on which the cause of action for the claim had arisen. Thus, it cannot be said that the claims sought to be raised by the petitioner are ex-facie time-barred or dead claims on the date of the commencement of arbitration.

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.

E. CONCLUSION

90. The present arbitration petition having been filed within a period of three years from the date when the respondent failed to comply with the notice of invocation of arbitration issued by the petitioner is not hit by limitation.

91. The notice for invocation of arbitration having been issued by the petitioner within a period of three years from the date of accrual of cause of action, the claims cannot be said to be ex-facie dead or time-barred on the date of commencement of the arbitration proceedings.

92. In view of the aforesaid, the present petition is allowed. We appoint Shri Justice Sanjay Kishan Kaul, Former Judge of the Supreme Court of India, to act as the sole arbitrator. The fees of the arbitrator including other modalities shall be fixed in consultation with the parties.

93. All other rights and contentions are kept open for the parties to raise before the Arbitrator.

94. Before we part with the matter, we would like to mention that this Court while dealing with similar issues in many other matters has observed that the applicability of Section 137 to applications under Section 11(6) of the Act, 1996 is a result of legislative vacuum as there is no statutory prescription regarding the time limit. We would again like to reiterate that the period of three years is an unduly long period for filing an application under Section 11 of the Act, 1996 and goes against the very spirit of the Act, 1996 which provides for expeditious resolution of commercial disputes within a time-bound manner. Various amendments to the Act, 1996 have been made over the years so as to ensure that arbitration proceedings are conducted and concluded expeditiously. We are of the considered opinion that the Parliament should consider bringing an amendment to the Act, 1996 prescribing a specific period of limitation within which a party may move the court for making an application for appointment of arbitrators under Section 11 of the Act, 1996. The Petition stands disposed of in the aforesaid terms.

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

.....CJI.

(Dr. Dhananjaya Y. Chandrachud) .....J. (J.B. Pardiwala) .....J. (Manoj Misra) New Delhi:

1st March, 2024.