Secunderabad Cantonment Board vs M/S B. Ramachandraiah And Sons on 15 March, 2021

Equivalent citations: AIR 2021 SUPREME COURT 1391, AIRONLINE 2021 SC 132

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Bench: Rohinton Fali Nariman, B.R. Gavai, Hrishikesh Roy

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 900-902 OF 2021
(@ SLP (CIVIL) Nos.27960-62 of 2019)

SECUNDERABAD CANTONMENT BOARD …APPELLANT

VERSUS

M/S B. RAMACHANDRAIAH & SONS …RESPONDENT

JUDGMENT

R.F. Nariman, J.

1. Leave granted.

2. These appeals arise out of applications under Section 11 of the Arbitration and Conciliation Act, 1996 [“Arbitration Act”]. On 02.09.2000, the appellant before us, Secunderabad Cantonment Board [“Appellant”], floated a notice inviting tender [“N.I.T.”] for an annual term contract for:

> 1. Repairs to Main Roads (Resurfacing with Centralised with Hot Mix Plant and Paver);
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> 2. Repairs to Main Roads (Widening of Roads with Centralised Hot Mix Plant and Paver);

3. Repairs to Internal Roads (Resurfacing with Hot Mix Paver and Plant).

3. Pursuant to the aforesaid N.I.T., three agreements were entered into with the respondent, M/s Ramachandraiah and Sons ["Respondent"], the first one dated 23.09.2000 and the other two dated 17.09.2001.

Clause 5 of each of the aforesaid agreements, which is in identical terms, is important and reads as follows:

> "5. Final Bill: The Contractor shall submit his final bil of the work with full and complete measurements showing the deductions on account of part payments received and stores supplied by the Board cost of water and any other items received by him under the contract within 08 days from the date of completion and handing over the work. The contractor shall also submit alongwith his bill a no claim certificate stating that there are no claims from the cantonment board on account of the work undertaken and completed by him under the contract and that no claim thereafter shall be entertainable. The bill shall also contain a statement showing the justification of cement consumed by the Contractor."

4. The arbitration clause contained in Clause 17 of each of the aforesaid agreements reads as follows:

> "17. LAW Governing the Contract: The Contract shall be governed by the Indian Law. [A]ll disputes between the parties to this contract or being out of relating to the contract other than those for which the decision of the accepting officer is final and conclusive shall after the written notice given by either party to the other be referred to the sole arbitrator as appointed by the [P]resident Cantonment Board [S]ecunderabad. The award of the Arbitrator shall be final, conclusive and binding on both parties to the contract"

5. Work orders were issued with respect to the aforesaid works. The Appellant argued that the Respondent had failed to complete the work within the stipulated period, but vide its meeting dated 05.10.2002, it resolved to grant an extension of time upto 31.12.2002 on an undertaking from the Respondent that the Appellant would be at liberty to impose penalty as provided in the contracts and as decided by the Appellant in case balance works were not completed by 31.12.2002.

On 30.10.2002, the Respondent submitted the required undertaking.

6. It is not disputed that vide the final contract certificates issued by the Appellant on 18.02.2003 and 26.03.2003, final payment was received by the Respondent in respect of the works in question. After a hiatus of about six months, the Respondent then started making demands towards reimbursement on account of variation in prices of material, labour and fuel. These demands were made vide letters dated 08.09.2003, 24.07.2004 and 12.10.2004.

7. After a silence of over two years, the Respondent then issued a letter dated 07.11.2006 by which the Respondent requested for the appointment of an arbitrator in respect of the claim of reimbursement on account of price variation in all the three contracts. It was specifically stated that necessary steps should be taken by the Appellant within 15 days of receipt of the letter. Receiving no reply from the Appellant, the Respondent issued yet another letter dated 13.01.2007, in which it spoke of a fundamental breach of contractual obligations and then stated that it had no option but to rescind the contracts and have an arbitrator appointed within 30 days, in conformity with the arbitration clause provided in the contracts.

8. To this letter, a laconic reply was received from the Appellant on 23.01.2007, stating that the matter referred to in their letter was under

> consideration. It is not disputed that the 30-day period, spoken of in the letter dated 13.01.2007, was over by 12.02.2007. Despite this being the position, the Respondent kept on writing letters at long intervals between the years 2007-2009, reiterating its claim. Finally, by a legal notice dated 30.01.2010, the Respondent specifically stated:
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> "In order to reiterate the brief details of the Contracts, all the three works have been completed way back in 31.03.2002 and final bill was received under protest.

It is also expedient to point out that arbitration proceedings have already commenced since 07.11.2006 (within intent of the Arbitration and Conciliation Act of 1996).

In the event that the Hon'ble appointing authority continues to abdicate his rights to appoint an arbitrator, the only remedy left to us is to seek the appointment of an arbitrator by the Hon'ble Chief justice of High Court of Andhra Pradesh (to enforce the arbitration clause) as intended by the agreement (since the agreement envisages arbitration as the means of settlement of disputes in preclusion to a court of law)."

9. To this legal notice dated 30.01.2010, the Appellant replied on 16.02.2010, stating:

> "1. ... Subsequent to awarding those contracts, work orders have been issued and part of works were executed by your client within the stipulated time and the bills for the works executed were cleared on submission of final bills way back in the year 2002-2003 and your client has received the payments by adhering to Clause 5 of the Contract entered by and between your client and my client. Since the final payments were made for the works executed the copies requested by you may not be available as 8 years time has been elapsed after conclusion of the contract.
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> 2. Subsequent to conclusion of the contract and after receipt of final payments, your client has started addressing letters as referred in your notice culminating into the present notice under reply and seeking additional claim towards reimbursement on variation in prices, though there is no such clause in the agreement entered for execution of above referred works to claim amounts on variation of prices. Moreover

the contract period is one year from the date of awarding contract and the contract periods were came to an end by 2001 and 2002 respectively. Whereas your client has got issued final notice under reply on 30.01.2010 and insisting appointment of an Arbitrator though no dispute is subsisting between your client and my client and moreover your client's claim is barred under law of limitation." "4. In the above said background the contention in your notice under reply that your client is insisting for the appointment of an Arbitrator for adjudication of the dispute and that appointing authority has not appointed the arbitrator and that arbitration proceedings have already commenced since 07.11.2006 and that in the event the Hon'ble Appointing authority continues to abdicate his right to appoint an arbitrator you client is left with no option except to seek appointment of Arbitrator by the Hon'ble Chief Justice of High Court of A.P. is highly objectionable and untenable and your client has no legal right to raise the dispute after concluding the contract way back in the year 2002. The claim of your client to appoint an Arbitrator cannot be acceded to as there is no arbitral issues are subsisting between your client and my client and furthermore the claim raised by your client is hopelessly barred under law of limitation and it is incorrect to state that your has received the payments under protest.

5. My Client further reiterates that the above referred three contracts were awarded for a period of one year in the year 2000-2001 and since your client could not complete the works entrusted to him within the stipulated period, at his request the time was further extended up to 31.12.2002 and by that time he can only complete the work to the tune of Rs.75 lakhs approximately and your client's request to release work order for balance amount with regard to the works in question were turn down by the Hon'ble High Court of A.P. Hence, the question of reimbursement on variation in prices as claimed by your client does not arise and he is not entitled for such claims.

6. My client further reiterates that as per clause 5 of the Agreement, final bill amounts will be released on submitting no claim certificate stating that there is no claim form the Cantonment Board on account of the works undertaken and completed by the contractor and no claim thereafter shall be entertainable. Pursuant to this Clause your client has received final bill amounts, hence there are no issues to be adjudicated by an arbitrator. As referred above in the contract entered by and between your client and my client, there is no specific clause under which your client is entitled for reimbursement on variation of prices. Hence the same cannot be made an issue to be adjudicated by an arbitrator."

10. By way of rejoinder to the aforesaid reply notice, the Respondent issued what it called a "clarification notice" on 20.03.2010, followed by three letters dated 30.09.2010, reiterating the earlier requests for the appointment of an arbitrator. This was rejected by the Appellant vide a letter dated 10.11.2010, which letter informed the Respondent that the President of the Secunderabad Cantonment Board had rejected the application for appointment of an arbitrator as all payments were made and

nothing remained pending.

11. After a three-year long hiatus, the Respondent then filed applications under Section 11 of the Arbitration Act on 06.11.2013. Vide the impugned judgment dated 20.08.2019, a learned Single Judge of the High Court for the State of Telangana held that the Section 11 applications were within time as they were filed within three years from the letter dated 10.11.2010 rejecting the request to appoint an arbitrator. The learned Single Judge also went on to record:

"39. Proceedings dt. 07.11.2003 filed by the respondent of a Board Meeting of the respondent no doubt show payment of Rs. 14,06,580/- in addition to Rs. 14,84,000/- but this payment is not on account of claim under Clause 2.2.46 for reimbursement on variation in prices claimed by the applicant. It is a payment sanctioned for actual quantities of the various items of work which had increased, and so the same cannot be prima-facie construed as a payment towards the claim of the applicant under Clause 2.2.46." "42. The prolonged silence of the respondent from 08.09.2003 onwards regarding claims made by the applicant under Clause 2.2.46 without any emphatic rejection of the same, prima facie show that there appears to be a live issue In that regard between the parties."

12. As a result, the Section 11 applications were allowed and Shri Y.V. Ramakrishna (Retired District Judge) was appointed as arbitrator to adjudicate the disputes between the parties arising out of the three agreements. The question of the bar of limitation of the claims made was left open to be considered and decided by the arbitrator.

13. Shri P.S. Narasimha, learned Senior Advocate appearing on behalf of the Appellant, submitted that the date on which the request made for the appointment of an arbitrator was received by the President of the Secunderabad Cantonment Board was 23.01.2007, as a result of which, this is the date on which the limitation period starts running under Article 137 of the Limitation Act, 1963 ["Limitation Act"] insofar as an application under Section 11(6) of the Arbitration Act is concerned. For this purpose he relied upon a judgment of the High Court of Bombay in Deepdharshan Builders Pvt. Ltd. v. Saroj, (2019) 1 AIR Bom R 249, as well as a recent judgment of this Court in Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd., (2020) 14 SCC 643. He then argued that even so far as the cause of action on merits is concerned, it arose way back on 08.09.2003, when the Respondent raised the claim with regard to the dispute for the first time. Once time begins to run, limitation cannot be extended by writing any number of subsequent letters. He also relied upon the recent judgment of this Court in Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, stating that this case falls under paragraph 148 of the judgment, in that the claim was ex facie time barred and dead and that there was no subsisting dispute.

> 14. In reply, Shri Nithin Chowdary Pavuluri, learned counsel appearing for the Respondent, argued that the request for appointment of an arbitrator was rejected by the Appellant for the first time on 10.11.2010, and thus, 10.11.2010 would be the date on which the cause of action would arise. He pressed the point that the rejection of the request to appoint an arbitrator constituted a failure to perform the function entrusted to the President of the Secunderabad Cantonment Board under Clause 2.2.52 of the General Conditions of Contract ["GCC"], and thus the cause of action under Section 11(6)(c) of the Arbitration Act first arose on 10.11.2010. Till such rejection, the claim would have to be deemed to have been pending and thus, the Respondent's claim was alive at the time of filing the applications under Section 11 of the Arbitration Act. Further, though he pressed the point that the final bill was received under protest since the price variation bill submitted with the final bill had not been cleared by the Appellant, he produced no such document evidencing the same. In addition, he sought to distinguish, on facts, the judgments of this Court in Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd., (2020) 14 SCC 643 and Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 from the appeals before us, by arguing that the GCC between the Appellant and the Respondent specifically provided for a procedure to appoint an arbitrator and that the Appellant was responsible for delaying and sitting on the Respondent's request.

Thus, he supported the impugned judgment of the High Court by which the Section 11 applications were allowed.

15. Having heard learned counsel appearing for both parties, it is first necessary to refer to the recent judgment of this Court in Geo Miller & Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd., (2020) 14 SCC 643, which extracts passages from all the earlier relevant judgments, and then lays down as to when time begins to run for the purpose of filing an application under Section 11 of the Arbitration Act.

This Court, after referring to the relevant statutory provisions, held:

> "15. In Damodar Das [State of Orissa v. 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 [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.

xxx xxx xxx "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.

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23. Turning to the other decisions, it is true that in Inder Singh Rekhi [Inder Singh Rekhi v. DDA, (1988) 2 SCC 338], this Court observed that the existence of a dispute is essential for appointment of an arbitrator. A dispute arises when a claim is asserted by one party and denied by the other. The term “dispute” entails a positive element and mere inaction to pay does not lead to the inference that dispute exists. In that case, since the respondent failed to finalise the bills due to the applicant, this Court held that cause of action would be treated as arising not from the date on which the payment became due, but on the date when the applicant first wrote to the respondent requesting finalisation of the bills. However, the Court also expressly observed that “a party cannot postpone the accrual of cause of action by writing reminders or sending reminders”.

24. In the present case, the appellant has not disputed the High Court's finding that the appellant itself had handed over the final bill to the respondent on 8-2-1983. Hence, the holding in Inder Singh Rekhi [Inder Singh Rekhi v. DDA, (1988) 2 SCC 338] will not apply, as in that case, the applicant's claim was delayed on account of the respondent's failure to finalise the bills. Therefore the right to apply in the present case accrued from the date on which the final bill was raised (see Union of India v. Momin Construction Co. [Union of India v. Momin Construction Co., (1997) 9 SCC 97]).

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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.”

16. The recent judgment of this Court in Bharat Sanchar Nigam Ltd. & Anr. v. M/s Nortel Networks India Pvt. Ltd., delivered on 10.03.2021 in Civil Appeal Nos. 843-844 of 2021 has also considered the entire law on the subject. The first paragraph of the said judgment reads as follows:

> "1. The present Appeals raise two important issues for our consideration : (i) the period of limitation for filing an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"); and (ii) whether the Court may refuse to make the reference under Section 11 where the claims are ex facie time-barred?"

17. Insofar as the first issue is concerned, after examining Article 137 of the Limitation Act, this Court held:

> "11. 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.
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> 12. 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 recognized even under Section 20 of the Arbitration Act 1940. Reference may be made to the judgment of this Court in C. Budhraja v. Chairman, Orissa Mining Corporation Ltd. [(2008) 2 SCC 444] 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. Paragraph 26 of this judgment reads as follows :
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> "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 Major (Retd.) Inder Singh Rekhi v. DDA [(1988) 2 SCC 338] , Panchu Gopal Bose v. Board of Trustees for 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.""

18. Insofar as the second issue is concerned, this Court went into the position prior to the Arbitration and Conciliation (Amendment) Act, 2015 ["2015 Amendment"] together with the change made by the introduction of Section 11(6A) by the 2015 Amendment, stating:

> "24. Sub-section (6A) came up for consideration in the case of Duro Felguera SA v. Gangavaram Port Ltd. [(2017) 9 SCC 729], wherein this Court held that the legislative policy was to minimize judicial intervention at the appointment stage. In an application under Section 11, the Court should only look into the existence of the arbitration agreement, before making the reference. Post the 2015 amendments, all that the courts are required to examine is whether an arbitration agreement is in existence —nothing more, nothing less.
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> "48. Section 11(6-A) added by the 2015 Amendment, reads as follows:
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> "11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub- section (4) or sub-section (5) or sub-
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> section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement." (emphasis supplied) From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.
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> 59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v.

Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] . This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

25. In Mayavati Trading Company Private Ltd. v. Pradyut Dev Burman [(2019) 8 SCC 714], a three-judge bench held that the scope of power of the Court under Section 11 (6A) had to be construed in the narrow sense. In paragraph 10, it was opined as under :

> "10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] , as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera, SA [Duro Felguera, SA v.
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> Gangavaram Port Ltd., (2017) 9 SCC 729"

26. In Uttarakhand Purv Sainik Kalyan Nigam v. Northern Coal Field Limited [(2020) 2 SCC 455] this Court took note of the recommendations of the Law Commission in its 246th Report, the relevant extract of which reads as :

> "7.6. The Law Commission in the 246th Report [Amendments to the Arbitration and Conciliation Act, 1996, Report No. 246, Law Commission of India (August 2014), p. 20.] recommended that:
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> "33. ... the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void. Insofar as the nature of intervention is concerned, it is recommended that in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal." In view of the legislative mandate contained in the amended Section 11(6A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-komptenz principle. The doctrine of kompetenz-komptenz implies that the arbitral tribunal is empowered, and has the competence to rule on its own jurisdiction, including determination of all jurisdictional issues. This was intended to minimise judicial intervention at the pre-reference stage, so that the arbitral process is not thwarted at the threshold when a preliminary objection is raised by the parties." (emphasis in original)
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> 19. This Court went on to hold that limitation is not a jurisdictional issue but is an admissibility issue. It then referred to a recent judgment of this Court in Vidya Drolia

v. Durga Trading Corporation, (2021) 2 SCC 1, and stated as follows:

> "36. In a recent judgment delivered by a three-judge bench in Vidya Drolia v. Durga Trading Corporation [(2021) 2 SCC 1], on the scope of power under Sections 8 and 11, it has been held that the Court must undertake a primary first review to weed out "manifestly ex facie non-existent and invalid arbitration agreements, or non-arbitrable disputes." The prima facie review at the reference stage is to cut the deadwood, where dismissal is bare faced and pellucid, and when on the facts and law, the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration agreement exists, or that the subject matter is not arbitrable, that reference may be refused.
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> In paragraph 144, the Court observed that the judgment in Mayavati Trading had rightly held that the judgment in Patel Engineering had been legislatively overruled.
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> Paragraph 144 reads as :
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> "144. As observed earlier, Patel Engg. Ltd. explains and holds that Sections 8 and 11 are complementary in nature as both relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Amendments to Section 8 vide Act 3 of 2016 have not been omitted. Section 11 covers the situation where the parties approach a court for appointment of an arbitrator.

Mayavati Trading (P) Ltd., in our humble opinion, rightly holds that Patel Engg. Ltd. has been legislatively overruled and hence would not apply even post omission of sub-section (6-A) to Section 11 of the Arbitration Act. Mayavati Trading (P) Ltd. has elaborated upon the object and purposes and history of the amendment to Section 11, with reference to sub-section (6-A) to elucidate that the section, as originally enacted, was facsimile with Article 11 of the Uncitral Model of law of arbitration on which the Arbitration Act was drafted and enacted." (emphasis supplied) 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.

Paragraph 148 of the judgment reads 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.
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> 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." In paragraph 154.4, it has been concluded that:

"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) In paragraph 244.4 it was concluded that:

"244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer"."

37. The upshot of the judgment in Vidya Drolia is affirmation of the position of law expounded in Duro Felguera and Mayavati Trading, which continue to hold the field. It must be understood clearly that Vidya Drolia has not resurrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engineering (supra).

It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the

tribunal." (emphasis in original)

20. 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 07.11.2006. This demand was reiterated by a letter dated 13.01.2007, 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 12.02.2007. The Appellant's laconic letter dated 23.01.2007, which stated that the matter was under consideration, was within the 30-day period. On and from 12.02.2007, 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 06.11.2013, 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.

21. Even otherwise, the claim made by the Respondent was also ex facie time barred. It is undisputed that final payments were received latest by the end of March 2003 by the Respondent. That apart, even assuming that a demand could have been made on account of price variation, such demand was made on 08.09.2003. Repeated letters were written thereafter by the Respondent, culminating in a legal notice dated 30.01.2010. Vide the reply notice dated 16.02.2010, it was made clear that such demands had been rejected. Even taking 16.02.2010 as the starting point for limitation on merits, a period of three years having elapsed by February 2013, the claim made on merits is also hopelessly time barred.

22. For all these reasons, the appeals are allowed and the impugned judgment of the High Court dated 20.08.2019 is set aside.

.....J. [R.F. NARIMAN] .....J. [B.R. GAVAI] New Delhi;

March 15, 2021.