

M/S.Saravana Global Holdings Ltd vs N.Jayamurugan on 21 July, 2023

Author: Abdul Quddhose

Bench: Abdul Quddhose

O.P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.07.2023

Pronounced on : 21.07.2023

CORAM

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

O.P.No.595 of 2019

and

A.No.5367 of 2019

M/s.Saravana Global Holdings Ltd.,
(Formerly known as Saravana Foundations Ltd.,)
No.15, New Giri Road, T.Nagar,
Chennai - 600 017.

... Petitioner

Vs.

N.Jayamurugan

... Respondent

PRAYER: Petition has been filed under Section 34 of the Arbitration Conciliation Act, 1996 to set aside the award dated 20.02.2019.

For Petitioner : Mr.K.V.Babu
for Mr.Sashidhar Sivakumar

For Respondent : Mr.AR.L.Sundaresan
Senior Counsel
Assisted by Mr.AR.Karthik Lakshmi
for Mr.L.Palanimuthu

ORDER

The issues that arise for consideration in this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, challenging the arbitral award dated 20.02.2019 are as follows:

- a) Whether the arbitrator was correct in treating the letter dated 05.03.2015 sent by the petitioner to the respondent as a promise to pay a time barred debt which saves limitation attracting Section 25 (3) of the Indian Contract Act;
 - b) Whether the alleged promise to pay the time barred debt through the petitioner's letter dated 05.03.2015 is a fresh contract giving rise to a fresh cause of action and whether the terms and conditions of the earlier contract including the arbitration agreement can be made applicable when admittedly the earlier MOU dated 18.05.2006 had become unenforceable on account of it becoming time barred;
 - c) Whether the alleged promise to pay through the petitioner's letter dated 05.03.2015 has satisfied the requirements of Section 25 (3) of the Indian Contract Act enabling the respondent to make a claim for a time barred debt;
- <https://www.mhc.tn.gov.in/judis>
- d) Whether the arbitrator was right in awarding compensation to the respondent at the rate of Rs.1,00,000/- per acre, when the alleged promise to pay through the petitioner's letter dated 05.03.2015 does not cover a promise to pay compensation;
 - e) The difference between an acknowledgment of debt given within the period of limitation coming within the purview of Section 18 of the Limitation Act, 1963 and a promise to pay a time barred debt as per Section 25 (3) of the Indian Contract Act which enables the claimant to seek payment despite the debt being a time barred debt.

2. Brief facts leading to the filing of this petition under Section 34 of the Arbitration and Conciliation Act, 1996:

The respondent in this petition is the claimant and the petitioner is the respondent in the arbitration who has also made a counter claim against the respondent. The respondent had invested money with the petitioner for the purchase of 200 acres of land at Moosivakkam Village, Kancheepuram under a Memorandum of Understanding (MOU) dated 18.05.2006. <https://www.mhc.tn.gov.in/judis>

3. As per the MOU dated 18.05.2006, the petitioner agreed to identify and acquire 200 acres of land for and on behalf of the respondent. The terms and conditions entered into between the parties are found in the MOU dated 18.05.2006. One of the conditions is that the time fixed for completing the process of acquisition was 90 days from the date of MOU. There arose a dispute between the petitioner and the respondent under the MOU dated 18.05.2006. Admittedly, there is an arbitration clause in the MOU dated 18.05.2006. However, as per the general law of limitation under the Limitation Act, 1963, the debt if at all payable to the respondent by the petitioner has become a time barred debt. The respondent claims a sum of Rs.5,33,76,000/- which is the alleged balance unutilized amount retained by the petitioner out of the total payment made by the respondent which the petitioner has refused to return to the respondent, despite the petitioner not having invested the said amount for and on behalf of the respondent for the purchase of the properties as stipulated under the MOU dated 18.05.2006.

4. According to the respondent, only a portion of the payments made by the respondent was utilized by the petitioner for the purchase of <https://www.mhc.tn.gov.in/judis> properties for and on behalf of the respondent. The last payment made by the respondent to the petitioner for the purchase of properties as per the MOU dated 18.05.2006 was on 02.09.2006.

5. The respondent had relied upon the following documents in support of his contention that his claim before the arbitrator is within the period of limitation as per the provisions of Section 25 (3) of the Indian Contract Act:

a) Letter dated 26.02.2015 (Ex.C6) issued by the petitioner to the respondent to provide confirmation of balance in the respondent's books of account;

b) Confirmation of balance letter dated 26.02.2015 (Ex.C7) issued by the respondent to the petitioner, the receipt of which is acknowledged by an employee of the petitioner;

c) Letter issued by the petitioner to the respondent dated 05.03.2015 (Ex.C8), requesting for a copy of the notice issued by the respondent in respect of his dues recoverable from the petitioner as on 31.03.2008.

<https://www.mhc.tn.gov.in/judis>

6. It is an undisputed fact, as seen from the pleadings, that if not for the alleged promise to pay by the petitioner to the respondent through its letter dated 05.03.2015 (Ex.C8), the claim is barred by limitation, as the limitation period for making a claim as per the MOU dated 18.05.2006 would have come to an end in the year 2009 itself, as the last payment made by the respondent to the petitioner for purchase of properties for and on his behalf was on 02.09.2006. It is also an undisputed fact that the petitioner has not acknowledged the liability to the respondent at any time after the MOU dated 18.05.2006 in order to extend the period of limitation by further period of three years in accordance with the provisions of Section 18 of the Limitation Act, 1963.

7. Based on the letters dated 26.02.2015 and 05.03.2015 which according to the respondent is a confirmation of balance given by the petitioner to the respondent and a promise to pay a time barred debt as per Section 25 (3) of the Indian Contract Act, the claim filed by the respondent against the petitioner is within the period of limitation. The respondent had invoked arbitration as per the arbitration clause contained in clause 18 of the MOU dated 18.05.2006 against the petitioner by issuing an invocation <https://www.mhc.tn.gov.in/judis> notice dated 20.04.2015 (Ex.C9) to the petitioner. Thereafter, the respondent filed an application under Section 11 (6) of the Arbitration and Conciliation Act, seeking for appointment of a sole arbitrator and an order was passed by this Court on 01.08.2017 in O.P.No.752 of 2016 by which a sole arbitrator who has passed the impugned arbitral award was appointed by this Court. In the order dated 01.08.2017 passed in O.P.No.752 of 2016, the issue of limitation raised by the petitioner was left open for the arbitrator to decide.

8. The sole arbitrator appointed by this Court under Section 11 (6) of the Arbitration and Conciliation Act in O.P.No.752 of 2016 acted upon the reference and after contest by both the parties to the dispute, passed an arbitral award dated 20.02.2019, rejecting the counter claim of the petitioner and partly allowed the claim of the respondent by directing the petitioner to pay the respondent a sum of Rs.6,48,35,500/- with interest at the rate of 9% per annum from 27.04.2012 till the date of the arbitral award and in the event of the said amount not being paid within a period of two months from the date of the arbitral award, the petitioner shall pay interest at the rate of 18% per annum on Rs.6,48,35,500/- from the date of the arbitral award till <https://www.mhc.tn.gov.in/judis> the date of realization,. The aforesaid award amount includes a sum of Rs.4,61,35,500/- being the amount unutilized by the petitioner but not repaid to the respondent and a sum of Rs.1,87,00,000/- towards compensation payable by the petitioner to the respondent due to the non procurement of 187 Acres of land for and on behalf of the respondent at the rate of Rs.1,00,000/- per acre.

9. Before the sole arbitrator, the respondent had filed seventeen documents which were marked as Exs.C1 to C17 and the respondent himself was examined as the only witness (C.W.1). On the side of the petitioner, 21 documents were filed which were marked as Exs.R1 to R21 and the respondent had examined its authorised representative one Padam Chalani as the only witness (R.W.1). Aggrieved by the impugned arbitral award dated 20.02.2019, the respondent in the arbitration has filed this petition under Section 34 of the Arbitration and Conciliation Act, challenging the arbitral award on the following grounds:

a) The claims are ex-facie time barred;

b) The learned arbitrator has exceeded the scope of its reference as <https://www.mhc.tn.gov.in/judis> well as the MOU dated 18.05.2006 and has erroneously allowed the claim;

c) The learned arbitrator has erroneously treated the letters dated 26.02.2015 and 05.03.2015 as a promise to pay a time barred debt given by the petitioner which has extended the limitation by another period of three years from the date of the said letters;

d) The learned arbitrator has failed to take note of the fact that even if the letter dated 05.03.2015 is treated as a promise to pay a time barred debt which extends the period of limitation by another period of three years as per Section 25 (3) of the Indian Contract Act, the arbitration clause found in the MOU dated 18.05.2006 cannot be made applicable, as the MOU has got discharged, as the terms and conditions contained therein has become unenforceable on account of the fact that it has become time barred;

e) There is no valid arbitration agreement for the alleged promise to pay a time barred debt which is a fresh contract by itself and therefore, the impugned arbitral award is per se illegal and is null and void;

f) The learned arbitrator has erroneously treated the MOU dated 18.05.2006 as a running account. Running accounts mean mutual accounts and reciprocal demands between the parties, which accounts and demands remain open and unsettled. As seen from the MOU dated 18.05.2006, it is <https://www.mhc.tn.gov.in/judis> evident that the transaction was unilateral in nature and was not a running account.

10. Submissions of the learned counsels:

Mr.K.V.Babu, learned counsel representing Mr.Sashidhar Sivakumar, learned counsel for the petitioner drew the attention of this Court to the following:

a) MOU dated 18.05.2006 (Ex.C1);

b) Claim statement filed by the respondent before the learned arbitrator, wherein, in paragraph No.7, he himself has pleaded that the last payment made by the respondent / claimant to the petitioner / respondent was on 02.09.2006;

c) Ex.C2 letter dated 10.12.2009 issued by the respondent / claimant to the petitioner / respondent confirming the debt balance of Rs.5,33,76,000/- appearing in the respondent's books of accounts in the ledger account of the respondent / claimant as on 31.03.2008;

<https://www.mhc.tn.gov.in/judis>

d) Ex.C3, an undated letter of the petitioner to the respondent / claimant, expressing their inability to understand how the sum of Rs.5,33,76,000/- was arrived and requested the respondent / claimant to send the completed statement of account as per the respondent's / claimant's books;

e) Ex.C4, rejoinder letter dated 18.01.2010 issued by the respondent / claimant to the undated letter of the petitioner / respondent received on 21.12.2009, enclosing the statement of accounts in his books (Joint Books of claimant and his wife) for the years 2006-07, 2007-08, 2008-09 and as on 31.12.2009;

f) Legal notice dated 27.04.2012 (Ex.C5) sent on behalf of the respondent / claimant to the petitioner / respondent calling upon the petitioner / respondent to transfer the lands purchased for and on behalf of the respondent / claimant during the period from 03.05.2006 to 02.09.2006 and subsequently to pay a sum of Rs.5,33,76,000/- to the respondent / claimant due as on 22.09.2006 with interest;

g) Letter dated 26.02.2015 (Ex.C6) issued by the petitioner / respondent to the respondent / claimant to provide confirmation of balance in the claimant's books;

<https://www.mhc.tn.gov.in/judis>

h) Confirmation of balance letter dated 26.02.2015 (Ex.C7) issued by the respondent / claimant to the petitioner / respondent, the receipt of which is acknowledged by an employee of the respondent;

i) Letter issued by the petitioner / claimant dated 05.03.2015 (Ex.C8) to the respondent / claimant, requesting for a copy of the notice issued by the respondent / claimant in respect of the dues as on 31.03.2008;

j) Legal notice dated 20.04.2015 (Ex.C9) issued by the respondent / claimant through an Advocate, invoking arbitration as per clause 18 of the MOU dated 18.05.2006 as per Section 21 of the Arbitration and Conciliation Act, 1996;

k) Order passed by this Court dated 01.08.2017 under Section 11 (6) of the Arbitration and Conciliation Act, 1996 in O.P.No.752 of 2016 by which the sole arbitrator (a former Judge of this Court) was appointed;

l) The impugned arbitral award dated 20.02.2019 passed by the sole arbitrator in favour of the respondent against the petitioner.

11. After relying upon the aforementioned documents, as well as the impugned arbitral award, the learned counsel for the petitioner would submit that the claims arising out of the MOU dated 18.05.2006 are time barred and unenforceable. He would further submit that Section 25 (3) of the Indian Contract Act will not get attracted for the instant case for the purpose of saving limitation.

12. Learned counsel for the petitioner after drawing the attention of this Court to certain paragraphs in the arbitral award would further submit that the arbitrator has erroneously by total non application of mind has held that the transaction between the parties is that of accounts, which was a continuing one and the said accounts were running, continuous and mutual in nature. He would submit that as per the MOU dated 18.05.2006, it is evident that the transaction was unilateral in nature. According to him, there were no reciprocal demands, the entries of which could be set off or adjusted. He would further submit that once the balance has been struck, the account can no longer be considered to be running or continuous.

13. Learned counsel for the petitioner also drew the attention of this Court to the letter dated 10.12.2009 sent by the respondent / claimant (Ex.C2) informing the petitioner / respondent that as per the books of accounts of the respondent / claimant, a sum of Rs.5,33,76,000/- is due and <https://www.mhc.tn.gov.in/judis> payable by the petitioner / respondent to the respondent / claimant as on 31.03.2008. Therefore, according to him, even as per the respondent's / claimant's own statement, the petitioner / respondent has not acknowledged its liability within three years from 10.12.2009 in terms of Section 18 of the Limitation Act and therefore, the claim of the respondent / claimant is hopelessly barred by limitation. Therefore, the remedy under MOU dated 18.05.2006 is time barred and unenforceable after 09.12.2012.

14. Learned counsel for the petitioner would also submit that erroneously by total non application of mind, the sole arbitrator has held Section 25 (3) of the Indian Contract Act to be made applicable for the claim to save limitation. According to him, as per Section 25 (3) of the Indian Contract Act, there must be an express promise to pay a time barred debt in writing and only then the said Section gets attracted for the purpose of saving limitation. The learned counsel once again drawing the attention of this Court to the arbitral award and would submit that the arbitrator has wrongly proceeded to decide the issue of limitation on the proposition that an implied promise to pay would attract Section 25 (3) of the Indian Contract Act. He also drew the attention of this Court to Section 25 (3) of <https://www.mhc.tn.gov.in/judis> the Indian Contract Act and Section 9 of the Indian Contract Act which defines promise to pay and would submit that on a conjoint reading of Section 25 (3) of the Indian Contract Act along with Section 9 of the Indian Contract Act, it is clear that the promise to pay a time barred debt for the purpose of saving limitation must be an express promise and not an implied promise. But, according to him, erroneously the arbitrator has wrongly proceeded to decide the issue of limitation on the proposition that an implied promise to pay would attract the provision of Section 25 (3) of the Indian Contract Act.

15. Learned counsel for the petitioner also drew the attention of this Court to question Nos.61 and 62 which pertains to cross examination of C.W.1 and would submit that C.W.1 himself has admitted during his cross examination that there was no confirmation of balance given by the petitioner / respondent to the respondent / claimant. Hence, according to him, it is clear that Section 25 (3) of the Indian Contract Act does not get attracted to save the limitation. Learned counsel for the petitioner would also submit that a promise to pay a time barred debt under Section 25 (3) of the Indian Contract Act amounts to a fresh contract and enforceable <https://www.mhc.tn.gov.in/judis> independently. According to him, it amounts to novation of original obligations of the contract and therefore, the promise to pay a time barred debt being a fresh contract which does not contain an arbitration clause is not arbitrable by invoking the arbitration clause contained under the MOU dated 18.05.2006.

16. In support of his submissions that Section 25 (3) of the Indian Contract Act does not get attracted for the instant case, learned counsel for the petitioner relied upon the following decisions:

- a) In the case of Kotak Mahindra Bank Limited Vs. Kew Precision Parts Private Limited and Others reported in MANU/SC/0971/2022;

- b) In the case of Abdul Rafiq Vs. Bhajan reported in AIR 1932 All 199;
- c) In the case of N.Ethirajulu Naidu Vs. K.R.Chinnikrishnan Chettiar reported in AIR 1975 Mad 333;
- d) In the case of M.Balaji Vs. Perim Janardhana Rao and Others reported in MANU/TN/3133/2020;
- e) In the case of M.Mohan Vs. Tamil Nadu Cooperative Union reported in MANU/TN/5690/2021.

<https://www.mhc.tn.gov.in/judis>

17. In support of his submissions that the promise to pay a time barred debt as per Section 25 (3) of the Indian Contract Act is a fresh contract enforceable independently and the arbitration clause contained in the MOU dated 18.05.2006 is not binding, learned counsel for the petitioner relied upon the following decisions:

- a) In the case of The Union of India (UOI) Vs. Kishorilal Gupta and Bros. reported in AIR 1959 SC 1362;
- b) In the case of Young Achievers vs. IMS Learning Resources Private Limited reported in 2013 (10) SCC 535;
- c) In the case of R.Madesh Vs. M.Rathinam reported in MANU/TN/1260/2015;
- d) In the case of Meenakshi Solar Power Pvt. Ltd. and Others Vs. Abhyudaya Green Economic Zones Pvt. Ltd. and Others reported in MANU/TL/0141/2021.

18. Per contra Mr.AR.L.Sundaresan, learned Senior Counsel assisted by Mr.AR.Karthik Lakshmanan, learned counsel for Mr.L.Palanimuthu, learned counsel for the respondent would submit as follows:

<https://www.mhc.tn.gov.in/judis>

- a) The letters dated 05.03.2015 sent by the petitioner to the respondent seeking a copy of the notice, seeking payment of dues and requesting the same to be given to one S.Rajasekar, the petitioner's employee for the purpose of settlement, will undoubtedly amount to promise to pay a time barred debt. He drew the attention of this Court to the letter dated 26.02.2015 sent by the respondent to the petitioner, requesting the petitioner to provide confirmation of balance and on the same day, the petitioner had provided a confirmation of balance which was confirmed by the petitioner through its employee S.Rajasekar on 26.02.2015 through writing;

b) Learned senior counsel appearing for the respondent would submit that the petitioner having confirmed the balance outstanding due to the respondent through confirmation of balance letter dated 05.03.2015 for a sum of Rs.5,33,76,000/-, the confirmation letter dated 05.03.2015 is an express promise to pay the time barred debt by the petitioner to the respondent as per Section 25 (3) of the Indian Contract Act. Hence, he would submit that the arbitration claim made by the respondent against the petitioner is well within the period of limitation;

<https://www.mhc.tn.gov.in/judis>

c) Learned senior counsel for the respondent would submit that since the view taken by the arbitrator that the claim made by the respondent is well within the period of limitation as per Section 25 (3) of the Indian Contract Act is a possible legal view, this Court cannot interfere with the findings of the arbitrator under Section 34 of the Arbitration and Conciliation Act;

d) Learned senior counsel for the respondent would submit that the petitioner was able to identify and purchase properties for the respondent measuring approximately 13 acres of land only instead of 200 acres agreed upon under the MOU dated 18.05.2006. He would submit that after adjusting the sale consideration for the 13 acres of land and after adjusting a sum of Rs.2,27,00,000/- received from the petitioner, a sum of Rs.5,33,76,000/- is still due and payable by the petitioner to the respondent towards unutilized money for the purchase of properties for and on behalf of the respondent;

e) Learned senior counsel for the respondent would submit that the arbitrator only based on the evidence available on record came to the right conclusion that the letters of the petitioner dated 26.02.2015 and 05.03.2015 <https://www.mhc.tn.gov.in/judis> will amount to promise to pay the time barred debt which has extended the period of limitation by another period of three years from 05.03.2015. He would also submit that only based on the evidence available on record, the arbitrator has passed an arbitral award directing the petitioner to refund a sum of Rs.4,61,35,500/- which is determined by the arbitral tribunal to have been retained by the petitioner / respondent out of the total amount received from the respondent / claimant for the purchase of properties measuring 200 acres. He would also submit that since the petitioner failed to purchase 187 acres of land for and on behalf of the respondent, the arbitrator was also right in granting compensation to the respondent at the rate of Rs.1,00,000/- per acre for the 187 acres of land not purchased by the petitioner for and on behalf of the respondent;

f) Learned senior counsel appearing for the respondent would submit that since the arbitral award has been passed only based on evidence available on record and only in accordance with law and the view taken by the arbitrator is a possible legal view, this Court cannot interfere with the arbitral award under Section 34 of the Arbitration and Conciliation Act;

g) Learned senior counsel for the respondent would submit that as seen from the order of this Court in A.No.2419 of 2021 filed by the <https://www.mhc.tn.gov.in/judis> petitioner under Section 34 (4) of the Arbitration and Conciliation Act, 1996, which was dismissed by this Court on 25.10.2021 and

confirmed by the Division Bench of this Court on 29.08.2022 in O.S.A.(CAD).No.123 of 2021 and by the Honourable Supreme Court in Special Leave to Appeal (C).No.16828 of 2022 dated 30.09.2022, no grounds have been made out by the petitioner for this Court to interfere with the award of the arbitrator. According to him, the petitioner has not satisfied any of the grounds required for setting aside an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996.

Discussion:

19. The following are the undisputed facts:

a) The enforcement of the terms and conditions of the MOU dated 18.05.2006 had become time barred;

b) Only through the letters dated 26.02.2015 and 05.03.2015 of the petitioner, the respondent claims it will amount to promise to pay a time barred debt which will extend the limitation by another period of three years <https://www.mhc.tn.gov.in/judis> as per Section 25 (3) of the Indian Contract Act;

c) The letters dated 26.02.2015 and 05.03.2015 of the petitioner which according to the respondent is a promise to pay a time barred debt is restricted only to a sum of Rs.5,33,76,000/- which is towards refund of advance by the petitioner to the respondent. The alleged promise to pay a time barred debt does not cover the compensation amount at the rate of Rs.1,00,000/- per acre for the 187 acres of land not purchased, determined by the arbitrator under the impugned arbitral award.

20. The remedy provided in law to the creditors for recovery of their monies comes with an expiration date. When the time provided under the law of limitation for recovering such debt lapses, the debt becomes barred due to passage of excess time. Such debts being barred by the statute of limitation, their liability still subsists eventhough the remedy perishes. This principle is based on ethical principle that a debt does not extinguish and facts of a case may stop operation of the clock of limitation fixed by law or entirely revive a debt barred by the law of limitation, as set out in Section 18 of the Limitation Act, 1963 ("Limitation Act") and Section 25 (3) of the <https://www.mhc.tn.gov.in/judis> Indian Contract Act ("Contract Act"), respectively.

21. Section 25 (3) of the Indian Contract Act:

Consideration is an essential requisite of a contract. However, Section 25 of the Contract Act provides certain exceptions when agreements without any consideration are deemed to be valid and binding. One such exception is Section 25 (3) of the Indian Contract Act, 1872, wherein it is considered a valid contract when a person to be charged or his agent, makes a promise to the creditor, in writing, to pay the debt partly or wholly, of which the creditor might have enforced payment, but the debt has become barred due to the law of limitation.

22. Section 25 (3) of the Indian Contract Act reads as follows:

"Section 25 (1) ...

(2)...

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law <https://www.mhc.tn.gov.in/judis> for the limitation of suits."

23. In order to satisfy the requirements of Section 25 (3) of the Indian Contract Act, the following essentials must be present:

- a) There must be a promise to pay a debt;
- b) The creditor might have enforced payment but the debt is barred by limitation;
- c) The promise must be made in writing, and;
- d) It should be signed by the person to be charged therewith or his agent.

24. In the decision relied upon by the learned counsel for the petitioner in the case of N.Ethirajulu Naidu Vs. K.R.Chinnikrishnan Chettiar reported in AIR 1975 Mad 333, it has been held by the Division Bench of this Court that an agreement to be valid under Section 25 (3) of the Indian Contract Act requires an express promise made in writing and signed by the person to be charged therewith. As per the said decision, nothing short of an express promise will provide a fresh period of limitation <https://www.mhc.tn.gov.in/judis> and that an implied promise is not sufficient.

25. The Honourable Supreme Court in its recent decision viz., in the case of Kotak Mahindra Bank Limited Vs. Kew Precision Parts Private Limited and Others dated 05.08.2022 reported in MANU/SC/0971/2022 also relied upon by the learned counsel for the petitioner has also held that in order to invoke Section 25 (3) of the Indian Contract Act, the following conditions must be satisfied:

- a) It must refer to a debt, which the creditor, but for the period of limitation, might have enforced;
- b) There must be a distinct promise to pay such debt, fully or in part;
- c) The promise must be in writing, and signed by the debtor or his duly appointed agent;

26. The Honourable Supreme Court in the aforementioned decision in paragraph No.33 of the said decision has also distinguished between an acknowledgement of debt under Section 18 of the Limitation Act and promise to pay a time barred debt under Section 25 (3) of the Indian

<https://www.mhc.tn.gov.in/judis> Contract Act. The Honourable Supreme Court has held that in an acknowledgment of debt under Section 18 of the Limitation Act, the said acknowledgment need not be accompanied by any promise to pay, whereas, Section 25 (3) of the Indian Contract Act gets attracted in respect of time barred debts only if there is an express promise to pay a time barred debt that is time barred or in part thereof. The Honourable Supreme Court has held that the promise to pay under Section 25 (3) of the Indian Contract Act also should be clear and unconditional. The relevant paragraphs of the Honourable Supreme Court's decision referred to supra are extracted hereunder:

"30. In this appeal, it is contended that the last offer of 20th December, 2018 was followed by an agreement. Whether there was such agreement or not would have to be considered by the Adjudicating Authority. To invoke Section 25(3), the following conditions must be satisfied:

- (i) It must refer to a debt, which the creditor, but for the period of limitation, might have enforced;
- (ii) There must be a distinct promise to pay such <https://www.mhc.tn.gov.in/judis> debt, fully or in part;
- (iii) The promise must be in writing, and signed by the debtor or his duly appointed agent.

31. Under Section 25(3), a debtor can enter into an agreement in writing, to pay the whole or part of a debt, which the creditor might have enforced, but for the limitation of a suit in law. A written promise to pay the barred debt is a valid contract. Such a promise constitutes novation and can form the basis of a suit independent of the original debt, for it is well settled that the debt is not extinguished, the remedy gets barred by passage of time as held by this Court in *Bombay Dyeing and Manufacturing Co. Limited v.*

State of Bombay MANU/SC/0014/1957 : AIR 1958 SC

32. Section 25(3) applies only where the debt is one which would be enforceable against the Defendants, but for the law of limitation. Where a debt is not binding on the Defendant for other reasons, and consequentially not enforceable against him, there is no question of applicability of Section 25(3).

<https://www.mhc.tn.gov.in/judis>

33. There is a distinction between acknowledgment Under Section 18 of the Limitation Act, 1963 and a promise within the meaning of Section 25 of the Contract Act. Both promise and acknowledgment in writing, signed by a party or its agent authorised in that behalf, have the effect of creating a fresh starting of limitation. The difference is that an acknowledgment Under Section 18 of the Limitation Act has to be made within the period of limitation and need not be accompanied by

any promise to pay. If an acknowledgment shows existence of jural relationship, it may extend limitation even though there may be a denial to pay. On the other hand, Section 25(3) is only attracted when there is an express promise to pay a debt that is time barred or any part thereof. Promise to pay can be inferred on scrutinising the document. Only the promise should be clear and unconditional."

27. In the case on hand, the respondent / claimant had relied upon the letters of the petitioner dated 26.02.2015 and 05.03.2015 and he would claim that the said letters have been issued by the petitioner, promising to pay the respondent a time barred debt. The said letters viz., Exs.C6, C7 and C8 are reproduced hereunder:

<https://www.mhc.tn.gov.in/judis> Ex.C6:

<https://www.mhc.tn.gov.in/judis> Ex.C7:

<https://www.mhc.tn.gov.in/judis> <https://www.mhc.tn.gov.in/judis> Ex.C8:

<https://www.mhc.tn.gov.in/judis>

28. As seen from Ex.C7 dated 26.02.2015, the alleged confirmation of balance has been signed by S.Rajasekar, who is said to be a Marketing Executive of M/s.Saravana Foundations Limited, whereas, the respondent / claimant is M/s.Saravana Global Holdings Ltd. Further, as seen from the letter of the petitioner dated 05.03.2015 (Ex.C8), the said letter does not disclose the amount outstanding due to the respondent from the petitioner. It is also not an unconditional acknowledgment of liability and an unconditional promise to pay a sum of Rs.5,33,76,000/- given by the petitioner to the respondent. The said letter (Ex.C8) has merely requested the respondent to furnish a copy of the notice which may be handed over to S.Rajasekar, the Document Assistant Manager of the petitioner for settlement. It is not an unconditional undertaking to pay, given by the petitioner to the respondent. Further, in the letter dated 26.02.2015 (Ex.C7), the designation of S.Rajasekar in M/s.Saravana Foundations Ltd. is disclosed as its Marketing Executive, whereas, in the letter of the petitioner dated 05.03.2015 (Ex.C8), the designation of S.Rajasekar is disclosed as a Document Assistant Manager. The confirmation of balance alleged to have been given by S.Rajasekar on behalf of M/s.Saravana Foundations Limited <https://www.mhc.tn.gov.in/judis> on 26.02.2015 (Ex.C7) is also type written and is in the same font as that of the respondent's communication dated 26.02.2015 to the petitioner and that too given in the very same letter (Ex.C7).

29. The Honourable Supreme Court in the case of Kotak Mahindra Bank Limited Vs. Kew Precision Parts Private Limited and Others reported in MANU/SC/0971/2022 referred to supra has made it clear that the promise to pay a time barred debt under Section 25 (3) of the Indian Contract Act should be clear and unconditional and it must be an express promise made in writing. As seen from the aforementioned documents viz., Exs.C6, C7 and C8, the alleged promise is vague and it can never be construed to be an unconditional one. The confirmation of balance signed by S.Rajasekar, the Marketing Executive in Ex.C7 has also been given on behalf of M/s.Saravana Foundations

Limited and not on behalf of M/s.Saravana Global Holdings Limited, the petitioner herein, who is a party to the MOU dated 18.05.2006 (Ex.C1).

30. The initial burden of proof to prove the claim is upon the respondent / claimant. Being a claim seeking to enforce payment of a time barred debt, based upon an alleged promise to pay given by the petitioner as per Section 25 (3) of the Indian Contract Act, onus is much heavier on the respondent / claimant to prove that the petitioner has expressed a promise to pay, in writing, a time barred debt to the respondent. However, the arbitrator under the impugned award has erroneously, by giving a go-bye to the well settled proposition, has held that it is the responsibility of the petitioner to disprove the contention of the respondent by examining S.Rajasekar who is alleged to have signed the confirmation of balance letter dated 26.02.2015 (Ex.C7) The arbitrator has erroneously held that having failed to examine S.Rajasekar, the petitioner's employee, it can be inferred that a confirmation of balance was in fact given by the petitioner on 26.02.2015 (Ex.C7).

31. The Honourable Supreme Court in Kotak Mahindra Bank Limited Vs. Kew Precision Parts Private Limited and Others reported in MANU/SC/0971/2022 case referred to supra, has also made it clear that a promise to pay a time barred debt under Section 25 (3) of the Indian Contract Act should be clear and unconditional. Exs.C6, C7 and C8 which are the relevant documents filed by the respondent for the purpose of establishing that there was a promise to pay the time barred debt given by <https://www.mhc.tn.gov.in/judis> the petitioner are not documents which will prove that the petitioner had unconditionally confirmed the balance outstanding due to the respondent arising out of the MOU dated 18.05.2006 (Ex.C1) and had promised to pay.

32. By total non application of mind to Exs.C6, C7 and C8, the arbitrator has held in the impugned arbitral award that the petitioner had promised to pay the time barred debt to the respondent amounting to Rs.5,33,76,000/-. The alleged confirmation of balance said to have been signed by S.Rajasekar on behalf of M/s.Saravana Foundations Limited is a type written one and has been given in the very same letter addressed to the petitioner, which also creates suspicion about its genuineness.

33. The respondent's letter dated 26.02.2015 (Ex.C7) and petitioner's confirmation of balance given on the very same date is typed in the very same font. The arbitrator has failed to take note of all the aforementioned factors and without there being any evidence, excepting for Exs.C6, C7 and C8, which is unreliable, has accepted the contention of the respondent that the petitioner had promised to pay the time barred debt through their confirmation of balance dated 26.02.2015 and the subsequent letter dated <https://www.mhc.tn.gov.in/judis> 05.03.2015.

34. Only based on evidence, an arbitral award can be passed in favour of the respondent / claimant. In the instant case, the MOU which has given rise to the claim is of the year 2006. Admittedly, the last payment made by the respondent to the petitioner in terms of the MOU dated 18.05.2006 was on 02.09.2006. The petitioner has also disputed the letter issued by the respondent dated 10.12.2009 (Ex.C2), wherein, the respondent as the claimant that as per his books of accounts a sum of Rs.5,33,76,000/- is due and payable by the petitioner to the respondent through the petitioner's

undated letter (Ex.C3). In Ex.C3, the petitioner has stated in its reply that it fails to understand as to how a sum of Rs.5,33,76,000/- is claimed by the respondent from the petitioner. Just because the petitioner had not responded to the respondent's legal notice dated 26.02.2015, it cannot be construed that the petitioner has admitted the debt claimed by the respondent in the said notice. Ex.C8 letter dated 05.03.2015, sent by the petitioner also does not refer to the MOU dated 18.05.2006 (Ex.C1) and therefore, it cannot be treated as a promise to pay a time barred debt arising out of the MOU dated 18.05.2006 (Ex.C1).

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35. The arbitrator has also rendered his findings based on the principle of implied promise, whereas, for the purpose of attracting Section 25 (3) of the Indian Contract Act, there must be an express promise to pay a time barred debt and the said promise must be in writing. It would not suffice if from the surrounding circumstances it can be inferred that there was an implied promise to pay a time barred debt. The promise to pay for the purpose of Section 25 (3) of the Indian Contract Act should be express, clear and unconditional. Only based on adverse inference due to the non examination of S.Rajasekar as a witness by the petitioner, the arbitrator has erroneously held that the confirmation of balance letter viz., Exs.C7 and C8 are promises given by the petitioner to pay a time barred debt, attracting Section 25 (3) of the Indian Contract Act. The said finding is erroneous and has been given by total non application of mind to the statutory requirements to be satisfied under Section 25 (3) of the Indian Contract Act, which makes it clear that any promise to pay a time barred debt should be in writing and must be an express promise and should be clear and unconditional.

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36. One more important factor, the learned arbitrator has failed to take note of, in the arbitral award, is whether the terms and conditions contained in the MOU dated 18.05.2006 (Ex.C1) can be made applicable for the documents viz., letters dated 26.02.2015 and 05.03.2015 (Exs.C6, C7 and C8). Assuming, Section 25 (3) of the Indian Contract Act gets attracted for Exs.C6, C7 and C8, arbitration clause contained in the MOU dated 18.05.2006 (Ex.C1) cannot be invoked to adjudicate the claim under Section 25 (3) of the Indian Contract Act for the following reasons:

a) Promise to pay a time barred debt will amount to a fresh promise, creating a fresh liability / obligation in respect of an existing debt. A contract gets discharged on account of several factors. One of them is through novation of the contract as per Section 62 of the Indian Contract Act. Any promise to pay a time barred debt under Section 25 (3) of the Indian Contract Act amounts to novation of contract as it is a fresh promise and a fresh contract. As seen from Exs.C6, C7 and C8, the arbitration clause contained in the MOU dated 18.05.2006 (Ex.C1) is not incorporated in Exs.C6, C7 and C8. Assuming that the documents Exs.C6, C7 and C8 are <https://www.mhc.tn.gov.in/judis> documents evidencing promise to pay a time barred debt, the said documents give rise to a fresh contract between the parties. Unless and until the terms and conditions of the MOU dated 18.05.2006 (Ex.C1),

which includes the arbitration clause, have been incorporated in the confirmation of balance letter, allegedly issued by the petitioner through Exs.C7 and C8, the question of initiating arbitration based upon an arbitration clause contained in the MOU dated 18.05.2006 (Ex.C1) will not arise.

37. The Honourable High Court of Telangana in the decision relied upon by the learned counsel for the petitioner in the case of Meenakshi Solar Power Pvt. Ltd. and Others Vs. Abhyudaya Green Economic Zones Pvt. Ltd. and Others reported in MANU/TL/0141/2021 also makes it clear that whenever a contract is superseded by another, the arbitration clause, being a component / part of the earlier contract, falls with it or if the original contract is an entity is put to an end, the arbitration clause, which is a part of it, also perishes along with it. This Court is in agreement with the view taken by the Telangana High Court. In the case on hand also even assuming the promise to pay a time barred debt by the petitioner is accepted by this Court as claimed by the respondent, the said promise to pay a time barred <https://www.mhc.tn.gov.in/judis> debt is a fresh contract by itself and the earlier contract viz., the MOU dated 18.05.2006 (Ex.C1) is superseded by the promise to pay a time barred debt. The arbitration clause contained in the MOU dated 18.05.2006 (Ex.C1) cannot be made applicable to the promise to pay a time barred debt by the petitioner as the said promise to pay is a fresh contract by itself independent of the earlier MOU dated 18.05.2006 (Ex.C1).

38. The various other decisions relied upon by the learned counsel for the petitioner viz., the Allahabad High Court Judgment in the case of Gobind Das and Others Vs. Sarju Das reported in 1908 SCC Online All 41 and the Privy Council Judgment in the case of Elvira Rodrigues Siqueira Vs. (Godnicalo Hypolito Constancio) Noronha reported in AIR 1934 PC 144 also makes it clear that the promise to pay a time barred debt must be an express promise and cannot be ambiguous and vague.

39. The only possible legal view that could have been taken by the arbitrator from the evidence available on record is to hold that the claim of the respondent is hopelessly barred by the law of limitation for the following reasons:

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a) Exs.C6, C7 and C8 does not satisfy the requirements of Section 25 (3) of the Indian Contract Act which enables a claimant to seek enforcement of a time barred debt;

b) Exs.C6, C7 and C8 are vague and ambiguous in nature. The promise alleged to have been given under Exs.C7 and C8 by the petitioner to pay a time barred debt is not express and is also not clear and unconditional. The MOU dated 18.05.2006 (Ex.C1) has also not been referred to in the alleged confirmation of balance said to have been issued by the petitioner through Exs.C7 and C8;

c) The alleged confirmation of balance through Ex.C7 has been signed by S.Rajasekar as a Marketing Executive for M/s.Saravana FoundationS Limited and not on behalf of M/s.Saravana Global Holdings Limited, the petitioner herein;

d) Designation of S.Rajasekar in Ex.C7 is different from his designation disclosed in Ex.C8;

e) Unless and until the promise to pay is express in writing through clear and unconditional promise, the said promise to pay cannot be treated as a promise to pay attracting Section 25 (3) of the Indian Contract Act;

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f) The respondent / claimant (CW1) during his cross examination has also admitted that there was no confirmation of balance given by the petitioner / respondent as seen from the answers to question Nos.61 and 62 which are as follows:

"Q.61. Have you filed the confirmation letter. Please show the same?

A. As regards confirmation letter what I have meant is only the confirmation letter given by us.

Q.62. In the confirmation letter the amount as per your books only is mentioned and it is not confirmed by the respondent, am I right?

A. Yes. But till date the respondent have not denied the same till this Arbitral Proceedings was commenced."

g) Apart from the fact that the documents viz., letters (Exs.C6, C7 and C8) cannot be treated as a promise to pay attracting Section 25 (3) of the Indian Contract Act and the arbitrator has also failed to take note of the fact that once Section 25 (3) of the Indian Contract Act gets attracted, it amounts to a fresh contract which has superseded the earlier contract viz., the MOU dated 18.05.2006 (Ex.C1). The clauses in the MOU dated 18.05.2006 (Ex.C1) have also not been incorporated by the parties in <https://www.mhc.tn.gov.in/judis> Exs.C6, C7 and C8. Therefore, the arbitration clause found in the MOU dated 18.05.2006 (Ex.C1) cannot be made applicable to the alleged promise to pay documents viz., Exs.C6, C7 and C8. Therefore, the arbitrator should not have entertained the claim of the respondent and ought to have dismissed the claim at the threshold itself by holding that the claim of the respondent is not maintainable, since there is no arbitration clause under the Exs.C6, C7 and C8.

40. Hence, it is clear that the arbitrator by an absolutely perverse finding, without there being any evidence that the petitioner had promised to pay a time barred debt, which has been expressed in writing in clear terms and is unconditional, has erroneously allowed the claim by holding that the claim filed by the respondent is within the period of limitation, by erroneously applying Section 25 (3) of the Indian Contract Act. The arbitrator has also, by total non application of mind to the legal position that once a contract, in the instant case the MOU dated 18.05.2006 (Ex.C1), has got discharged, the terms and conditions contained in the said MOU which includes the arbitration clause cannot be made applicable to the promise to pay a time barred debt as per Section 25 (3) of

the Indian Contract Act. The <https://www.mhc.tn.gov.in/judis> alleged promise to pay as per Section 25 (3) of the Indian Contract Act is a novation of the earlier contract viz., the MOU dated 18.05.2006 (Ex.C1). Being a case of novation, the alleged promise to pay is a fresh contract by itself giving rise to a fresh cause of action and the terms and conditions of the earlier MOU dated 18.05.2006 has got discharged by the lapse of time for its enforcement. Therefore, the arbitration clause contained in the MOU dated 18.05.2006 (Ex.C1) cannot be made applicable for the alleged promise to pay through Exs.C6, C7 and C8. However, a perverse finding which amounts to patent illegality, the arbitrator has passed an arbitral award, based on the arbitration clause contained in the MOU dated 18.05.2006 (Ex.C1) which has already got discharged by the lapse of time.

41. Running accounts mean mutual accounts and reciprocal demands, where accounts and demands remain open and unsettled. The MOU dated 18.05.2006 (Ex.C1) is not a running account. Under the MOU dated 18.05.2006 (Ex.C1), investment has been made only by the respondent and there are no reciprocal demands. This being the case, the question of calculating limitation based on Article 1 of the limitation Act will not arise. The claim having been filed by the respondent only in the year 2018, <https://www.mhc.tn.gov.in/judis> eventhough, the claim having become time barred, even according to the respondent / claimant, the arbitrator relying upon the alleged promise to pay through Exs.C6, C7 and C8 for coming to the erroneous conclusion that Section 25 (3) of the Indian Contract Act gets attracted, would certainly amount to patent illegality and is opposed to public policy.

42. An application under Section 34 of the Arbitration and Conciliation Act can be entertained by this Court whenever a decision of an arbitral tribunal rendered in its award is opposed to public policy and patently illegal. Any claim which is hopelessly barred by the law of limitation is certainly opposed to public policy and patently illegal for the reason that if such claims are entertained, there will be no finality for any litigation / arbitration. In the instant case, it is undoubtedly clear that the arbitral award has been passed in respect of a time barred claim and that there has been no express promise to pay in writing a time barred debt. There is also no valid arbitration agreement as the earlier contract viz., the MOU dated 18.05.2006 (Ex.C1) has been discharged by the lapse of time and has been superseded by the alleged promise to pay a time barred debt which is claimed by the respondent in the arbitration. The dismissal of <https://www.mhc.tn.gov.in/judis> Section 34 (4) application will have no bearing as the limitation issue and the novation of the contract based on the alleged promise to pay was never considered by this Court in the said application.

43. By an absolutely perverse finding and without there being any evidence to prove that there was a promise to pay a time barred debt by the petitioner in accordance with Section 25 (3) of the Indian Contract Act, the arbitrator has passed the impugned award against the petitioner which has to be necessarily set aside by this Court. Apart from determining the amount payable towards refund of the unutilized sums of money, allegedly retained by the petitioner which was meant for purchase of properties for and on behalf of the respondent, the arbitrator has also passed an erroneous award for compensation at the rate of Rs.1,00,000/- per acre for the alleged 187 acres of land not procured by the petitioner for and on behalf of the respondent without any iota of evidence and that too when the alleged promise to pay in Exs.C6 to C8 admittedly does not cover the said claim.

44. For the foregoing reasons, the arbitral award dated 20.02.2019 passed by the sole arbitrator in O.P.No.752 of 2016 has to be set aside by <https://www.mhc.tn.gov.in/judis> this Court and the petition will have to be allowed.

45. Accordingly, the arbitral award dated 20.02.2019 passed by the sole arbitrator in O.P.No.752 of 2016 is hereby set aside and this petition is allowed as prayed for. No costs. Consequently, the connected application is closed.

Index	: Yes/No
Speaking Order	: Yes / No
Neutral Citation Case	: Yes / No
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ABDUL QUDDHOSE. J.,

ab

Pre-delivery Order in

21.07.2023

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