

Elfit Arabia & Anr.
v.
Concept Hotel BARONS Limited & Ors.

(Arbitration Petition (Civil) No. 15 of 2023)

09 July 2024

**[Dr Dhananjaya Y Chandrachud, CJI, J.B. Pardiwala
and Manoj Misra, JJ.]**

Issue for Consideration

Whether claims of the petitioner in the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 were barred by limitation.

Headnotes[†]

Arbitration and Conciliation Act, 1996 – s.11(6) – Petition under – Claims of Petitioners, if barred by limitation – Court exercising jurisdiction u/s 11(6) may reject ex-facie non-arbitrable or dead claims – Duty of the court to protect the parties from being compelled to arbitrate when the claim is demonstrably barred by limitation:

Held: Whether a claim is barred by limitation lies ordinarily within the domain of the arbitral tribunal – However, a Court exercising jurisdiction u/s 11(6) of the Act may reject ex-facie non-arbitrable or dead claims, to protect other party being drawn into protracted arbitration process that is bound to eventually fail – Court must ‘cut the deadwood’ by refraining from appointing an arbitrator when claims are ex-facie time-barred and dead, or there is no subsisting dispute – This examination does not involve a full review of contested facts but only a primary review, where contested facts speak for themselves – Such limited scrutiny is necessary as it is the duty of the court to protect the parties from being compelled to arbitrate when the claim is demonstrably barred by limitation – If courts don’t intervene within this limited compass and mechanically refer every dispute to arbitration, it may undermine the effectiveness of the arbitration process itself – On facts, the notices invoking arbitration were issued 11 years after the cause of action arose, which is well beyond the limitation period of 3 years and thus the claim which is sought to be raised is hopelessly barred by limitation. [Paras 5, 6, 8]

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Arbitration and Conciliation Act, 1996 – s.11(6) – On dishonour of cheques given to petitioner, it instituted petition u/s.11(6) for appointment of arbitrator – In the interregnum, proceedings u/s.138 NI Act instituted against respondents – If a “continuing cause of action” – Negotiable Instruments Act, 1881 – s.138:

Held: Initiation of arbitration and criminal proceedings under s.138 of NI Act are separate and independent proceedings that arise from two separate causes of action – Institution of proceedings u/s 138 does not imply “continuing cause of action” for purpose of initiating arbitration, as erroneously contended by petitioner. [Para 9]

Case Law Cited

Vidya Drolia v. Durga Trading Corporation [\[2020\] 11 SCR 1001](#) :
(2021) 2 SCC 1 – relied on.

Arif Azim Co. Ltd. v. Aptech Ltd. [\[2024\] 3 SCR 73](#) : (2024) 5 SCC 313; *BSNL v. Nortel Networks (India) (P) Ltd.* [\[2021\] 2 SCR 644](#) : (2021) 5 SCC 738; *NTPC Ltd. v. SPML Infra Ltd.* [\[2023\] 2 SCR 846](#) : (2023) 9 SCC 385 – referred to.

List of Acts

Arbitration and Conciliation Act, 1996; Negotiable Instruments Act, 1881.

List of Keywords

Arbitration; Barred by limitation, Domain of arbitral tribunal; Arbitration petition.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Arbitration Petition (Civil) No. 15 of 2023

(Under Section 11(6) of the Arbitration and Conciliation Act 1996)

With

Arbitration Petition (Civil) No. 10 of 2023

Appearances for Parties

Dr. Vineet Kothari, Sr. Adv., Mehul Kothari, Lzafeer Ahmad B. F., Vinay Kothari, Shubham Arun, Advs. for the Petitioners.

Gaurav Aggarwal, Sr. Adv., Chritarth Palli, Ms. Harsheen M Palli, Mrs. Nina Nariman, Avishkar Singhvi, B. Shravanth Shanker, Anil

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G Lalla, Ms. Prerna Robin, B Yeshwanth Raj, Naved Ahmed, Vivek Kumar Singh, Shubham Kumar, Advs. for the Respondents.

Judgment / Order of the Supreme Court**Order****ARBITRATION PETITION (CIVIL) NO. 15 OF 2023**

- 1 The petitioner, an entity incorporated in the United Arab Emirates, was purportedly approached by the respondents to finance a telecommunication project undertaken by Telesuprecon Nigeria Limited (TNL). Accordingly, the Memorandum of Understanding (MoU) which forms the basis of the petition under Section 11(6) of the Arbitration and Conciliation Act 1996¹ was executed on 1 June 2004. TNL was represented by the second respondent, who is also a director of the first respondent – a company incorporated in India. Pursuant to the terms of the MoU, the petitioners claim to have disbursed funds on various occasions. On 2 August 2006, a supplementary MoU was executed, setting out the terms of repayment and settlement of the petitioners' dues. The respondents agreed to lien their property as comfort and issue cheques in support of their finances.
- 2 It has been stated that cheques were given to the petitioner from time to time during the course of meetings between the parties to negotiate repayment. On 7 May 2011, fifteen cheques which had been furnished to the petitioner for a consolidated amount of Rs. 7.30 crores were presented for payment but allegedly dishonoured. Accordingly, on 2 June 2011, the petitioners issued a legal notice to the respondents to implement the MoU and make the necessary payment.
- 3 Eleven years thereafter, on 4 July 2022, the petitioners invoked arbitration in terms of clause 19 of the MoU. The respondent failed to reply to the notice invoking arbitration. Therefore, the petitioner issued a fresh notice dated 27 October 2022 calling upon the respondent to refer the dispute to arbitration. The petitioner did not receive a response to the second notice and instituted the present petition before this court for the appointment of an arbitrator.
- 4 According to the petitioner, in the interregnum, proceedings under Section 138 of the Negotiable Instruments Act 1881 were instituted

¹ "Act"

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against the respondents. An order of acquittal was passed by the Magistrate on 23 July 2018. Proceedings are pending before the High Court of Bombay in appeal.

- 5 The respondents contend that the claims of the petitioner are barred by limitation and urge this Court to dismiss the petition. Whether a claim is barred by limitation lies ordinarily within the domain of the arbitral tribunal. However, a court exercising jurisdiction under Section 11(6) of the Act may reject ex-facie non-arbitrable or dead claims, to protect the other party from being drawn into a protracted arbitration process,² that is bound to eventually fail. The court must ‘cut the deadwood’ by refraining from appointing an arbitrator when claims are ex-facie time-barred and dead, or there is no subsisting dispute.³
- 6 This examination does not involve a full review of contested facts but only a primary review, where uncontested facts speak for themselves.⁴ Such limited scrutiny is necessary as it is the duty of the court to protect the parties from being compelled to arbitrate when the claim is demonstrably barred by limitation. If courts do not intervene within this limited compass and mechanically refer every dispute to arbitration, it may undermine the effectiveness of the arbitration process itself.⁵
- 7 The above principles that have been affirmed in a consistent line of precedent, flow from the following observations in Vidya Drolia v. Durga Trading Corporation⁶:

“139. ... Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the *prima facie* examination may require a deeper consideration. The court’s challenge is to find the right amount of and the

2 Arif Azim Co. Ltd. v. Aptech Ltd. (2024) 5 SCC 313, para 68.

3 Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 1, para 154.4; BSNL v. Nortel Networks (India) (P) Ltd. (2021) 5 SCC 738, para 45.1.

4 NTPC Ltd. v. SPML Infra Ltd. (2023) 9 SCC 385, para 27.

5 *Ibid*, para 28.

6 [2020] 11 SCR 1001 : (2021) 2 SCC 1

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context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable.

...

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. ...

...

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. ... ”

(emphasis supplied)

- 8 Having regard to the uncontested chronology of events detailed in paragraphs 1 to 4 above, it is abundantly clear that the notices invoking arbitration dated 4 July 2022 and 27 October 2022 were

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issued eleven years after the cause of action arose in 2011.⁷ This is well beyond the limitation period of three years,⁸ and the claim which is sought to be raised is hopelessly barred by limitation.

- 9 The initiation of arbitration and criminal proceedings under Section 138 of the Negotiable Instruments Act 1881 are separate and independent proceedings that arise from two separate causes of action.⁹ Therefore, the institution of the proceedings under Section 138 does not imply a ‘continuing cause of action’ for the purpose of initiating arbitration, as erroneously contended by the petitioner.
- 10 The facts of the present case undoubtedly fall within the narrow compass of interference that courts must exercise at this stage. If this Court were to refer the dispute to arbitration, it would amount to compelling the parties to arbitrate a ‘deadwood’ claim that is ex-facie time-barred.
- 11 We, therefore, decline to entertain the Arbitration Petition.
- 12 The Arbitration Petition is accordingly dismissed.
- 13 Pending applications, if any, stand disposed of.

ARBITRATION PETITION (CIVIL) NO. 10 OF 2023

- 14 The companion Arbitration Petition, namely (Arbitration Petition No. 15 of 2023) has been dismissed by the above order. Save and except for the date of the MoU which is 26 May 2004 in the present case, the facts are similar.
- 15 For the reasons already indicated, we arrive at the conclusion that the claim is ex-facie barred by limitation.
- 16 The Arbitration Petition is accordingly dismissed.
- 17 Pending applications, if any, stand disposed of.

Result of the case: Arbitration Petitions dismissed.

⁷*Headnotes prepared by:* Bibhuti Bhushan Bose

(With assistance from: Nivedita Rawat, LCRA)

7 Section 21, Arbitration and Conciliation Act, 1996.

8 Section 46(1), Arbitration and Conciliation Act 1996; Article 55 of the Schedule, Limitation Act, 1963.

9 Sri Krishna Agencies v. State of A.P. (2009) 1 SCC 69, para 7.