* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 8th March, 2022
Decided on: 25th March, 2022

\+ **ARB.P. 325/2021**

GAIL (INDIA) LIMITED ..... Petitioner
Represented by: Mr. Sidharth Bhatnagar, Senior Advocate with Ms. Samiksha Godiyal, Ms. Pracheta Kar & Mr. Aditya Sidhra, Advs.

versus

KESAR ALLOYS & METALS PRIVATE LIMITED ..... Respondent
Represented by: Mr. Saurabh Kirpal, Senior Advocate with Mr. Vivek Jain & Ms. Suchitra Kumbhat, Advs.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short the Act), the petitioner seeks appointment of a sole arbitrator to adjudicate the disputes arising between the parties in connection with the Gas Sale Agreement dated 26th June, 2010 (in short the GSA) for the yearly supply of 33.718 BBTUs of Regasified LNG (in short RLNG) by GAIL to Kesar Alloys plant at Pithampur until 30th April, 2028.

2. According to the petitioner, in terms of Article 6.1 of the GSA, GAIL was bound to deliver and Kesar Alloys was bound to receive the Annual Contract Quantity of RLNG until 2028. As per Article 14 of the GSA, in case Kesar Alloys was to take delivery of quantity of RLNG lower than the quantity agreed under Article 6.1, the shortfall would still be charged to its

account and Kesar Alloys would be liable to pay 90% of the agreed Annual Contract Quantity. This obligation to pay 90% of the contracted quantity was irrespective of the actual quantity received at the Delivery Point. According to the petitioner, it continued to make available the agreed Annual Contract Quantity of RLNG to Kesar Alloys at the Delivery point without any protest or complaint from Kesar Alloys. Thereafter the petitioner raised "*Pay for if not taken*" claims against Kesar Alloys for the contract years 2014 to 2019 as Kesar Alloys defaulted in the obligation since 2014.

3. According to the petitioner, Kesar Alloys sought to terminate the GSA on 25th July, 2013 unilaterally, which was not permissible under the GSA and not accepted by the petitioner. Thus rejection of the proposal of Kesar Alloys was communicated by the petitioner vide its letter dated 29th July, 2013. According to the petitioner in view of the disputes arising, the petitioner made various communications through letters and emails to Kesar Alloys on 22nd August, 2016; 31st March, 2017; 12th May, 2017; 23rd March, 2018; 17th December, 2018; 24th April, 2019 and 11th September, 2019 to amicably resolve the disputes, however, Kesar Alloys did not respond. Finally, GAIL issued a notice of settlement of disputes to Kesar Alloys on 18th March, 2020 under Article 15.1 of the GSA to amicably resolve the disputes, however no response to the same was also received and thus on 10th October, 2020 GAIL issued a notice of invocation of arbitration in terms of Article 15.6 of the GSA. GAIL provided its list of three persons requesting Kesar Alloys to appoint a sole arbitrator from the list within 30 days, however, Kesar Alloys failed to appoint the sole arbitrator and hence the petition.

4. Refuting the claim of the petitioner seeking appointment of an arbitrator, learned counsel for the respondent says that no arbitrator can be appointed under Section 11(6) of the Act for the reason the claim of the petitioner is time barred as also the petition seeking appointment of an arbitrator under Section 11(6) of the Act is also time-barred. It is contended that once the period of limitation starts running, no subsequent disability or inability to institute a suit or make an application, stops the period of limitation in terms of Section 9 of the Limitation Act. Reliance is placed on the decision reported as (2021) 5 SCC 738 *Bharat Sanchar Nigam Limited Vs. M/s Nortel Network India Pvt. Ltd.* and 2021 (5) SCC 705 *Secunderabad Cantonment Board Vs. B. Ramachandraiah & Sons*.

5. Responding to the contentions of learned counsel for the respondent, learned counsel for the petitioner submits that the unilateral termination of the contract by Kesar Alloys by its letter dated 25th July, 2013 was rejected by the petitioner vide its letter dated 29th July, 2013 and when Kesar Alloys failed to make payment for the period 2014, GAIL issued several letters including the letter dated 22nd August, 2016, inviting Kesar Alloys to settle the disputes amicably with GAIL through the various mechanisms provided under Article 15 of the GSA, failing which GAIL will be constrained to initiate appropriate legal proceedings as available to it. It is stated that despite various correspondence when Kesar Alloys did not come forward for settlement, notice invoking arbitration was issued by GAIL vide the letter dated 10th October, 2020 which was also not responded and hence the petitioner filed the present petition.

6. Learned counsel for the petitioner further contends that under Section 11(6A) of the Act the scope of inquiry before this Court is restricted to

"*existence of an arbitration agreement*". Reliance is placed on the decision reported as (2020) 2 SCC 455 *Uttarakhand Purv Sainik Kalyan Nigam Ltd. Vs. Northern Coal Field Ltd*. and 2021 SCCOnline SC 282 *Sanjiv Prakash Vs. Seema Kukreja*. Relying upon the decision reported as 2010 (115) DRJ 438 *Prasar Bharti Vs. MAA Communication* it is contended that the cause of action for filing a petition under Section 11 of the Act arises only after one party receives a request from the other party, for appointment of an arbitrator and this request is rejected or the party fails to reach an agreement in this regard. It is stated that notice dated 22nd August, 2016 was not a notice invoking arbitration but made a request to Kesar Alloys to amicably settle the disputes in terms of dispute resolution agreed under the GSA under Article 15.1. Hence it cannot be said that either the claim is barred by limitation or that the petition under Section 11 of the Act invoking arbitration is barred by limitation. It is further stated that the claim of the Kesar Alloys that it terminated the GSA on 25th July, 2013 whereas the first notice was issued on 2nd August, 2016 beyond the period of limitation of three years is incorrect for the reason, Kesar Alloys waived the purported termination of GSA in March 2018 when parties entered into a correspondence from 23rd March, 2018 to 27th March, 2018 and it was clearly stated that the request for termination of GSA by Kesar Alloys had not been given effect to by the parties and the parties were still discussing possible termination of the GSA and an offer was made for a contemplated prospective termination of GSA after payment of amount calculated by GAIL. It is stated that the respondent did not issue a single communication in March 2018 stating that the contract had been terminated in 2013 and that it was not interested in the scheme. In view of the correspondence between

the parties it cannot be said that ex-facie the claim of GAIL is time-barred or that the petition under Section 11(6) of the Act is also barred by limitation and it will be for the arbitrator to decide the disputed question of facts and law. Reliance in this regard is placed on the decisions reported as (2021) 5 SCC 738 *BSNL Vs. Nortel Networks (India) (P) Ltd*. and (2021) 2 SCC 1 *Vidya Drolia Vs. Durga Trading Corporation*.

7. Article 15 of the GSA which provides for disputes resolution reads as under:

> *"15.1 Amicable Settlement*
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> *The Parties shall use their respective reasonable endeavors to settle any Dispute amicably through negotiations. If a Dispute is not resolved within sixty (60) Days after written notice of a Dispute by one Party to the other Party then the provisions of Article 15.6 shall apply unless the subject matter of such Dispute is required to be referred to a Sole Expert under Article 15.2 in which case the provisions of Article 15.2 shall apply.*
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> *15.2 Determination by Sole Expert*
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> *Any Dispute arising out of matters relating to Article 10 or Article 13 shall be referred only to a Sole Expert who shall be appointed in accordance with Article 15.3.*
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> *15.3 Appointment of Sole Expert*
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> *The procedure for the appointment of an expert shall be as follows:*
>
> *(a) The party wishing the appointment to be made shall give notice to that effect to the other and such notice shall give details of the matter which it is proposed shall be resolved by the expert.*
>
> *(b) The parties shall meet in an endeavour to agree upon an expert to whom the matter in dispute shall be referred for determination.*
>
> *(c) If within twenty-one (21) days from the service of the said notice the parties have either failed to*

meet or failed to agree upon an expert then the parties shall attempt to agree upon a person ("Appointing Authority") who shall be requested to make the appointment of an expert and in the event of failure to so agree within fourteen (14) days thereafter, the matter shall be referred for arbitration as per Article 15.6.

(d) Having selected the Sole Expert, the parties shall forthwith jointly notify such expert of his selection and request him within fourteen (14) days to confirm whether or not he is willing and able to accept the appointment. If such expert is either unwilling or unable to accept such appointment or has not confirmed his willingness and ability to accept such appointment within the said period of fourteen (14) days, the Parties shall further attempt to mutually select sole expert fails the dispute shall be referred for arbitration in accordance with Article 15.6.

15.4 Qualifications of Sole Expert

x x x x

15.5. Terms of Reference and determination of Sole Expert

x x x x

15.6 Arbitration

Any Dispute arising in connection with this Agreement which is not resolved by the Parties pursuant to Article 15.1 within sixty (60) Days of the notice of the Dispute or Article 15.3(c) and Article 15.3(d), shall:

Alternative 1-Where both the Parties are Government Company

x x x x

Alternative 2· where one Party to the Agreement is not a Government Company

(a) be finally settled by arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996 and rules made there under, from time to time. The procedure for appointment of arbitrators shall be as follows:

(i) After the sixty 60 Days period described in Article 15.1, either Party may submit the Dispute to a

single arbitrator (the "Sole Arbitrator"). The Buyer shall select the Sole Arbitrator within thirty [30] Days of the expiration of such sixty 60 Days period from a panel of three (3) distinguished persons nominated by the Seller.

(ii) The decision(s) of the Sole Arbitrator, supported by reasons for such decision, shall be final and binding on the Parties.

(iii) The venue of arbitration shall be New Delhi.

This Article 15.6 shall survive the termination or expiry of this Agreement.

15.7 Continue performance

While any Dispute under this Agreement is pending, including the commencement and pendency of any Dispute referred to the Sole Expert or arbitration, the Parties shall continue to perform all of their (respective obligations under this Agreement without prejudice to the final determination in accordance with the provisions under this Article 15."

8. As noted above, Article 15.6 survives even on termination or expiry of the GSA. Thus the case of the GAIL is that after Kesar Alloys unilaterally terminated the GSA, GAIL replied back on 29th July, 2013 whereafter Kesar Alloys made no communication with GAIL and after a reasonable time period, the disputes were sought to be amicably settled failing which the disputes were to be settled in terms of Article 15.6 as noted above which provides for reference of disputes to the sole arbitrator.

9. Kesar Alloys issued a letter dated 25th July, 2013 terminating the GSA which provided that Kesar Alloys would like to discontinue the gas supplied with immediate effect/ before 31st July, 2013 as such it was giving notice/ intimation in terms of Article 19 of the GSA. This notice of termination was duly replied by GAIL vide its letter dated 29th July, 2013 stating that the notice of termination in the instance case does not come under the purview

of 19 of the GSA and that Kesar Alloys should inform GAIL the specific reason for termination of GSA so that the same can be examined at their end. Kesar Alloys was also requested to reconsider their decision of termination specifically in terms of the provisions of Article 19.8 (a to f) of the GSA. Thereafter GAIL issued a letter dated 28th February, 2015 in regard to the Annual take or Pay Deficiency Claim for the contract year 2014 under the long term RLNG GSA followed by a letter dated 29th February, 2016 regarding the Annual Statement of Settlement in respect of the year 2015 and the letter dated 20th February, 2017 in respect of the Annual Statement of Settlement for the year 2016. Though GAIL continued writing such letters dated 14th February, 2018; 26th February, 2019; 28th February, 2020 raising the claims for each year, the first notice under Article 15.1 of the GSA inviting Kesar Alloys to settle the disputes amicably with GAIL in terms of the mechanism provided under Article 15 of the GSA was issued on 22nd August, 2016. There is no correspondence from 29th July, 2013 to 22nd August, 2016 except as noted above wherein GAIL continued to raise claims for every year, however there was no response whatsoever from Kesar Alloys.

10. Undoubtedly, the dispute between the parties arose pursuant to the termination of the agreement dated 25th July, 2013 of Kesar Alloys and for the first time GAIL issued notice under Article 15.1 of the GSA inviting Kesar Alloys to settle the matter in terms of Article 15.1 on 22nd August, 2016. Though GAIL continued raising the claims for every year, there is no admission/acknowledgement of the liability by Kesar Alloys. Thus, the first notice under Article 15.1 having been issued on 22nd August, 2016 i.e. beyond the period of three years from 25th July, 2013 when Kesar Alloys

issued the letter of termination of GSA, the claim of the petitioner that the termination of GSA by Kesar Alloys is illegal and hence GAIL is entitled to recovery of money even if no supply of RLNG was taken by Kesar Alloys, is ex-facie barred by limitation. Even from 31st July, 2013 when the last supply, if any, was made by GAIL to Kesar Alloys, the claim of GAIL is time barred.

11. In *BSNL (supra)* the Hon'ble Supreme Court distinguishing the adjudication of a claim barred by limitation and the invocation of the arbitration being barred by limitation, held:

> *"16. The period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognised even under Section 20 of the Arbitration Act, 1940. Reference may be made to the judgment of this Court in J.C. Budhraja v. Orissa Mining Corpn. Ltd. [J.C. Budhraja v. Orissa Mining Corpn. Ltd., (2008) 2 SCC 444 : (2008) 1 SCC (Civ) 582] wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator. Para 26 of this judgment reads as follows : (SCC p. 460)*
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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 Inder Singh Rekhi v. DDA [Inder Singh Rekhi v. DDA, (1988) 2 SCC 338] , Panchu Gopal Bose v. Port of Calcutta [Panchu Gopal Bose v. Port of Calcutta, (1993) 4 SCC 338] and Utkal Commercial Corpn. v. Central Coal Fields Ltd. [Utkal Commercial Corpn. v. Central Coal Fields Ltd., (1999) 2 SCC 571] also make this position clear."

23. We will now discuss the second issue which has arisen for consideration i.e. whether the Court while exercising jurisdiction under Section 11 is obligated to appoint an arbitrator even in a case where the claims are ex facie time-barred. To determine this issue, we would have to examine the scope of jurisdiction under Section 11 of the Act.

37. After the amendment by the 2019 Amendment to Section 11 is notified, it will result in the deletion of sub-section (6-A), and the default power will be exercised by arbitral institutions designated by the Supreme Court, or the High Court, as the case may be.

37.1. It is relevant to note that sub-section (6-B) in Section 11, has not been amended by the 2019 Amendment Act. Sub-section (6-B) provides that the designation of any person, or institution by the court, shall not be regarded as a delegation of "judicial power". Consequently, it would not be open for the person or institution designated by the court to exercise any judicial power, and adjudicate on any issue, including the issue of validity of the agreement, or the arbitrability of disputes.

37.2. The amendment to sub-section (8) of Section 11 by the 2019 Amendment [which is also yet to be notified], provides that the arbitral institution will be empowered to : (a) seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of Section 12, to secure the appointment of an independent and impartial arbitrator; and (b) ensure that the arbitrator has the qualifications required by the arbitration agreement.

Issue of limitation

38. Limitation is normally a mixed question of fact and law, and would lie within the domain of the Arbitral Tribunal. There is, however, a distinction between jurisdictional and admissibility issues. An issue of "jurisdiction" pertains to the power and authority of the arbitrators to hear and decide a case. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal.

39. Admissibility issues however relate to procedural requirements, such as a breach of pre-arbitration requirements, for instance, a mandatory requirement for mediation before the commencement of arbitration, or a challenge to a claim or a part of the claim being either time-barred, or prohibited, until some precondition has been fulfilled. Admissibility relates to the nature of the claim or the circumstances connected therewith. An admissibility issue is not a challenge to the jurisdiction of the arbitrator to decide the claim.

40. The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the Arbitral Tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some precondition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.

41. In Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho [Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho, (2019) 1 SLR 263 : 2018 SGCA 81] , the Singapore Court of Appeal distinguished between "jurisdiction" and "admissibility" in paras 207 and 208, which read as:

> *"207. Jurisdiction is commonly defined to refer to the "power of the tribunal to hear a case", whereas admissibility refers to "whether it is appropriate for the tribunal to hear it" : Waste Management Inc. v. United Mexican States [Waste Management Inc. v. United Mexican StatesICSID Case No. ARB(AF)/98/2, dissenting opinion of Keith Highet dated 8-5-2000, para 58 (Arbitral Award).] . To this, Zachary Douglas adds clarity to this discussion by referring to "jurisdiction" as a concept that deals with "the existence of [the] adjudicative power" of an Arbitral Tribunal, and to "admissibility" as a concept dealing with "the exercise of that power" and the suitability of the claim brought pursuant to that power for adjudication : [Zachary Douglas, The Press, 2009] at paras 291 and 310.*
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> *208. The conceptual distinction between jurisdiction and admissibility is not merely an exercise in linguistic hygiene pursuant to a pedantic hair-spitting endeavour. This distinction has significant practical import in investment treaty arbitration because a decision of the tribunal in respect of jurisdiction is reviewable by the supervisory courts at the seat of the arbitration (for non-ICSID arbitrations) or before an ICSID ad hoc committee pursuant to Article 52 of the ICSID Convention (for ICSID arbitrations,) whereas a decision of the tribunal on admissibility is not reviewable : see Jan Paulsson, "Jurisdiction and Admissibility" in Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner (Gerald Aksen et al, eds) (ICC Publishing, 2005) at p. 601, Douglas at para 307, Waibel at p. 1277, paras 257 and 258, Hanno Wehland, "Jurisdiction and Admissibility in Proceedings under the ICSID Convention*

and the ICSID Additional Facility Rules" in ICSID Convention after 50 Years : Unsettled Issues (Crina Baltag, Ed.) (Kluwer Law International, 2016) at pp. 233-234, and Chin Leng at p. 124."

42. The judgment in Lesotho [Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho, (2019) 1 SLR 263 : 2018 SGCA 81] was followed in BBA v. BAZ [BBA v. BAZ, 2020 SGCA 53] wherein the Court of Appeal held that statutory time bars go towards admissibility. The Court held that the "tribunal v. claim" test should be applied for purposes of distinguishing whether an issue goes towards jurisdiction or admissibility. The "tribunal v. claim" test asks whether the objection is targeted at the tribunal (in the sense that the claim should not be arbitrated due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself is defective and should not be raised at all).

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

44. The issue of limitation which concerns the "admissibility" of the claim, must be decided by the Arbitral Tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties.

45. In a recent judgment delivered by a three-Judge Bench in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , 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 barefaced 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.

45.1. In para 144, the Court observed that the judgment in Mayavati Trading [Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] had rightly held that the judgment in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] had been legislatively overruled. Para 144 reads as : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC pp. 114-15)

> *"144. As observed earlier, Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] 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. [Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] , in our humble opinion, rightly holds thatPatel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] 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. [Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] 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."*
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> *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. Para 148 of the judgment reads as follows : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 119)

"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 the 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."*

45.2. In para 154.4, it has been concluded that : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 121)

"154.4. Rarely as a demurrer the court may interfere at Sections 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."

45.3. In para 244.4 it was concluded that : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 162)

"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"."

46. The upshot of the judgment in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] is affirmation of the position of law expounded in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] and Mayavati Trading [Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] , which continue to hold the field. It must be understood clearly that Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] has not resurrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]

47. 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.

48. Applying the law to the facts of the present case, it is clear that this is a case where the claims are ex facie time-barred by over 5½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 4-8-2014. The notice of arbitration was invoked on 29-4-2020. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation.

49. The present case is a case of deadwood/no subsisting dispute since the cause of action arose on 4-8-2014, when the claims made by Nortel were rejected by BSNL. The respondent has not stated any event which would extend the period of limitation, which commenced as per Article 55 of the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the final bill by making deductions.

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

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

51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, [S.S. Rathore v. State of M.P., (1989) 4 SCC 582 : 1990 SCC (L&S)

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

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

Conclusion

53. Accordingly, we hold that:

53.1. The period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. The period of limitation will begin to run from the date when there is failure to appoint the arbitrator. It has been suggested that Parliament may consider amending Section 11 of the 1996 Act to provide a period of limitation for filing an application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings.

53.2. In rare and exceptional cases, where the claims are ex facie time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference."

12. As held in *Vidya Drolia* and *BSNL* (supra), where there is not even a vestige of doubt that the claim is ex facie non-arbitrable, the Court will not relegate the parties to arbitration. From the facts as noted above, it is evident

that the respondent issued the letter terminating the arbitration on 25th July, 2013 and the first letter of the petitioner under Article 15.1 of the GSA for settlement of the disputes amicably was issued on 22nd August, 2016 whereafter the notice invoking arbitration under Article 15.6 of the GSA was issued on 10th October, 2020. Even taking the sixty day period required to elapse on failure of settlement before issuing notice invoking arbitration, the notice invoking arbitration was required to be issued within three years from 21st October, 2016. Further, all the correspondences by GAIL are unilateral and there is no admission of any liability as claimed by GAIL. Thus the claim of GAIL being ex facie barred by limitation, as the process under Article 15 of GSA was initiated after three years of the termination of GSA by Kesar Alloys on 25th July, 2013 in any case after the last delivery, if any, on 31st July, 2013, in view of the law laid down by the Supreme Court in *Vidya Drolia* (supra) and *BSNL* (supra), the dispute between the parties cannot be referred to arbitration.

13. Petition is accordingly dismissed.

14. Judgment be uploaded on the website of the Court.

(MUKTA GUPTA)
JUDGE

MARCH 25, 2022
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