NEUTRAL CITATION NO. 2025:MPHC-JBP:33913

IN THE HIGH COURT OF MADHYA PRADESH

AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE DEEPAK KHOT

ON THE 14th OF JULY, 2025

ARBITRATION CASE No. 51 of 2024

NATHULAL JAIN

Versus

MADHYA PRADESH WAREHOUSING AND LOGISTICE CORPORATION

Shri Siddharth Gulatee – learned Senior Advocate with Shri Ankit Kumar Pandey, Advocate for the applicant.

Shri Vivek Ranjan Pandey – Advocate for the respondents.

ORDER

The present application has been filed by the applicant under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996') for appointment of an Arbitrator to resolve the dispute arose between the parties pursuant to an agreement dated 02.05.2009 (Anneuxre A-1).

2. Undisputed facts of the case are that the applicant and non-applicant entered into a contract for loading-unloading and transportation of procured grains. It is not disputed that agreement dated 02.05.2009 (Anneuxre A-1) has been executed between the parties. It is also not disputed that there exist arbitration Clause No.19 at page 27 of the application which is a mechanism for redressal of the grievances of the parties through settlement by the procedure of arbitration provided under the contract.

3. It is submitted by learned senior counsel for the applicant that a dispute arose between the parties because of deduction of amount of Rail Transit Loss (RTL) by the non-applicant and therefore the applicant served a notice dated 25.06.2012 (Annexure A/4) invoking the arbitration clause. When no heed was paid to such notice-cum-request letter, the applicant had again reminded the non-applicant vide Annexure A/5 dated 27.11.2013 for reference of the matter to the arbitration as per the arbitration agreement contained in Annexure P/1 at page 27 of the application. It is further submitted that when no reference was made nor reply was given to the notice sent by the applicant, the applicant was left with no option except to knock the doors of this Court and therefore, the applicant filed Writ Petition No.4453/2014 (Annexure P/6) before this Court.

4. It is further submitted that the writ petition remained pending after notice to the non-applicant and finally on 11.03.2024 on the objection of the respondent that there exist an alternative efficacious remedy of resolution of the dispute between the parties by invoking arbitration clause contained in the agreement Annexure A/1, the matter was dismissed with liberty to avail the remedy available the applicant. In furtherance to the liberty granted by this Court, the applicant submitted this application under Section 11(6) of the Act of 1996 and prayed for appointment of an independent Arbitrator in view of the amended provisions of the Act of 1996.

5. The prayer as made by learned senior counsel for the applicant has been vehemently opposed by learned counsel appearing for the non-applicant on the ground that the applicant has slept over his right for years together and after a period of ten years, no adjudication can be done by any Arbitrator for stale claim of the applicant. It is submitted that though the non-applicant has not filed any reply on merits of application filed under Section 11(6) of the

Act of 1996, but as a preliminary objection he has filed preliminary reply and stated that this application is not maintainable on the ground of delay. The non-applicant has relied on the order passed by this Court in the case of ***Sancheti Rice Udyog Unit-II Waraseoni vs. M.P.Civil Supplies Corp. Thr.District Manager*** (AC No.60/2023 decided on 21.11.2023) filed as R/1 alongwith preliminary objection. It is further submitted that this Court while dealing with the application under Section 11(6) of the Act of 1996 has found that the case is barred by limitation exceeding period of three years and rejected the application. He placed heavy reliance on the judgment relied by the Coordinate Bench of this Court in the said order Annexure R/1 i.e. ***M/s Uttarakhand Purv Sainik Kalyan Nigam Limited vs Northern Coal Field Limited, reported in 2018 AIR MP 74*** to state that the application for appointment of an Arbitrator beyond the period of limitation cannot be entertained and petition deserves to be dismissed. He has also placed reliance on the judgment of ***Ms. Geo Miller & Company Pvt. Ltd. vs Chairman Rajasthan Vidyut Utpadan Nigam Ltd. (2020) 14 SCC 643*** to state that prayer for appointment of an Arbitrator can be considered within a period of three years from arising of cause of action.

6. No other arguments have been advanced by the parties.

7. Heard learned counsel for the parties and perused the record.

8. It is not disputed that the applicant and non-applicant entered into a contract for loading-unloading and transportation of procured grains. It is not disputed that agreement dated 02.05.2009 (Anneuxre A-1) has been executed between the parties. It is also not disputed that there exist arbitration clause in the agreement dated 02.05.2009 (Anneuxre A-1). It is also not in dispute that some controversy arose because of deduction of bill amount of Rail Transit Loss (RTL) by the non-applicant and therefore the applicant served a

notice dated 25.06.2012 (Annexure A/4) invoking the arbitration clause and reminder dated 27.11.2013 against which the non applicant has kept a blissful silence. It is also not in dispute that when the grievance of the applicant had not been redressed, the applicant had filed Writ Petition No.4453/2014 (Annexure P/6) before this Court immediately on 10.03.2014 i.e. within two years of the first notice sent for invoking the arbitration clause. It is also not disputed that the matter in regard to the controversy between the parties, writ petition remained pending for ten years which was later on disposed of vide order dated 11.03.2024 (Annexure P/6) and just after one month on 07.04.2024, this application under Section 11(6) has been filed before this Court.

9. Now the question which has been raised by the non-applicant in regard to the question of limitation, whether it would apply at the stage of referral of arbitration when the facts of the case in regard to chronology of limitation are not in dispute.

10. Learned counsel for the applicant has relied on the judgment of Hon'ble Apex Court in the case of ***Ellora Paper Mills Ltd. v. State of M.P., (2022) 3 SCC 1*** to state that if the arbitration proceedings are not substantially commenced, the provisions of amended Act of 1996 would apply and according to him, as per Section 11(6A) of the Act of 1996, this Court has to see only whether the dispute is arbitrable or not and for resolution of dispute between the parties, there exist an arbitration clause or not. He further placed heavy reliance on the judgment of Hon'ble Apex Court in the case of ***Uttarakhand Purv Sainik Kalyan Nigam Limited (2020) 2 SCC 455*** to state that question of limitation is a mix question of fact and law and is not to be decided by the referral Court instead that has to be left to be decided by an Arbitrator as held by the Hon'ble Apex Court.

11. Learned counsel for the non-applicant has submitted that the judgment in ***Ellora Paper Mills Ltd. (supra)*** has not considered the earlier judgment passed in the case of ***Geo Miller & Company Pvt. Ltd. (supra)*** which was the earlier judgment passed by the Hon'ble Apex Court which is reproduced hereunder :

> "31. We therefore find that the appellant company's case has a certain element of mala fides insofar as it has made detailed submissions in respect of its communications with the respondents subsequent to 4-10-1997, but has remained conspicuously silent on the specific actions taken to recover the payments due prior to that date. Under Section 114 Illustration (g) of the Evidence Act, 1872 this Court can presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.
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> 32. Hence, in the absence of specific pleadings and evidence placed on record by the appellant with respect to the parties' negotiation history, this Court cannot accept the appellant's contention that it was only after the respondent's letter dated 18-12-1999 that the appellant could have contemplated arbitration in relation to the outstanding amounts. Even if we were to include the time spent proceeding before the Settlement Committee, the limitation period, at the latest, would have started running from 4-10-1997 which is when the appellant made a representation to the Settlement Committee and the Committee failed to respond to the same.
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> 33. It is further relevant to note that even the respondent's letter dated 18-12-1999 does not completely repudiate the appellant's claims but requests the submission of certain documents for verification. Hence it was not so radical a departure from the prevailing situation at that time so as to give a finding that the appellant could not have contemplated arbitration prior to the aforesaid letter.
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> 34. We also find it pertinent to add that the appellant's own default in sleeping over his right for 14 years will not constitute a case of "undue hardship" justifying extension of time under Section 43(3) of the 1996 Act or show "sufficient cause" for condonation of delay under Section 5 of the Limitation Act. The appellant should have approached the court for appointment of an arbitrator under Section 8(2) of the 1940 Act within the appropriate limitation period. We agree with the High Court's observation that the entire dispute seems concocted so as to pursue a monetary claim against the respondents, taking advantage of the provisions of the 1996 Act."

12. He further states that the claim of the applicant being stale cannot refer to the Arbitrator and should be decided and dismissed at this stage only by this Court itself under Section 11 (6) of the Act of 1996.

13. He further submitted that under Section 11 there is a rider of sub-Section 5 that the application is to be filed within 30 days, if the parties fail to appoint Arbitrator after the request made by the other party.

14. In response, it is submitted by learned counsel for the applicant that the controversy in the matter in regard to limitation is covered by Section 14 of the Limitation Act which provides that if any party chooses a wrong forum and the time spent before such forum deserves to be condoned by applying the principle of Section 14 of the Limitation Act. He relied on the judgments of Hon'ble Apex Court in the cases of ***Geo Miller & Company Pvt. Ltd. (supra) and HBM Print Ltd. v. Scantrans India (P) Ltd., (2009) 17 SCC 338***.

15. It is further submitted by learned senior counsel for the applicant that the controversy in regard to application of amended Act has been resolved by the Hon'ble Apex Court in the case of ***Ellora Paper Mills Ltd. (supra)***. Relevant paragraphs are reproduced hereunder :

> 19. In the aforesaid decision in Ajay Sales & Suppliers case [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730] , this Court also negatived the submission that as the contractor participated in the arbitration proceedings before the arbitrator therefore subsequently, he ought not to have approached the High Court for appointment of a fresh arbitrator under Section 11 of the Arbitration Act, 1996. After referring to the decision of this Court in Bharat Broadband Network Ltd. v. United Telecoms Ltd. [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] , it is observed and held in para 18 as under : (Ajay Sales & Suppliers case [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730])

"18. Now so far as the submission on behalf of the petitioners that the respondents participated in the arbitration proceedings before the sole arbitrator — Chairman and therefore he ought not to have approached the High Court for appointment of arbitrator under Section 11 is concerned, the same has also no substance. As held by this Court in Bharat Broadband Network [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] there must be an "express agreement" in writing to satisfy the requirements of Section 12(5) proviso. In paras 15 & 20 it is observed and held as under : (SCC pp. 768 & 770-71)

'15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject-matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.

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20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of

such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Contract Act, 1872 becomes important. It states:

"9. *Promises, express and implied.*—Insofar as a proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court [Bharat Broadband Network Ltd. v. United Telecoms Ltd., 2017 SCC OnLine Del 11905] as indicating an express agreement on the facts of the case is dated 17-1-2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] which, as we have seen hereinabove, was only on 3-7-2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 7-10-2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2), and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a

statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate.' "

(emphasis in original)

16. Further, Hon'ble Apex Court in the case of ***Uttarakhand Purv Sainik Kalyan Nigam Ltd. (supra)*** has held :

"7. We have heard the learned counsel for the parties and perused the pleadings.

7.1. Section 21 of the 1996 Act provides that arbitral proceedings commence on the date on which a request for disputes to be referred to arbitration is received by the respondent.

7.2. In the present case, the notice of arbitration was issued by the petitioner Contractor to the respondent Company on 9-3-2016. The invocation took place after Section 11 was amended by the 2015 Amendment Act, which came into force on 23-10-2015, the amended provision would be applicable to the present case.

7.3. The 2015 Amendment Act brought about a significant change in the appointment process under Section 11: first, the default power of appointment shifted from the Chief Justice of the High Court in arbitrations governed by Part I of the Act, to the High Court; second, the scope of jurisdiction under sub-section (6-A) of Section 11 was confined to the examination of the existence of the arbitration agreement at the pre-reference stage.

7.4. Prior to the coming into force of the 2015 Amendment Act, much controversy had surrounded the nature of the power of appointment by the Chief Justice, or his designate under Section 11. A seven-Judge Constitution Bench of this Court in SBP & Co. v. Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] defined the scope of power of the Chief Justice under Section 11. The Court held that the scope of power exercised under Section 11 was to first decide:

(i) whether there was a valid arbitration agreement; and

(ii) whether the person who has made the request under Section 11, was a party to the arbitration agreement; and

(iii) whether the party making the motion had approached the appropriate High Court.

7.5. Further, the Chief Justice was required to decide all threshold issues with respect to jurisdiction, the existence of the agreement, whether the claim was a

dead one; or a time-barred claim sought to be resurrected; or whether the parties had concluded the transaction by recording satisfaction of their mutual rights and obligations, and received the final payment without objection, under Section 11, at the pre-reference stage. The decision in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] was followed by this Court in Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , Master Construction [Union of India v. Master Construction Co., (2011) 12 SCC 349 : (2012) 2 SCC (Civ) 582] , and other decisions.

7.6. The Law Commission in the 246th Report [Amendments to the Arbitration and Conciliation Act, 1996, Report No. 246, Law Commission of India (August 2014), p. 20.] recommended that:

> "33. … the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void. Insofar as the [Ed.: The matter between two asterisks has been emphasised in original.] nature [Ed.: The matter between two asterisks has been emphasised in original.] of intervention is concerned, it is recommended that in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal."
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> (emphasis supplied)

7.7. Based on the recommendations of the Law Commission, Section 11 was substantially amended by the 2015 Amendment Act, to overcome the effect of all previous judgments rendered on the scope of power by a non obstante clause, and to reinforce the kompetenz-kompetenz principle enshrined in Section 16 of the 1996 Act. The 2015 Amendment Act inserted sub-section (6-A) to Section 11 which provides that:

> "(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-

section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement."

(emphasis supplied)

7.8. By virtue of the non obstante clause incorporated in Section 11(6-A), previous judgments rendered in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , were legislatively overruled. The scope of examination is now confined only to the existence of the arbitration agreement at the Section 11 stage, and nothing more.

7.9. Reliance is placed on the judgment in Duro Felguera S.A. v. Gangavaram Port Ltd. [Duro Felguera S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764. Refer to TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , wherein this Court held that: (SCC p. 759, para 48)

"48. … From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple — it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement."

(emphasis supplied)

7.10. In view of the legislative mandate contained in Section 11(6-A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-kompetenz principle.

7.11. The doctrine of "kompetenz-kompetenz", also referred to as "compétence-compétence", or "compétence de la recognized", implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement.

Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [Dresser Rand S.A. v. Bindal Agro Chem Ltd., (2006) 1 SCC 751. See also BSNL v. Telephone Cables Ltd., (2010) 5 SCC 213 : (2010) 2 SCC (Civ) 352. Refer to PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1] . If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

7.12. The legislative intent underlying the 1996 Act is party autonomy and minimal judicial intervention in the arbitral process. Under this regime, once the arbitrator is appointed, or the tribunal is constituted, all issues and objections are to be decided by the Arbitral Tribunal.

7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.

7.14. In the present case, the issue of limitation was raised by the respondent Company to oppose the appointment of the arbitrator under Section 11 before the High Court. Limitation is a mixed question of fact and law. In ITW Signode (India) Ltd. v. CCE [ITW Signode (India) Ltd. v. CCE, (2004) 3 SCC 48] a three-Judge Bench of this Court held that the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law. Reliance is also placed on the judgment of this Court in NTPC Ltd. v. Siemens Atkeingesellschaft [NTPC Ltd. v. Siemens Atkeingesellschaft, (2007) 4 SCC 451] , wherein it was held that the Arbitral

> Tribunal would deal with limitation under Section 16 of the 1996 Act. If the tribunal finds that the claim is a dead one, or that the claim was barred by limitation, the adjudication of these issues would be on the merits of the claim. Under sub-section (5) of Section 16, the tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral proceedings would continue, and the tribunal would make the award. Under sub-section (6) a party aggrieved by such an arbitral award may challenge the award under Section 34. In Iffco Ltd. v. Bhadra Products [Iffco Ltd. v. Bhadra Products, (2018) 2 SCC 534 : (2018) 2 SCC (Civ) 208] this Court held that the issue of limitation being a jurisdictional issue, the same has to be decided by the tribunal under Section 16, which is based on Article 16 of the Uncitral Model Law which enshrines the kompetenz principle."

17. Furthermore, Hon'ble Apex Court while dealing with the controversy in regard to the applicability of amended Act has held that the law laid down by the Courts earlier is effectively and objectively overruled to the extent of the amended provisions of the Act of 1996 which provides for fair and impartial appointment of the Arbitrator under Section 11(6) of the Act of 1996, nullify element of bias as per Section 12(5) of the Act of 1996 and the controversy to be decided by the Arbitrator on all aspects regarding the jurisdiction as well as limitation Section 11(6A) of the Act of 1996, provides that the Court has to see existence of arbitration agreement only.

18. The contention of learned counsel for the non-applicant in regard to that prior to amendment the situation was different and was dealt by the Hon'ble Apex Court in the same judgment in para 7.5 which deals with three particular questions for decision of appointment of an Arbitrator as well as to decide the issues whether the claims are dead one or alive by the Chief Justice or the designate Judge appointed by the Chief Justice. Para 7.5 of the judgment is reproduced hereunder :

> "7.5. Further, the Chief Justice was required to decide all threshold issues with respect to jurisdiction, the existence of the agreement, whether the claim was a dead one; or a time-barred claim sought to be resurrected; or whether the parties

had concluded the transaction by recording satisfaction of their mutual rights and obligations, and received the final payment without objection, under Section 11, at the pre-reference stage. The decision in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] was followed by this Court in Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , Master Construction [Union of India v. Master Construction Co., (2011) 12 SCC 349 : (2012) 2 SCC (Civ) 582] , and other decisions."

19. It has been submitted by learned counsel for the non-applicant by way of written submissions dated 15.07.2025 that the application filed by the applicant is barred by limitation. It is also submitted that the period of three years for filing application under Section 11(6) of the Act of 1996 would commence from the date when the cause of action arose and the cause of action arose on 25.06.2012 and the period has expired on 25.06.2015. The present application has been filed on 07.04.2024 after more than nine years. To bolster his submission, he relied on the judgment by the Hon'ble Apex Court in the case of ***Bharat Sanchar Nigam Ltd. & Anr. vs. M/s Nortel Networks Pvt. Ltd. (2021) 5 SCC 738*** to state that the period of limitation for filing application under Section 11(6) of the Act of 1996 will be governed by Article 137 of the First Schedule of the Limitation Act, 1963 which provides for three years from the date when the right to apply accrues, however, that period is also long enough for filing the said application. The second argument which has been raised is that power of Court to refuse to refer the case for appointment of an Arbitrator which is hopelessly barred under the Limitation Act. To bolster his submission he has relied on the judgment of Hon'ble Apex Court in the cases of ***Geo Miller & Company Pvt. Ltd. vs Chairman Rajasthan Vidyut Utpadan Nigam Ltd. (2020) 14 SCC 643, Ms.***

B and T AG vs. Ministry of Defence (2023) SCC Online SC 657 and HPCL Bio-Fules Ltd. vs. Shahaji Bhanudas Bhad Civil Appeal No.12233/2024.

20. It is further submitted that after service of notice of invocation of arbitration on 25.06.2012, the applicant chose to file Writ Petition and abandoned his right for arbitration. The applicant had withdrawn the said writ petition to pursue the remedy of arbitration beyond period of limitation which is impermissible as the petitioner had chosen wrong remedy and that does not give liberty to the applicant for condonation of delay in filing the present application. To bolster his submission, he has relied on the judgment of Hon'ble Apex Court in the case of ***HPCL Bio-Fules Ltd. vs. Shahaji Bhanudas Bhad Civil Appeal No.12233/2024.***

21. What emerges from the uncontroverted facts of the case is that the notice for invocation of arbitration proceedings was issued on 25.06.2012 Annexure P/4. When no response has been given by the non-applicant, another reminder dated 27.11.2013 was issued. When the authorities of non-applicant sat tight over the notice and reminder sent by the applicant, the applicant had filed Writ Petition No.4453/2014 (Annexure P/6) before this Court on 10.03.2014 just immediately after issuance of the notice. The said Writ Petition remained pending before this Court and ultimately on the objection of the non-applicant, the said Writ Petition was withdrawn for availing statutory remedy vide order dated 11.03.2024 and just after one month i.e. on 07.04.2024, the present application has been filed.

22. So on the basis of aforesaid facts it is clear that the applicant though agitated the matter before the Court for redressal of its grievance in timely manner but in wrong forum and on the objection of the non-applicant, the same was dismissed as withdrawn with liberty to avail the remedy available in the contract in question. It is not apparent from the order passed in writ

petition that non-applicant had taken any objection of limitation, in fact objection of alternative remedy was taken.

23. Now the basic question which emerges from the aforesaid discussion is that whether the application is to be treated under the amended Act of 1996 which was brought in the year 2015 or it has to be treated under the old Act which was in vogue prior to 2015. Though the applicant has relied on the judgment of Hon'ble Apex Court in the case of ***Ellora Paper Mills Ltd. (supra)*** which is on the line of commencement of arbitration and illuminate the principle of commencement of arbitration according to which the arbitration proceedings commence when it is substantially commenced.

24. Hon'ble Apex Court in the case of ***Shree Vishnu Constructions vs. Engineer In Chief Military Engineering Service & ors. (2023) 8 SCC 329*** has held that notice invoking arbitration is issued prior to coming into force of the 2015 Amendment Act, but the application under Section 11 for appointment of an arbitrator is made post coming into force of the 2015 Amendment Act, thus, the provisions of the 1996 Act as they stood prior to coming into force of the 2015 Amendment Act, shall be applicable and not the 1996 Act as amended by the 2015 Amendment Act.

25. Now, it is clear that if an application is filed for appointment of Arbitrator before the High Court, it can be entertained as per the provisions of the old Act which provides that the appointment of an Arbitrator by the designate of the Hon'ble Chief Justice of the High Court and as per the roster system, this Court is having jurisdiction to deal with the situation in accordance with the old Act also.

26. As submitted by learned counsel for the non-applicant that the Hon'ble Apex Court in the case of ***Uttarakhand Purv Sainik Kalyan Nigam Ltd. (supra)*** in para 7.5 of the conclusion has held that the Chief Justice or his

designate was required to decide all the issues with respect to jurisdiction, existence of the agreement, whether the claim was a dead one; or a time-barred claim sought to be resurrected; or whether the parties had concluded the transaction by recording satisfaction of their mutual rights and obligations, and received the final payment without objection. Conclusion of the Hon'ble Apex Court is extracted hereunder :

> "7.4. Prior to the coming into force of the 2015 Amendment Act, much controversy had surrounded the nature of the power of appointment by the Chief Justice, or his designate under Section 11. A seven-Judge Constitution Bench of this Court in SBP & Co. v. Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] defined the scope of power of the Chief Justice under Section 11. The Court held that the scope of power exercised under Section 11 was to first decide:
>
> (i) whether there was a valid arbitration agreement; and
>
> (ii) whether the person who has made the request under Section 11, was a party to the arbitration agreement; and
>
> (iii) whether the party making the motion had approached the appropriate High Court.
>
> 7.5. Further, the Chief Justice was required to decide all threshold issues with respect to jurisdiction, the existence of the agreement, whether the claim was a dead one; or a time-barred claim sought to be resurrected; or whether the parties had concluded the transaction by recording satisfaction of their mutual rights and obligations, and received the final payment without objection, under Section 11, at the pre-reference stage. The decision in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] was followed by this Court in Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , Master Construction [Union of India v. Master Construction Co., (2011) 12 SCC 349 : (2012) 2 SCC (Civ) 582] , and other decisions."

27. Now, dealing with the questions raised by the non-applicant in regard to limitation and time spent in availing wrong remedy, when facts of the case are revisited, then it is found that the applicant within time has issued notice for invocation of Arbitration on 25.06.2012, thereafter, reminder was sent on 27.11.2013. When such notice and reminder were not responded, Writ

Petition No.4453/2014 was filed on 10.03.2014 and same was withdrawn to avail remedy vide order dated 11.03.2024 on the objection raised by the non-applicant. The present application has been filed within one month on 07.04.2024 which shows that the applicant was vigilant and prosecuting the cause before this Court, may be in wrong forum but he was not negligent or shows laxity in prosecuting the claim. The argument in regard to abandonment of right to prosecute in the light of the aforesaid facts are baseless and misconceived. There cannot be abandonment of any statutory remedy and right, if a party opts for any remedy which is not in accordance with law or embark on a wrong advice. Limitation Act itself provides for condonation of such period lost in prosecuting the cause before wrong forum under Section 14 of the Limitation Act.

28. On going through the facts and circumstances of the case, this Court is of the considered opinion that the case of the applicant is covered under Section 14 of the Limitation Act and benefit of condonation of delay deserves to be granted to the applicant.

29. It is evident that the applicant has filed the present application within one month from the date of withdrawal of the writ petition. Thus, this Court is of the considered opinion that as per the guidelines issued by the Hon'ble Apex Court in the case of ***Uttarakhand Purv Sainik Kalyan Nigam Limited (surpa)*** the applicant has met out that the present application is not barred by time. The time spent in pursuing the wrong remedy is condonable and is hereby condoned. The claim of the applicant is not stale and is still alive. The dispute has been continuing since 2012 for payment of outstanding bills and this Court is having ample power under Section 14 of the Limitation Act and under the old Act as per the dictum of the Hon'ble Apex Court to decide the issue of limitation. Thus, this Court finds that the claim of the applicant is to

be decided by the Arbitrator as per the scheme of the old Act. Consequently, treating this application under Section 11(6) of the unamended Act of 1996, is allowed.

30. With the consent of learned counsel for the parties and the proposed empanelled Arbitrator as per the list issued by M.P.Arbitration Centre, Jabalpur following order is passed :-

(i) ***Justice Shri H.P. Singh, Former Judge, High Court of MP, Bungalow B-139, Priyadarshani Colony, Dumna Airport Road, Jabalpur Mob. No.94253-25600 e-mail justicehpsingh@gmail.com*** is appointed as sole Arbitrator to resolve the dispute between the parties in the case.

(ii) Arbitrator shall issue the notices and fix the date and suitable venue for arbitration. Said arbitration will take place at Bhopal as per clause 13 of the agreement.

(iii) Parties are directed to deposit necessary charges and fees as per M.P. Arbitration Center (Domestic and International) Rules, 2019.

(iv) Director of Madhya Pradesh Arbitration Centre [Domestic and International, Jabalpur (M.P.D.I.A.C.)] shall communicate the decision of this Court to the Sole Arbitrator.

(v) Other provisions of Section 15(3)(4) of the Arbitration and Conciliation Act, 1996 will apply to Substitute Arbitrator.

31. Arbitration case is disposed of.

(DEEPAK KHOT)
JUDGE

anand