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

\+ **ARB.P. 396/2024**

PAISALO DIGITAL LIMITED ....Petitioner

Through: Mr. Apratim Animesh Thakur, Mr. Varun Singh & Mr.Lakshya Sachdeva, Advs. (M: 9810817397)

versus

SAT PRIYA MEHAMIA MEMORIAL EDUCATIONAL TRUST & ORS. .... Respondents

Through: Mr. Manish Gupta, Mr. Neelmani Guha, Ms. Harshal Gupta, Ms. Deepti Verma, Mr. Prateek Gupta, Mr. Sanjay Mangal & Mr. P.C. Gupta, Advs. (M: 8986351553)

46 AND

\+ **O.M.P.(I) (COMM.) 39/2024 and I.A. 7321/2024**

M/S PAISALO DIGITAL LIMITED (FORMERLY KNOWN AS S.E. INVESTMENTS LIMITED)................................Petitioner

Through: Mr. Apratim Animesh Thakur, Mr. Varun Singh & Mr.Lakshya Sachdeva, Advs.

versus

SAT PRIYA MEHAMIA MEMORIAL EDUCATIONAL TRUST (REGD) AND ORS.. Respondents

Through: Mr. Manish Gupta, Mr. Neelmani Guha, Ms. Harshal Gupta, Ms. Deepti Verma, Mr. Prateek Gupta, Mr. Sanjay Mangal & Mr. P.C. Gupta, Advs.

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>O R D E R</u>

% **03.04.2024**

1. This hearing has been done through hybrid mode.

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Background

2. These are two connected petitions – ***ARB.P. 396/2024***, under Section 11 of the Arbitration and Conciliation Act, 1996 *(hereinafter, 'the Act')* and ***O.M.P.(I) (COMM.) 39/2024***, under Section 9 of the Act, seeking interim measures in the petition.

3. The petitions arise out of a loan transaction between the Petitioner-M/s. Paisalo Digital Limited and the Respondent No.1- M/s. Sat Priya Mehamia Memorial Educational Trust (Regd.). The Petitioner is recognised as a Non-Banking Financial Company *(hereinafter, 'NBFC')* and is registered with the Reserve Bank of India *(hereinafter, 'RBI')*. The Respondent No. 1 is a registered trust under the Indian Trusts Act, 1882. The chronology of events is set out below.

4. The Petitioner extended a total of three loans for a sum of Rs.12 crores to the Respondent No.1, in terms of the hypothecation/loan agreements dated 24th March, 2018. The loans carried an interest rate of 17% per annum, and were repayable in 60 monthly instalments from the date of disbursement, as per the agreements. The Respondent Nos. 2 to 7 stood as guarantors for the aforesaid loans, vide three guarantee agreements dated 24th March, 2018. A particular stretch of land belonging to a school, admeasuring 30 bighas 6 biswas was mortgaged with the Petitioner, as security for repayments. Respondent Nos. 1-5 mortgaged five immovable properties, situated at 0.5 Milestone, Jind Road, Rohtak, Haryana – 124001, vide five letter(s) Evidencing Deposit of Title Deeds dated 4th January, 2019.

5. The date of disbursal of the loan was 24th March, 2018. As per the petition, the Respondents continued to default on their contractual

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obligations. Despite several notices demanding payment, including a Demand Notice, the Respondents failed to meet their obligations. However, due to continuing defaults which were committed, the loan was recalled by the Petitioner on 8th December, 2018. Thereafter, the Petitioner issued a loan recall-cum-demand notice dated 29th January, 2019 to all the Respondents recalling the whole loan amount. Aggrieved with the continuing defaults, it is stated that the Petitioner invoked guarantee(s) provided by Respondent Nos. 2-7, vide notice dated 28th February, 2019, demanding the outstanding dues. However, as per the petition, the Respondents had sought further time for clearing their liabilities. Subsequently, Respondent No.1's account was declared as a Non-Performing Asset *(hereinafter, 'NPA')* on 1st March, 2019.

6. The Petitioner then invoked proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 *(hereinafter, 'SARFAESI Act')*. On 10th April, 2019, a notice regarding the liability amounting to Rs. 23,02,88,001/- was issued to the Respondents under Section 13(2) of the SARFAESI Act. Vide letter dated 21st May, 2019, the Respondents sought further time to settle their dues, acknowledging their liabilities. Thereafter, a notice dated 8th August, 2019 was issued to the Respondents to obtain the possession of the residential property as mentioned in the application under Section 14 of the SARFAESI Act.

7. Due to the non-payment of the dues, the Petitioners then filed proceedings before the District Magistrate under Section 14 of the SARFAESI Act. Vide order dated 17th September, 2021 the District Magistrate, Rohtak rejected the said proceedings. In the order passed the

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District Magistrate, it was held that the application under Section 14 of SARFAESI Act, 2002 was rejected as the amounts presented in the Affidavit of the Applicant/Petitioner and Notice under Section 13(2) of the SARFAESI Act were not in consonance.

8. Thereafter, on 22nd January, 2024, the Petitioner filed ***O.M.P.(I) (COMM.) 39/2024*** – the present Section 9 petition seeking interim reliefs. In the Section 9 petition, the Court had considered the facts on 25th January, 2024. After hearing ld. Senior Counsel, who had appeared for the Petitioner, interim relief was granted to the Petitioner and it was directed that the *status quo* shall be maintained as to title and possession in respect of the list of mortgaged properties given the application. In the Section 9 petition, the Petitioner had not disclosed the fact that SARFAESI proceedings had been initiated and the order passed in the said matter was also not disclosed.

9. On 19th March, 2024, the Petitioner filed - ***ARB.P. 396/2024***, the Section 11 petition under the Act seeking appointment of a sole arbitrator in the matter for adjudication of Petitioner's claims. Vide order dated 22nd March, 2024, notice was issued in the said petition and both the matters were directed to be listed together for further proceedings.

Submissions

10. Respondent No.1 has now filed an application being ***I.A.7321/2024*** in ***O.M.P.(I)(COMM.) 39/2024*** seeking to place on record the order passed by the District Magistrate in the SARFAESI proceedings.

11. The stand of the Respondent No.1, as per Mr. Gupta, ld. Counsel is that the Petitioner has been changing the outstanding amount, which is due, from time to time. Initially, the amount, which was due, was stated to be approximately Rs.15.94 crores. However, thereafter, the said amount is now

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claimed to be Rs.23.20 crores. But in the notice invoking arbitration 27th December, 2023, late payment fee of more than Rs.54 crores is sought to be charged and, thus, the outstanding amount has mounted to more than Rs.76 crores, as against the initial loan of Rs.12 crores.

12. Ld. Counsel for Respondent No.1 further submits that such increased amount, being charged as late fee, amounts to more than 125% interest per annum, which is not permissible in law. As per ld. Counsel, a writ petition being ***W.P.(C) 3560/2024*** has been filed in this regard, seeking an enquiry into the unfair lending practices of the Petitioner.

13. In addition, his submission is that the Respondent No.1 is willing to deposit a sum of Rs.21.95 crores as full and final settlement, and on a receipt of "No Dues Certificate" from the Petitioner.

14. He also submits that invocation of arbitration proceedings under Section 11 of the Act is barred by limitation, and reliance is placed upon the decision of the Supreme Court in ***B and T AG v. Ministry of Defence, (2023 SCC OnLine SC 657)***.

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15. Finally, it is argued by the ld. Counsel for Respondent that the Section 9 petition, itself was not maintainable in view of the fact that SARFAESI proceedings had already been initiated *qua* the same land. Reliance is placed on a decision of this Court in ***ARB.A.(COMM.) 36/2022*** titled ***'Indiabulls Housing Finance Ltd. & Anr. v. Shipra Estate Ltd' (decided on 21st February, 2023)***.

16. Ld. Counsel for the Petitioner disputes the stand of the Respondent. Regarding the arbitration petition under Section 11(6) of the Act, ld. Counsel for the Petitioner submits that insofar as limitation is concerned, there has been an acknowledgement of debt by the Respondent No.1.

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Reliance is placed upon the letter dated 21st May, 2019. According to him, in the said letter, the Respondent No.1 had accepted the outstanding dues. Thus, limitation would only run from the said date.

17. Further, in view of the decisions in ***In Re: Cognizance for Extension of Limitation [Suo Moto Writ Petition (C) No. 3 of 2020, Order dated 10th January, 2022]*** and ***Arif Azim Co. Ltd. v. Aptech Ltd., (2024 SCC OnLine SC 215)***, the period between 15th March, 2020 to 28th February, 2022 would be excluded and, therefore, the petition under Section 11(6) of the Act is well within limitation. Insofar as the Section 9 petition is concerned, ld. Counsel for the Petitioner submits that if the Respondent No.1 accepts that it is willing to deposit the sum of Rs.21.95 crores, then the same may be directed to be deposited and the matter be referred to arbitration.

18. On a query as to why the SARFAESI proceedings were not disclosed to the Court at the time when the interim order was obtained on 25th January, 2024, ld. Counsel for the Petitioner apologises for the same and submits that the same ought to have been disclosed.

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Analysis

19. The Court has considered the matter.

20. Firstly, coming to the Section 9 petition, there is no doubt that the SARFAESI proceedings ought to have been disclosed by the Petitioner and Section 9 being a discretionary relief, non-disclosure goes to the root of the matter.

21. On the question whether SARFAESI proceedings would bar the filing of Section 9 petitions, some of the decisions cited need to be seen.

22. The decision in ***Indiabulls Housing Finance Ltd. (supra)*** holds that the remedy provided under a statute, in terms of the ***Vidya Droliya & Ors. v.***

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Durga Trading Corporation, [(2021) 2 SCC 1], would have to be availed of by the parties, and that there is no choice to the Petitioner to choose between a forum, when there is a conflict between the two statutes and they are repugnant to each other.

23. On the question whether Section 9 petition would be barred due to the same, SARFAESI proceedings have already been rejected by the concerned District Magistrate. The extension of the loan is not disputed. What is disputed is merely the amount. The property being a security in law, since the SARFAESI proceedings were not pending at the time when the Section 9 petition was filed, this Court holds that the Section 9 petition is still maintainable. Moreover, even if the SARFAESI proceedings would have been pending, there shall not be a bar on filing for seeking interim relief under the provisions of the Act, especially if the stand of the Petitioner is that the property mortgaged is incapable of clearing the entire outstanding amount.

24. In view of the decision in ***M.D. Frozen Foods Exports Pvt. Ltd. & Ors. v. Hero Fincorp Limited (MANU/SC/1244/2017)***, it is amply clear that provisions of the SARFAESI Act are a remedy in addition to the provisions of the Arbitration and Conciliation Act, 1996. In ***MD Frozen Foods (supra)*** the Supreme Court has clearly held that SARFAESI proceedings and arbitration proceedings which are civil proceedings, provide cumulative remedies i.e., they are not in derogation or conflict with each other. The relevant extracts from the said judgment are set out below:

> *"32. The aforesaid is not a case of election of remedies as was sought to be canvassed by learned senior Counsel for the Appellants, since the alternatives are between a Civil Court, Arbitral Tribunal or a Debt Recovery*

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Tribunal constituted under the RDDB Act. Insofar as that election is concerned, the mode of settlement of disputes to an arbitral tribunal has been elected. ***The provisions of the SARFAESI Act are thus, a remedy in addition to the provisions of the Arbitration Act.*** *In Transcore v. Union of India and Anr. (supra) it was clearly observed that the SARFAESI Act was enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. Liquidation of secured interest through a more expeditious procedure is what has been envisaged under the SARFAESI Act and the two Acts are cumulative remedies to the secured creditors.*

33. ***SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process.*** *In the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum."*

25. In view of the above, it is clear that the proceedings under the SARFAESI Act shall not bar proceedings under the Act. Further, the High Court of Bombay in ***Tata Motors Finance Solutions Limited v. Naushad Khan c/o. Nazbul Hoda Khan (2023:BHC-OS:15041)***, placed reliance on ***M.D. Frozen Food (supra)*** to hold that proceedings under the Act and SARFAESI Act are for varied purposes. The relevant paragraphs of the said judgement are set out below:

28. As noted hereinabove, the petitioner is notified as a 'financial institution', only under Section 2(1)(m)(iv) of the SARFAESI Act, for the purposes of the said Act and only in that context, can the petitioner approach the DRT for the purposes of enforcement. ***As laid down by the Supreme Court in the case of M. D. Frozen Foods Exports Private Limited Vs. Hero Fincorp Limited (supra), while arbitration is an adjudicatory process,***

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the proceedings under the SARFAESI Act are enforcement proceedings. It is only after the adjudicatory process of arbitration in the present case leads to determination and crystallization of the debt due to the petitioner, that the petitioner would be able to resort to the enforcement process under the SARFAESI Act.

29. The Delhi High Court in the case of ***Diamond Entertainment Technologies Private Limited and others Vs. Religare Finvest Limited through its Authorized Officer*** *(supra) has also taken an identical view after taking into account the judgement of the Supreme Court in the case of* ***Vidya Drolia and others Vs. Durga Trading Corporation*** *(supra).* ***It is specifically held that even though the Supreme Court in the said case of Vidya Drolia and others Vs. Durga Trading Corporation (supra) overruled the judgement of the Full Bench of the Delhi High Court in the case of HDFC Bank Ltd. vs. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815, the law enunciated by the Supreme Court in the case of M. D. Frozen Foods Exports Private Limited Vs. Hero Fincorp Limited (supra) is still good law****. This Court agrees with the aforesaid view taken by the Delhi High Court in the case of* ***Diamond Entertainment Technologies Private Limited and others Vs. Religare Finvest Limited through its Authorized Officer*** *(supra).*

xxx xxx xxx xxx

35. As regards the contention raised on behalf of the respondents that arbitration cannot be resorted to as the petitioner has referred to the RDDB Act and SARFAESI Act in the agreement itself, reserving liberty to invoke the provisions of the said statutes, this Court finds that mere reference to the said statutes cannot inure to the benefit of the respondents. As noted hereinabove, the SARFAESI Act is concerned only with the enforcement process after the adjudicatory process through arbitration is completed. ***Therefore, reference to the SARFAESI Act in the agreements cannot be a bar for the petitioner to invoke arbitration****. The reference to RDDB Act in the*

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agreements is limited to the extent that, if in future, there is a change in law and the petitioner is included under the definition of 'financial institution' under the RDDB Act, the petitioner has reserved its right to proceed under the RDDB Act. As on today, the petitioner is admittedly not notified as a 'financial institution' under the RDDB Act, and therefore, the adjudicatory process of arbitration is clearly available to the petitioner, in the light of the above- quoted arbitration clause in the agreements executed between the parties. Thus, the said contention raised on behalf of the respondents is also without any substance.

36. A perusal of the above-quoted arbitration clause indicates that in case of disputes arising between the parties, the adjudicatory process of arbitration has to be resorted to. ***The petitioner, in the present case, has indeed invoked arbitration. This Court finds that there are arbitrable disputes that have arisen between the parties and that therefore, both the petitions under Section 9 and the application under Section 11 of the Arbitration Act can certainly be entertained****.*

37. In the light of the above, the objection regarding jurisdiction raised on behalf of the respondents is rejected.

38. The petitioner has claimed interim measures in the backdrop of the material placed on record to indicate the defaults on the part of the respondents in repayment of loans advanced for purchase of vehicles. The subject vehicles were hypothecated with the petitioner. The respondents have not been able to dispute the fact that they have indeed defaulted. In such a situation, there is enough material placed on record on behalf of the petitioner to show that, unless interim measures, as prayed on behalf of the petitioner, are granted, there is likelihood of the respondents dealing with the subject vehicles, including creating third party rights, which would unnecessarily complicate the matters, pending resolution of disputes through arbitration"

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26. Thus, SARFAESI proceedings would not bar arbitration proceedings. However, the Petitioner had a duty to disclose the order of the SARFAESI proceedings in the Section 9 petition. There cannot be any justification for concealment of such a material fact.

27. The application filed by the Respondent No.1 clearly admits that the Respondent No.1 is willing to deposit a sum of Rs.21.95 crores, subject to issuance of a 'No Dues Certificate'.

28. In the overall facts in the Section 9 petition, considering that the Respondent prays for vacation of the interim order pertaining to the land which is worth of about Rs. 60 crores, it is directed that Respondent No.1 shall deposit a sum of Rs.21.95 crores with the worthy Registrar General of this Court, which shall be kept in the form of FDR on auto renewal mode. The said deposit shall be made within 90 days. The said deposit shall be subject to further orders passed below, and to the final decision in the arbitration proceedings.

29. It is made clear that interim order shall be vacated upon the deposit being made by the Respondents. Upon the deposit of the entire amount of Rs.21.95 crores, the original title deeds shall be released to the Respondent No.1. Further, criminal complaints, if any, filed by the parties against each other shall also not be proceeded with.

30. Further, in the Section 9 petition, costs of Rs.5 lakhs are imposed upon the Petitioner for non-disclosure of the order relating to the SARFAESI proceedings before the District Magistrate. The said costs shall be deposited with the Delhi High Court Staff Welfare Fund. The details of the same are herein under:

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Name of the Account:- Delhi High Court Staff Welfare Fund
Account No.: 1553011007442
Bank: UCO Bank, Delhi High Court

ARB.P. 396/2024

31. Insofar as the Section 11(6) petition is concerned, the letter dated 21st May, 2019 reads as under:

> "*Kind Attention. Mr. Samresh Agarwal*
>
> *Subject:- Account Status of all the loans account of Sat Priya Mehamia Memorial Educational Trust (SPMMET)*
>
> *Dear Sir*
>
> *We would like to thank you for providing us the facility towards repayment of PNB account in Mar 2018.*
>
> *We are aware that you had issued legal notice towards recovery of your loans to SPMMET. We also acknowledge that we have not paid any EMI since Inception of the loans disbursed by Patsalo Digital Ltd. to us. Hence, we are in default under the EMI repayment.*
>
> *As you are aware that we are obtained a letter from APAC Financial Service Pvt Ltd (APAC) for the take over of your loan and all the process including the review, due diligence, site visit and valuation are already completed by the APAC. We are now in final leg of obtaining the final sanction from APAC for the loan take over. We are looking to clear your all dues shortly.*
>
> *However,* ***our loan account is presently under default status with your NBFC and you must be aware that APAC as an NBFC*** *would not be able to consider a default account. Hence request you to please confirm to the APAC* ***directly that the account in your books is "Standard" as on date****.*
>
> *Our proposal is going for the first committee approval on coming Friday (24 May 2019) and then to the Board for approval. We expect to complete the process in May 2019 itself and drawdown by 10 June-15 June 2019.*

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> ***Please note: We confirm to you that your communication to the APAC will be confidential and we in any manner, any time, would never use your this communication to APAC as a measure for legal recourse against you. We again confirm you that we are aware that we have defaulted all the EMI's till date and our account is in default status with you.***
>
> *Please be rest assure towards clearing of all the dues of SPMMET at the earliest. Looking forward for a positive response and support from your side*"

32. A perusal of the said letter shows that for clearing of the dues, an assurance was given by the Respondent No.1. In the opinion of this Court, in view of Section 18 of the Limitation Act, 1963, this is an acknowledgement of the debt and therefore, constitutes a fresh cause of action. After considering the judgments of the Supreme Court in ***M/s Arif Azim Co. Ltd (supra)*** and ***B and T AG (supra),*** this position was recently reiterated by this Court in ***Technical Construction Company v. Engineering Project (India) Limited (Arb. P. 510/2023 decision dated 15th March, 2024)***. The relevant paragraphs of the said order are extracted hereinbelow:

> *18. In the opinion of this Court, the acknowledgement in the said reply, prima facie, constitutes an acknowledgment in terms of Section 18 of the Limitation Act, 1963 and would also constitute a fresh cause of action for the Petitioner to seek its claimed amount. The same has been established in* ***Food Corporation of India v. Assam State Cooperative Marketing & Consumer Federation Ltd., (2004) 12 SCC 360****.*
>
> *xxx xxx xxx*
>
> *20. In all the three decisions cited by the Respondent, there was no acknowledgement and only negotiations were taking place. The relevant paragraphs*

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of the said decisions are set out below:

i. *In **Vishram Varu (supra)** the Supreme Court held as under:*

> *"11. At the outset, it is required to be noted that in the present case, work order was issued on 7.4.1982 and the work/excess work was completed in the year 1986. Even as per the statement of claim, the amount due and payable was under work order dated 7.4.1982, which was executed up to 11.05.1986 and work order dated 15.01.1984 which was executed up to 26.8.1985. Therefore, right to claim the amount, due and payable, if any, can be said to have accrued in the year 1985/1986. Thereafter, the correspondences under the RTI Act had taken from the year 2012 onwards. Thereafter, for the first time, the appellant served a legal notice upon the General Manager, South Eastern Railway on 22.10.2018 requesting either to release the amount which was overdue or to refer the dispute to the arbitrator under clauses 63 & 64 of GCC under the 1996 Act. The aforesaid legal notice is thereafter followed by three to four letters/communications and thereafter the appellant herein filed the present application under Section 11(6) of the 1996 Act before the High Court in the year 2019. Merely because for the claim/alleged dues of 1985/1986, the legal notice calling upon the respondent to pay the amount due and payable or to refer the dispute to the arbitrator is made after a period of approximately thirty-two years, the appellant cannot be permitted to say that the cause of action to file the application under Section 11(6) of the 1996 Act had accrued in the year 2018/2019. <u>In the present case, the legal notice has been served and the arbitration clause is invoked and request to appoint the arbitrator was made after a period</u>*

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of approximately thirty-two years from the date of completion of work. Therefore, the appellant, who served the legal notice invoking the arbitration clause and requesting for appointment of an arbitrator after a period of approximately thirty-two years, cannot contend that still his application under Section 11(6) of the 1996 Act be considered as the limitation would start from the date of serving the legal notice and after completion of 30 days from the date of service of the legal notice and invoking arbitration clause."

*ii. In **B and T AG (supra)** the Supreme Court observed as under:*

> *"65. On a conspectus of all the aforesaid decisions what is discernible is that there is a fine distinction between the plea that the claims raised are barred by limitation and the plea that the application for appointment of an arbitrator is barred by limitation.*
>
> ***xxx xxx xxx xxx xxx***
>
> *67. "Cause of action" means the whole bundle of material facts, which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit. In delivering the judgment of the Board in Mussummat Chand Kour v. Partab Singh, reported in ILR (1889) 16 Cal 98, Lord Watson observed:*
>
> *"Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff it refers entirely to the grounds set forth in the plaint as the cause of action, or in other words to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour."*
>
> *68. Cause of action becomes important for the purposes of calculating the limitation period*

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for bringing an action. It is imperative that a party realises when a cause of action arises. If a party simply delays sending a notice seeking reference under the Act 1996 because they are unclear of when the cause of action arose, the claim can become time-barred even before the party realises the same.

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71. In Law of Arbitration by Justice Bachawat at p. 549, commenting on Section 37, it is stated that subject to the Act 1963, every arbitration must be commenced within the prescribed period. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the cause of action accrues, so in the case of arbitrations the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) "action" and "cause of arbitration" should be construed as arbitration and cause of arbitration. The cause of arbitration arises when the claimant becomes entitled to raise the question, that is, when the claimant acquires the right to require arbitration. An application under Section 11 of the Act 1996 is governed by Article 137 of the Schedule to the Act 1963 and must be made within 3 years from the date when the right to apply first accrues. There is no right to apply until there is a clear and unequivocal denial of that right by the respondent. It must, therefore, be clear that the claim for arbitration must be raised as soon as the cause for arbitration arises as in the case of cause of action arisen in a civil action

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*77. **Negotiations may continue even for a period of ten years or twenty years after the***

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> ***cause of action had arisen. Mere negotiations will not postpone the "cause of action" for the purpose of limitation. The Legislature has prescribed a limit of three years for the enforcement of a claim and this statutory time period cannot be defeated on the ground that the parties were negotiating****."*

iii.In M/s Arif Azim Co. Ltd (supra) *the relevant observations of the Court read:*

> *"77. From the email communications placed on record, it appears that due to the pre-existing disputes between the parties in relation to the franchise agreements, the respondent sent a demand notice to the petitioner seeking payment of royalty and renewal fees from the petitioner. It appears that in reply to the said notice dated 23.03.2018, the petitioner raised the issue of payment of dues relating to the ICCR project. Some more emails were exchanged between the parties on the issue however it can be seen that vide email dated 28.03.2018, the respondent clearly showed unwillingness to continue further discussions regarding payments related to the ICCR project. Thus, it can be said that the rights of the petitioner to bring a claim against the respondent were crystallised on 28.03.2018 and hence the cause of action for invocation of arbitration can also said to have arisen on this date. This position has also been admitted in the Written Submission dated 05.02.2024 wherein the petitioner has submitted as follows:*
>
> *"4. The limitation for claiming the due amount would expire on 27.03.2021…."*
>
> *78. We are not impressed with the submission canvassed on behalf of the respondent that the*

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*cause of action for raising the claims arose on 01.11.2017 and thus the limitation period for invoking arbitration should commence from the said date. The petitioner has alleged that the respondent received the payment for the course from the ICCR on 03.10.2017. However, the perusal of the communication exchanged between the parties indicates that it is only on 28.03.2018 that the right of the petitioner to bring a claim against the respondent could be said to have been crystallised**. The position of law is settled that mere failure to pay may not give rise to a cause of action. However, once the applicant has asserted its claim and the respondent has either denied such claim or failed to reply to it, the cause of action will arise after such denial or failure**.*

79. In B and T AG (supra) three principles of law came to be enunciated by this Court regarding the manner in which the point in time when the cause of action arose may be determined. First, that the right to receive the payment ordinarily begins upon completion of the work. Secondly, a dispute arises only when there is a claim by one side and its denial/repudiation by the other and thirdly, the accrual of cause of action cannot be indefinitely postponed by repeatedly writing letters or sending reminders. It was further emphasised by this Court that it was important to find out the "breaking point" at which any reasonable party would have abandoned the efforts at arriving at a settlement and contemplated referral of the dispute to arbitration. Such breaking point would then become the date on which the cause of action could be said to have commenced.

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89. In the present case, the notice invoking

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arbitration was received by the respondent on 29.11.2022, which is within the three-year period from the date on which the cause of action for the claim had arisen. Thus, it cannot be said that the claims sought to be raised by the petitioner are ex-facie time-barred or dead claims on the date of the commencement of arbitration.

90. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that ***while considering the issue of limitation in relation to a petition under Section 11(6) of the Act, 1996, the courts should satisfy themselves on two aspects by employing a two-pronged test - first, whether the petition under Section 11(6) of the Act, 1996 is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex-facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings.*** *If either of these issues are answered against the party seeking referral of disputes to arbitration, the court may refuse to appoint an arbitral tribunal.*

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95. Before we part with the matter, we would like to mention that this Court while dealing with similar issues in many other matters has observed that the applicability of Section 137 to applications under Section 11(6) of the Act, 1996 is a result of legislative vacuum as there is no statutory prescription regarding the time limit. We would again like to reiterate that the period of three years is an unduly long period for filing an application under Section 11 of the Act, 1996 and goes against the very spirit of the Act, 1996 which provides for expeditious resolution of commercial disputes within a time-bound manner. Various amendments to the Act, 1996 have been made over the years

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> *so as to ensure that arbitration proceedings are conducted and concluded expeditiously. We are of the considered opinion that the Parliament should consider bringing an amendment to the Act, 1996 prescribing a specific period of limitation within which a party may move the court for making an application for appointment of arbitrators under Section 11 of the Act, 1996. The Petition stands disposed of in the aforesaid terms.*

21. As can be seen from the above decisions, in none of the above-mentioned cases, was there an acknowledgement of the debt. The above decisions also do not deal with cases where the provision of limitation for filing of a petition in view of an express acknowledgement provided by the parties during the stage of notice, as per Section 18 of the Limitation Act, 1963 is raised as an issue. Thus, the fact situation in the present case is distinguishable.

22. Section 18 of the Limitation Act, reads:

*(1) Where, **before the expiration of the prescribed period for a suit or application** in respect of any property or right, **an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed,** or by any person through whom he derives his title or liability, **a fresh period of limitation shall be computed from the time when the acknowledgment was so signed**.*

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.—For the purposes of this section,—

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a

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refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,
(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf, and
(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

23. The above-mentioned provision clearly provides that if there is an express acknowledgement of liability in writing by the opposite party, a fresh period of limitation shall be computed from the time when acknowledgement was signed. The same has also been laid down by the Supreme Court in ***Food Corporation of India(supra)****, wherein it was held that that to amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act, it need not be accompanied by a promise to pay either expressly or even by implication. The relevant paragraphs of the said judgement are set out below:*

> *"14. According to Section 18 of the Limitation Act, an acknowledgement of liability made in writing in respect of any right claimed by the opposite party and signed by the party against whom such right is claimed made before the expiration of the prescribed period for a suit in respect of such right* ***has the effect of commencing a fresh period of limitation from the date on which the acknowledgement was so signed****. It is well settled that to amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act, it need not be accompanied by a promise to pay either expressly or even by implication.*
> *15. The statement providing foundation for a plea of acknowledgement must relate to a present subsisting liability, though the exact nature or the specific character of the said*

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> *liability may not be indicated in words. The words used in the acknowledgement must indicate the existence of jural relationship between the parties such as that of debtor and creditor. The intention to attempt such jural relationship must be apparent. However, such intention can be inferred by implication from the nature of the admission and need not be expressed in words.* ***A clear statement containing acknowledgement of liability can imply the intention to admit jural relationship of debtor and creditor.*** *Though oral evidence in lieu of or making a departure from the statement sought to be relied on as acknowledgement is excluded but surrounding circumstances can always be considered. Courts generally lean in favour of a liberal construction of such statements though an acknowledgement shall not be inferred where there is no admission so as to fasten liability on the maker of the statement by an involved or far-fetched process of reasoning. So long as the statement amounts to an admission, acknowledging the jural relationship and existence of liability, it is immaterial that the admission is accompanied by an assertion that nothing would be found due from the person making the admission or that on an account being taken something may be found due and payable to the person making the acknowledgement by the person to whom the statement is made."*

24. Adverting to the facts of this case, in the letter dated 22nd February 2023, the Respondent states categorically that the amount is payable and that the same would be paid once payment is received from PVVNL. Considering the acknowledgment which has been given, at this stage, the Court is unable to hold that the claims and the petition are barred by limitation. This

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issue shall, however, be adjudicated by the ld. Arbitrator after evidence is led in the matter.

33. Be that as it may, the period of limitation between 15th March, 2020 and 28th February, 2022 has to be excluded in terms of the decision of the Supreme Court in ***Re: Suo Moto Writ Petition (supra)*** and ***M/s. Arif Azim (supra).*** If the said period is excluded, at this stage, this Court is unable to hold that the claims are barred by limitation. This would, however, be subject to final decision by the Arbitral Tribunal.

34. Another major issue raised by the Respondent No.1, is the exorbitant amount of interest/late fee being purportedly charged by the Petitioner. The Court has considered the notice invoking arbitration wherein the Petitioner has stated as follows:

"2. That, consequently, our company extended loan/financial assistance to the Noticee No. 1 and 3 (Three) Hypothecation/Loan Agreements all dated 24.03.20 18 were executed. The details of loan accounts are as under:-

Loan Account No.	*Date of Loan Agreement*	*Amount of Loan*
LD6281	*24.03.2018*	*Rs.3,50,00,000/-*
LD6299	*24.03.2018*	*Rs. 4,00,00,000/-*
LD6300	*24.03.2018*	*Rs. 4,50,00,000/-*
Total		*Rs. 12,00,00,000/-*

As agreed under the Hypothecation/Loan Agreement(s) and other documents, the loans carried an interest @ 17% p.a. flat which translates to 27.45% annualized and was repayable in 60 monthly installments as mentioned in Schedule B of the respective loan agreements, from the date of disbursement. Therefore, timely repayment of loans was the essence of loan agreements. As per written agreement, in case of default, Late fee at the rate of 3% per month

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compounded monthly or at such higher rate as may be notified was payable by the Noticee(s).

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5. That the overdue installments which have become due and repayable by the Noticee No. l in the aforesaid loan account(s) amounts to ***Rs.21 ,95,00,000/- (Rupees Twenty One Crores Ninety Five Lakhs Only). In addition to it, since, the Noticee No.1 has failed to repay the installments on due dates, the late fee, as per agreed terms of the Hypothecation/Loan Agreements is payable on defaulted installments which works out to Rs.54,72,44,700/- (Rupees Fifty Four Crores Seventy Two Lakhs Forty Four Thousand Seven Hundred Only) till 26.12.2023 and continues to accrue till the defaulted installments are paid. Further, the Noticee No. 1 is also liable to pay Rs.3,95,000/- (Rupees Three Lakhs Ninety Five Thousand Only) towards cheque bouncing charges. Thus, as on 27.12.2023, the total outstanding dues including late fee and cheque bouncing charges recoverable from the Noticee No.1 by our company comes out to Rs.76,71,39,700/-*** *(Rupees Seventy Six Crores Seventy One Lakhs Thirty Nine Thousand Seven Hundred Only).The Noticee Nos.2 to 7 are jointly & severally liable to pay the outstanding dues as guarantors."*

35. A perusal of the above notice shows that late fee being charged by the Petitioner, against a loan of Rs.12 crores, is to the tune of Rs. 54.72 crores. The question as to whether such charging of late fee is conscionable and in accordance with law, is also an issue, which may be raised before the Arbitral Tribunal.

36. Subject to the above deposit of Rs. 21.95 crores being made, the interim order dated 25th January, 2024 shall stand vacated.

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37. **Justice U.U. Lalit (Retd) (9811395363)** is appointed as the ld. Sole Arbitrator to adjudicate the disputes between the parties. The arbitration shall take place under the aegis of Delhi International Arbitration Centre *(hereinafter, 'DIAC')*. The fee of the Arbitrator shall be paid in terms of the Fourth Schedule of the Act as amended by DIAC Rules, 2023.

38. Let a copy of the present order be emailed to Secretary, DIAC on email id- delhiarbitrationcentre@gmail.com.

39. At this stage, ld. Counsel for the Petitioner submits that they are willing to resolve the disputes amicably with the Respondents. If so, the parties may enter negotiations for a period of one month from the release of the order. For the said period when negotiations are going on, interim order dated 25th January, 2024, *qua* the land (situated at 0.5 Milestone, Jind Road, Rohtak, Haryana – 124001), shall continue, till the deposit of the amount is made by the Respondents. The Petitioner is also free to approach the ld. Sole Arbitrator for seeking interim relief(s).

40. The first date before the Arbitrator is fixed as 15th May, 2024.

ARB.P. 396/2024
O.M.P.(I) (COMM.) 39/2024 and I.A. 7321/2024

41. The petitions are disposed of. All pending applications are also disposed of, accordingly.

42. The next dates of hearing in *O.M.P.(I) (COMM.) 39/2024* stands cancelled.

PRATHIBA M. SINGH, J.

APRIL 3, 2024/*dk/bh*

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