REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION (C) NO. 13 OF 2023

M/S B AND T AG … PETITIONER

VERSUS

MINISTRY OF DEFENCE … RESPONDENT

J U D G M E N T

J. B. PARDIWALA, J.:

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, (for short, 'the Act 1996'), filed at the instance of a company based in Switzerland and engaged in the business of manufacturing of arms etc., praying for appointment of an arbitrator for the adjudication of disputes and claims arising out of the Contract No. 78953/SMG/GS/WE-4(GS-IV) dated 27.03.2012 executed with the respondent Government of India in its Ministry of Defence.

FACTUAL MATRIX

2. The respondent, Ministry of Defence *vide* the RFP No. 78953/SMG/GS/WE-4 dated 18.11.2009 floated an urgent tender for

procurement of 1,568 Sub Machine Guns under a Fast Track Procedure. The petitioner participated in the tender process and offered its bid. The tender was opened on 21.12.2010 and the petitioner was declared to be the lowest acceptable bidder. After due negotiations, the Contract was executed and signed on 27.03.2012.

3. The dispute between the parties arose in relation to the alleged wrongful encashment of warranty bond by the respondent. The respondent *vide* its letter dated 16.02.2016, directed the Joint Chief Executive Officer, State Bank of India, Frankfurt Branch, Germany to encash the WBG No. 12/380 for its full value i.e., Euro 201,793.75 and remit the amount through direct bank transfer to the Principal Controller of Defence Account (PCDA, Government account) in accordance with the details stated in the letter. One copy of the letter dated 16.02.2016 was also forwarded to the petitioner. This action on the part of the respondent, i.e., of encashing Liquidated Damages (LDs) for the requisite amount was on account of delay in the supply of goods beyond the contractual time period.

4. The respondent, *vide* its letter dated 24.02.2016, informed the Petitioner that the subject instructions for WBG encashment had been issued after due scrutiny and analysis of the case put up by the Petitioner *vide* letter dated 24.10.2014 and such encashment was with approval of the competent authority at Ministry of Defence. The respondent was also accorded sanction by the President of India to deduct Euro 197,230.35 towards the recovery of applicable LDs from the Petitioner in accordance with the terms of the Contract vide letter dated 11.08.2016.

5. In the aforesaid context, the respondent on 26.09.2016 deducted the amount for recovery of applicable LDs. The amount was consequently, credited into the Government Account as per the instructions contained in

the letter dated 11.08.2016 issued on behalf of the President of India. Accordingly, the claims of the Petitioner stood rejected.

6. Despite the aforesaid, the parties continued to engage themselves in "bilateral discussions" with a view to explore the possibility of resolving the dispute regarding imposition of the LDs and encashment of the WBG. However, the respondent *vide* its letter dated 22.09.2017 informed the petitioner, that all actions taken by the respondent were in accordance with the terms of the Contract, and that the petitioner was given sufficient opportunity to present its case.

7. The petitioner claims that after the letter dated 22.09.2017 was issued, the parties remained in constant communication with each other, to negotiate and resolve the dispute. Nonetheless, the petitioner *vide* letter dated 04.09.2019, requested the respondent to review and discuss the wrongful imposition of LDS and give a fair chance to the petitioner to present its case.

8. In such circumstances referred to above, the petitioner is here before this Court with the present petition.

SUBMISSIONS ON BEHALF OF THE PETITIONER

9. At the outset, Ms. Dua, the learned counsel appearing for the petitioner made a fervent appeal to this Court to take notice of the following dates and events:

27.03.2012: Petitioner and the Respondent entered into a Contract dated 27.03.2012 bearing No. 78953/SMG/GS/WE-4 for procurement / supply of quantity 568 9MM SMG Model MP-9 Sub Machine Gun with Accessories ("Contract"). The

Contract contained a dispute resolution clause which also incorporated an agreement to arbitrate (Article 21).

16.02.2016: Disputes arose between the parties in relation to wrongful encashment of bank guarantee vide letter dated 16.02.2016 for Euro 201,793.75 ("BG") and for wrongful imposition of liquidated damages to the tune of Euro 399,0240.10.

22.09.2017: It is pertinent to state that between 16.02.2016 and 22.09.2017, the parties were constantly engaged in "bilateral discussion" as specifically mandated by Article 21 of the Contract in order to resolve their disputes regarding the wrongful deduction of Liquidated damages and encashment of the BG. The Petitioner had urged the Respondent to reconsider the wrongful Encashment of BG. However, the Respondent, vide letter dated 22.09.2017 for the first time communicated to the Petitioner that it would not reconsider the request.

2017-2019: Even after the communication dated 22.09.2017, the Parties were constantly trying to negotiate and resolve their disputes. In relation to which the Petitioner even attended a meeting with Director General (Acquisition.) and Additional Secretary.

04.09.2019: The Petitioner further requested the Respondent to review and discuss the wrongful imposition of Liquidated Damages and give a fair chance to the Petitioner to explain their position. The Petitioner emphasized to consider this situation as an urgent matter as it involves M/s B&T AG Switzerland who has signed up to manufacture in India, their 9mm SMG

and the 338 Sniper Rifles, but their board has requested a resolution to this outstanding issue before proceeding further with any "Make in India" programme.

08.11.2021: The world was hit by COVID in March 2020. The Petitioner on 08.11.2021 issued Notice dated 08.11.2021 invoking Arbitration under Article 21 of the said Contract to the Respondent. The Petitioner enumerated the unresolved issues.

10.01.2022: The Supreme Court, in SMW (C) No. 3/2020 had taken Suo moto cognizance to extend the limitation under any general and special laws until 28.02.2022.

03.02.2022: Petitioner vide email dated 03.02.2022 requested the Respondent to expedite the proceedings and further suggested to propose the name of the Arbitrator who could be appointed for the adjudication of the disputes under the contract.

18.02.2022: The Respondent vide its response dated 18.02.2022 to the arbitration notice of the Petitioner, did not raise any objection to the invocation of the arbitration proceedings however suggested that the Respondent shall not opt for a Sole Arbitrator and is in favour of appointing a three member arbitral tribunal.

28.11.2022: The Petitioner vide e-mail dated 28.11.2022 and notice dated 25.11.2022 replied to the Respondent for appointing Hon'ble Mr. Justice Mukul Mudgal (Retd.) as their Nominee Arbitrator for the adjudication of the disputes under the said

Contract. However, no reply has been received by the Respondent to the said notice.

10. Ms. Dua submitted that the claims of the petitioner are not time barred as strongly asserted on behalf of the respondent. The learned counsel submitted that the respondent wrongfully deducted the LDs and encashed the bank guarantee on 16.02.2016. It was submitted that the parties were trying to amicably resolve the disputes by way of 'bilateral discussions' in accordance with Article 21.1 of the Contract.

11. Ms. Dua invited the attention of this Court to Article 21 of the Contract. Article 21 provides for the dispute resolution mechanism and is reproduced hereinunder:

"Article 21

ABITRATION

21.1. All disputes or differences arising out of or in connection with the present Contract, including the one connected with the validity of the present Contract or any part thereof, shall be settled by bilateral discussions.

21.2. Any dispute, disagreement of question arising out of or relating to this Contract or relating to ***construction or performance (except as to any matter the decision or determination whereof is provided for by these conditions), which cannot be settled amicably, shall within sixty (60) days or such longer period as may be mutually agreed upon****, from the date on which either party informs the other in writing by a notice that such dispute, disagreement or question exists, will be referred to the Arbitration Tribunal consisting of three arbitrators.*

21.3 Within sixty (60) days of the receipt of the said Notice, one arbitrator shall be nominated in writing by SELLER and one arbitrator shall be nominated by BUYER.

21.4. The third arbitrator, who shall not be a citizen or domicile or of the country either of the parties or of any other country unacceptable to any of the parties shall be nominated of the parties within (90) days of the receipt of the notice mentioned above, failing which the third arbitrator may be nominated by the President of International Chamber of Commerce, Paris, at request of either party but the said nomination would be after consultation with both the parties and shall preclude any citizen or domicile of any country as mentioned. The arbitrator nominated under this Clause shall not be regarded nor act as an umpire.

21.5. The Arbitration Tribunal shall have its seat in New Delhi or such other place in India as may be mutually agreed to between the parties.

21.6. The Arbitration Proceedings shall be conducted in India under the Indian Arbitration and Conciliation Act, 1996 and the award of such Arbitration Tribunal shall be enforceable in Indian Courts only.

21.7. The decision of the majority of the arbitrator shall be final and binding on the parties to this contract.

21.8. Each party shall bear its own cost of preparing and presenting its case. The cost of arbitration including the fees and expenses of the third arbitrator shall be shared equally by the Seller and the Buyer, unless otherwise awarded by the Arbitration Tribunal.

21.9 In the event of a vacancy caused in the office of the arbitrators, the party which nominated such arbitrator, shall be entitled to nominate another in his place and the arbitration proceedings shall continue from the stage they were left by the retiring arbitrator.

21.10. In the event of one of the parties failing to nominate its arbitrator within 60 days as above or if any of the parties does not nominate another arbitrator within 60 days of the place of arbitrator failing vacant, then the other party shall be entitled after due notice of at least 30 days to request the

President of International Chamber of Commerce, Paris to nominate another arbitrator as above.

21.11. If the place of the third arbitrator falls vacant, his substitute shall be nominated according to the provisions herein above stipulated.

21.12. The parties shall continue to perform their respective obligations under this contract during the pendency of the arbitration proceedings except in so far as such obligations are the subject matter of the said arbitration proceedings."

12. According to Ms. Dua, Article 21.1 of the Contract referred to above, clearly stipulates that all disputes or differences arising out of in connection with the present contract, including the one connected with the validity of the present contract or in part thereof, shall be settled by 'bilateral discussions'.

13. According to the learned counsel, the aforestated is one of the distinguishing features of the Contract in question as in defence procurement contracts, it would be in the interest of the parties to resolve the disputes if any by way of 'bilateral discussions' rather than by initiating arbitration proceedings. The learned counsel submitted that the respondent for the first time informed the petitioner by letter dated 22.09.2017 that the proposal put forward by the petitioner to reconsider the decision of wrongful deduction of LD and encashment of bank guarantee was rejected. According to the learned counsel, even thereafter, i.e., after 22.09.2017, the parties continued to negotiate with each other until 04.09.2019.

14. Relying on the decision of this Court in the case of ***Geo Miller and Company Private Limited v. Chairman, Rajasthan Vidyut Utpadan Nigam Limited,*** reported in (2020) 14 SCC 643, it was submitted that the

time spent in pre-arbitration negotiations, held in good faith may be excluded for the purpose of computation of the period of limitation.

15. According to the learned counsel, the ratio of the decision of this Court in the case of ***Geo Miller*** (supra) squarely applies to the facts of the present case. It was submitted that once the parties get involved in 'bilateral discussions' then the time stops to run as the contract mandates the parties to resolve the disputes by way of discussion and negotiations.

16. The learned counsel further submitted that the petitioner will be in a position to lead appropriate evidence in the arbitration proceedings to establish that the parties continued to negotiate and discuss as late as up to 04.09.2019. It was submitted that, the communication of the respondent to the petitioner, declining to reconsider the alleged illegal deduction of the Liquidated Damages *vide* letter dated 22.09.2017, could be said to be the "Breaking Point". The period of three years from 22.09.2017 after excluding the 'Covid period' in accordance with the order passed by this Court in ***Cognizance for Extension of Limitation, In re***, reported in (2022) 3 SCC 117, would end on 22.09.2022. However, the notice of arbitration was sent by the petitioner on 08.11.2021.

17. The learned counsel further pointed that the respondent by its own letter dated 18.02.2022, did not object to the invocation of the arbitration, however, it only objected to the appointment of a sole arbitrator.

18. In the last, the learned counsel submitted that the issue of limitation being a mixed question of law and fact will be looked into by the Arbitral Tribunal. What was the "Breaking Point" of negotiations cannot be gone into while deciding an application filed under Section 11(6) of the Act 1996.

19. In such circumstances referred to above, the learned counsel prayed that the petition filed under Section 11(6) of the Act 1996 for constituting an Arbitral Tribunal being within the period of limitation, the same may be allowed and Arbitral Tribunal be constituted.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

20. On the other hand, Mr. K. M. Nataraj, the learned Additional Solicitor General of India vehemently opposed the present petition submitting that not only the petition filed under Section 11(6) of the Act 1996 is time barred but even the claims raised by the petitioner could be said to be time barred.

21. According to the learned ASG, the grievance of the petitioner revolves around the deduction of LDs by encashment of the bank guarantee. The last of such deduction was made on 26.09.2016. According to the learned ASG, the cause of action in the present case, could be said to have arisen on 26.09.2016. However, the notice for invoking of arbitration in accordance with Article 21 of the Contract was issued only on 08.11.2021, i.e., after a period of more than five years and much beyond the limitation period of three years. According to the learned ASG, the claim of the petitioner is hopelessly time barred.

22. The learned ASG requested the Court to look into the following dates and events for the purpose of deciding the present petition:

27.03.2012: Contract was executed between the Petitioner and Respondent.

26.09.2016: CAUSE OF ACTION arose

Liquidated damages were finally deducted.

25.09.2019: The limitation period of 3 years expired.

08.11.2021: Advocate for claimant sent 'Notice for invoking of Arbitration under Article 21 of the Contract'.

16.11.2021: Respondent received the Notice invoking arbitration.

03.02.2023: The Petitioner filed Arbitration Petition No. 13 i.e. the Present Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 for Constitution of Arbitral Tribunal.

23. In the last, the learned ASG submitted that the period of limitation for issuing notice invoking arbitration not being specifically prescribed in the Schedule to the Limitation Act, 1963 (for short, 'the Act 1963') will be covered by the residuary Article i.e., Article 137 of the Schedule to the said Act.

24. In such circumstances referred to above, Mr. Nataraj, the learned ASG prayed that the claim of the petitioner being *ex facie* time barred, the present petition under Section 11(6) of the Act 1996 may not be entertained and the same may be rejected.

ANALYSIS

25. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our reconsideration is whether time-barred claims or claims which are barred by limitation, can be said to be live claims, which can be referred to arbitration?

26. Before adverting to the rival submissions canvassed on either side, we may look into few relevant provisions of the Act 1996 and the Act 1963.

27. Section 11 of the Act 1996 provides for appointment of arbitrators. Sub section (6) of Section 11 reads thus:

> *"**11(6).** Where, under an appointment procedure agreed upon by the parties,—*
>
> *(a) a party fails to act as required under that procedure; or*
>
> *(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or*
>
> *(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,*
>
> *a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."*

28. The plain reading of the aforesaid provision would indicate that no time limit has been prescribed for filing application under Section 11(6) of the Act, 1996 for appointment of an arbitrator.

29. Section 43 of the Act 1996 provides that the Limitation Act, 1963 would apply to arbitrations as it applies to the proceedings in Court. Section 43 reads thus:

> ***"43. Limitations.—(1)** The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.*
>
> ***(2)** For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred to in section 21.*

(3) *Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.*

(4) *Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.**"***

30. In context with Section 43 of the Act 1996 referred to above, we may refer to a decision of this Court in the case of ***Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and Others,*** reported in (2008) 7 SCC 169. In the said case, it was contended on behalf of the appellant therein that Section 43 of the Act 1996 makes the provisions of the Act 1963 applicable only to arbitrations and not to any proceedings relating to arbitration in a Court. Such contention canvassed on behalf of the appellant therein, was negatived by this Court observing as under:

*"**45.** Learned counsel for the appellant contended that Section 43 of the AC Act makes applicable the provisions of the Limitation Act only to arbitrations, thereby expressing an intent to exclude the application to any proceedings relating to arbitration in a court. The contention of the appellant ignores and overlooks Section 29(2) of the Limitation Act and Section 43(1) of the AC Act. Sub-section (1) of Section 43 of the Act provides that the Limitation Act shall apply to arbitrations as it applies to proceedings in court. The purpose of Section 43 of the AC Act is not to make the Limitation Act inapplicable to*

proceedings before court, but on the other hand, make the Limitation Act applicable to arbitrations. As already noticed, the Limitation Act applies only to proceedings in court, and but for the express provision in Section 43, the Limitation Act would not have applied to arbitration, as arbitrators are private tribunals and not courts. Section 43 of the AC Act, apart from making the provisions of the Limitation Act, 1963 applicable to arbitrations, reiterates that the Limitation Act applies to proceedings in court. Therefore, the provisions of the Limitation Act, 1963 apply to all proceedings under the AC Act, both in court and in arbitration, except to the extent expressly excluded by the provisions of the AC Act."

(Emphasis supplied)

31. Since a petition under Section 11(6) of the Act 1996 for seeking appointment of Arbitral Tribunal is required to be filed before the High Court or the Supreme Court, as the case may be, Article 137 of the Schedule to the Act 1963 would apply.

32. Article 137 reads thus:

"*Description of Suit*	*Period of Limitation*	*Time from when period begins to run*
137. *Any other application for which no period of limitation is provided elsewhere in this Division.*	*Three years.*	*When the right to apply accrues."*

33. A plain reading of the aforesaid Article would indicate that the period of limitation in cases covered by Article 137 is three years and the said period would begin to run when the right to apply accrues.

34. The starting point of limitation under Article 137 according to third column of the Article is the date when '*the right to apply arises'*. This

being a residuary Article to be adopted to different classes of applications, the expression '*the right to apply'* is an expression of a broad common law principle and should be interpreted according to the circumstances of each case. '*The right to apply'* has been interpreted to mean '*the right to apply first arises'*. (See: ***Merla Ramanna v. Nallaparaju and Others***, (1955) 2 SCR 938)

35. Further, it would be necessary to refer to Section 9 of the Act 1963 of the Act which reads thus:

> *"**9. Continuous running of time.—** Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it:*
>
> *Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues."*
>
> (Emphasis supplied)

CASE LAW ON THE SUBJECT

36. In the case of ***Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority*** reported in AIR 1988 SC 1887, it has been held that the existence of a dispute is essential for the appointment of an Arbitrator under Section 8 or a reference under Section 20 of the Arbitration Act, 1940 (for short, 'the Act 1940') and that a dispute can arise only when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference about the existence of a dispute as the expression "dispute" contains a positive element of assertion and in denying and merely an inaction to accede to a claim or a request. With respect to the period of time, in the light of the facts of that particular case as to when did the dispute actually

arises, despite the fact that the contract work in question was completed in the year 1980, the Court observed that even though it was true that on completion of the contract work right to get payment would normally arise, but where the final bill had not been prepared and when the assertion of the claim was made much after the completion of the work and there was non-payment, the cause of action arose from the date when the assertion was made. The Court then went on to observe that it was also true that a party cannot postpone the accrual of a cause of action by writing letters or sending reminders but where the bill had been finally prepared, the claim made by the claimant is the accrual of the cause of action. For a proper understanding of the ratio in the aforesaid judgment, we reproduce hereinbelow para 4 of the judgment in its entirety. Para 4 reads thus:

> *"**4.** Therefore, in order to be entitled to order of reference under S. 20, it is necessary that there should be an arbitration agreement and secondly, difference must arise to which this agreement applied. In this case, there is no dispute that there was an arbitration agreement. There has been an assertion of claim by the appellant and silence as well as refusal in respect of the same by respondent. Therefore, a dispute has arisen regarding non-payment of the alleged dues of the appellant. The question is for the present case when did such dispute arise. The High Court proceeded on the basis that the work was completed in 1980 and, therefore, the appellant became entitled to the payment from that date and the cause of action under Art. 137 arose from that date. But in order to be entitled to ask for a reference under S. 20 of the Act there must not only be an entitlement to money but there must be a difference or a dispute must arise. It is true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on 28th Feb. 1983 and there was non-payment, the cause of action from that date, that is to say, 28th of Feb. 1983. It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under S. 8*

or a reference under S. 20 of the Act. See Law of Arbitration by R.S. Bachawat, 1st Edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion in denying, not merely inaction to accede to a claim or a request. When in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

(Emphasis supplied)

37. Three principles of law are discernible from the aforesaid decision of this Court. First, ordinarily on the completion of the work, the right to receive the payment begins. Secondly, a dispute arises when there is a claim on one side and its denial/repudiation by the other and thirdly, a person cannot postpone the accrual of cause of action by repeatedly writing letters or sending reminders. In other words, 'bilateral discussions' for an indefinite period of time would not save the situation so far as the accrual of cause of action and the right to apply for appointment of arbitrator is concerned.

38. In ***Union of India and Another v. M/s L. K. Ahuja and Co.,*** reported in (1988) 3 SCC 76, this Court in paras 6 and 8 respectively of the judgment has laid down the ratio with regard to the limitation period applicable in arbitration proceeding. Paras 6 and 8 respectively read as under:

"6. *It appears that these questions were discussed in the decision of the Calcutta High Court in Jiwnani Engineering Works Pvt. Ltd. v. Union of India [AIR 1978 Cal 228] where one of us (Sabyasachi Mukharji, J.) was a party and which held after discussing all these authorities that the question whether the claim sought to be raised was barred by limitation or not, was not relevant for an order under Section 20 of the Act. Therefore, there are two aspects. One is whether the claim made in the arbitration is barred by limitation*

under the relevant provisions of the Limitation Act and secondly, whether the claim made for application under Section 20 is barred. In order to be a valid claim for reference under Section 20 of the Arbitration Act, 1940, it is necessary that there should be an arbitration agreement and secondly differences must arise to which the agreement in question applied and, thirdly, that must be within time as stipulated in Section 20 of the Act.

xxx ***xxx*** ***xxx***

8. *In view of the well settled principles we are of the view that it will be entirely a wrong to mix up the two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act and, secondly, whether the claim to be adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, if on admitted facts a claim is found at the time of making an order under Section 20 of the Arbitration Act, to be barred by limitation. In order to be entitled to ask for a reference under Section 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable. In this case the claim for reference was made within three years commencing from April 16, 1976 and the application was filed on December 13, 1976. We are, therefore, of the view that the High Court was right in this case. See in this connection the observations of this Court in Inder Singh Rekhi v. D.D.A. [(1988) 2 SCC 338]"*

(Emphasis supplied)

39. One would thus see that in ***L.K. Ahuja*** (supra) the Court was dealing with the twin aspects, one whether the claim made in the arbitration was barred by law of limitation under the relevant provisions of the relevant Act, and secondly whether the application under Section 20 of the Act 1940 was barred by limitation. In order to be a valid claim with reference to Section 28 of the Act 1940 it is necessary that there should be an arbitration agreement, secondly, the differences must arise to which the agreement in

question applies and thirdly that application must be within time as stipulated in Section 20 of the Act 1940. With reference to the limitation aspect the Court found that the assertion of claim and denial of the same was a necessary ingredient and then went on to say that it would be wrong to mix up the two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act 1940 and whether the claim to be adjudicated by the Arbitrator was barred by lapse of time.

40. On the aspect whether the decision on the issue of limitation should be decided at the stage of passing of an order referring the disputes to the arbitrator, this Court in the case of ***J.C. Budhraja v. Chairman, Orissa Mining Corporation Ltd. and Another,*** reported in (2008) 2 SCC 444 has drawn a fine distinction between the period of limitation for filing of a petition and as to the claims being barred by time. We quote the relevant observations made by this Court in ***J.C. Budhraja*** (supra) in paras 25 and 26 respectively, as under:

> ***"25.*** *The learned counsel for the appellant submitted that the limitation would begin to run from the date on which a difference arose between the parties, and in this case the difference arose only when OMC refused to comply with the notice dated 4-6-1980 seeking reference to arbitration. We are afraid, the contention is without merit. The appellant is obviously confusing the limitation for a petition under Section 8(2) of the Arbitration Act, 1940 with the limitation for the claim itself. The limitation for a suit is calculated as on the date of filing of the suit. In the case of arbitration, limitation for the claim is to be calculated on the date on which the arbitration is deemed to have commenced.*
>
> ***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 Major (Retd.) Inder Singh Rekhi v. DDA [(1988) 2 SCC 338], Panchu Gopal Bose v. Board of Trustees for Port of Calcutta [(1993) 4 SCC 338] and Utkal Commercial Corpn. v. Central Coal Fields Ltd. [(1999) 2 SCC 571] also make this position clear." (Emphasis supplied)

41. In ***SBP & Co. v. Patel Engineering Ltd. and Another,*** reported in (2005) 8 SCC 618, this Court held that dragging a party to an arbitration when there existed no arbitrable dispute, can certainly affect the right of that party, and, even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration.

42. Whether time barred claims should be referred to for decision in the arbitration proceedings was looked into by this Court in ***National Insurance Company Limited v. Boghara Polyfab Private Limited,*** reported in (2009) 1 SCC 267. Paras 22 to 22.2 respectively of the said judgment read as under:

"22. *Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. [(2005) 8 SCC 618] This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.*

22.1. *The issues (first category) which the Chief Justice/his designate will have to decide are:*

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. *The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:*

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection."

43. In ***Geo Miller*** (supra), this Court observed in para 28 and 29 as under:

*"**28.** Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. The Court upon careful consideration of such history must find out what was the "breaking point" at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This "breaking point" would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim.*

29. *Moreover, in a commercial dispute, while mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. It does not lie to the applicant to plead that it waited for an unreasonably long period to refer the dispute to arbitration merely on account of the respondent's failure to settle their claim and because they were writing representations and reminders to the respondent in the meanwhile."*

44. The aforesaid observations make it very clear that what is important for the Court is to find out what was the "Breaking Point" at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration.

45. The learned counsel appearing for the petitioner has placed strong reliance on para 28 of ***Geo Miller*** (supra) to fortify her submission that the "Breaking Point" was sometime in September, 2019 and not in 2016 as asserted by the respondent. What was the "Breaking Point" is a question of fact and we shall deal with this issue a little later. However, para 28 referred to above should be read along with the observations made by this Court in para 21 of the judgment. Para 21 reads thus:

*"**21.** Applying the aforementioned principles to the present case, we find ourselves in agreement with the finding of the High Court that the appellant's cause of action in respect of Arbitration Applications Nos. 25/2003 and 27/2003, relating to the work orders dated 7-10-1979 and 4-4-1980 arose on 8-2-1983, which is when the final bill handed over to the respondent became due. Mere correspondence of the appellant by way of writing letters/reminders to the respondent subsequent to this date would not extend the time of limitation. Hence the maximum period during which this Court could have allowed the appellant's application for appointment of an arbitrator is 3 years from the date on which cause of action arose i.e. 8-2-1986. Similarly, with*

respect to Arbitration Application No. 28/2003 relating to the work order dated 3-5-1985, the respondent has stated that final bill was handed over and became due on 10-8-1989. This has not been disputed by the appellant. Hence the limitation period ended on 10-8-1992. Since the appellant served notice for appointment of arbitrator in 2002, and requested the appointment of an arbitrator before a court only by the end of 2003, his claim is clearly barred by limitation."

(Emphasis supplied)

46. Relying on the observations made in para 21 referred to above, the submission canvassed on behalf of the respondent is that para 28 of ***Geo Miller*** (supra) may be applicable in a given set of facts where there is subsisting/continuing cause of action. However, in the present case, the Liquidated Damages were deducted by encashment of bank guarantee. This was a positive action on the part of the respondent, crystalising the rights/cause of action and the same should not be interpreted as a continuing cause of action.

47. In ***Bharat Sanchar Nigam Limited and Another v. Nortel Networks India Private Limited***, reported in (2021) 5 SCC 738, this Court undertook a comprehensive analysis of the relevant provisions and held that in cases where claims are *ex facie* time barred, the Court may refuse to make reference under Section 11 of the Act 1996. This decision assumes importance and we should look into the same in little details. The appellant BSNL issued a tender notification inviting bids for planning, engineering, supply, insulation, testing and commissioning of GSM based cellular mobile network in the Southern region. The respondent company was awarded the purchase order. On completion of the project, the appellant withheld an amount of Rs. 99.70 crore towards the liquidated damages and other levies.

The respondent raised a claim on 13.05.2014 for payment of the above said amount from the appellant who rejected the claim on 04.08.2014.

The respondent, after a period of over 5.5 years invoked the arbitration clause and requested for the appointment of an independent arbitrator on 29.04.2020. It was also contended that the dispute of withholding the said amount, would fall within the ambit of arbitrable disputes under the agreement. The appellant on 09.06.2020 replied that the request for appointment of an arbitrator could not be entertained since the case had already been closed and the notice invoking arbitration was time barred.

The respondent filed an application before the High Court of Kerala for appointment of arbitrator. The High Court *vide* their order dated 13.10.2020 referred the disputes to arbitration. The appellant filed a review petition before the High Court against the order dated 13.10.2020 which was dismissed by the Court *vide* their order dated 14.01.2021. Therefore, the appellant filed two Civil appeals before this Court.

The appellant submitted the following before this Court-

- The cause of action for invoking arbitration arose on 04.08.2014 when the claim made by the respondent was rejected by making deductions from the final bill.
- The respondent slept over its alleged rights for over 5.5 years, before issuing the notice of arbitration on 29.04.2020.
- The respondent did not take any action in between the period and therefore the notice invoking arbitration had become legally stale, non-arbitrable and unenforceable.
- The High Court had erroneously proceeded on the premise of mere existence of a valid arbitration agreement, without considering that

such an agreement was inextricably connected with the existence of a live dispute.

- In cases where the invocation of the arbitration agreement is *ex facie* time barred, the Court must reject the request for appointment of an arbitrator is at par with a civil action and would be covered under Article 137 of Schedule to the Act 1963.
- An action taken by a claimant must necessarily fall within the statutory period of 3 years from the date on which the right to apply accrues.

The respondent submitted the following-

- The amendment to Section 11 by the Arbitration and Conciliation (Amendment) Act, 2015 provides for a limited scope of enquiry at the pre-reference stage which is restricted only to the 'existence; of an arbitration agreement under Section 11(6A).
- The objection with respect to the claims being allegedly time barred, could be decided by the arbitral tribunal.
- The High Court rightly limited the enquiry at the pre-reference stage to the 'existence' of the arbitration agreement.
- The starting point of limitation for initiating a proceeding under Section 11 is the expiry of 30 days from the date of issuing notice of arbitration on 29.04.2020. The cause of action was, therefore, a continuing one. The High Court had rightly held that the issue of limitation must be decided by the arbitral tribunal.

The following two questions fell for the consideration of this Court-

- The period of limitation for filing an application under Section 11 of the Act 1996; and
- Whether the Court may decline to make the reference under Section 11 where the claims are *ex facie* time barred?

This Court observed that the Act 1996 has been framed for expeditious resolution of disputes and various provisions have been incorporated in the Act 1996 to ensure that the arbitral proceedings are conducted in a time bound manner. The Act 1996 does not prescribe any time period for filing an application under Section 11(6). Since there is no provision in the Act 1996 specifying the period of limitation for filing an application under Section 11, one would have to take recourse to the Act 1963, as per Section 43 of the Act 1996 which provides that the Limitation Act shall apply to arbitrators, as it applies to proceedings in Court.

Since none of the articles in Schedule to the Limitation Act provide a time period for filing an application for appointment of arbitrator under Section 11, it would be covered by the residual provision under Article 137 of the Limitation Act which provides that the period of limitation is three years for any other application for which no period of limitation is provided elsewhere in the division. The time limit starts from the period when the right to apply accrues.

This Court relied on its various other decisions including few High Court decisions. This Court held that an application under Section 11 is to be filed in a Court of Law, and since no specific Article of the Act 1963 applies, the residual Article would become applicable. The effect being that the period of limitation to file an application under Section 11 is three

years from the date of refusal to appoint the arbitrator or on expiry of 30 days whichever is earlier.

In the said case the respondent had issued the notice of arbitration on 29.04.2020 which was rejected by the appellant on 09.06.2020. The respondent filed an application under Section 11 before the High Court on 24.07.2020, i.e., within the period of three years of rejection of the request for appointment of arbitrator.

This Court allowed the appeals filed by the BSNL holding as under:

*"**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."*

Amendment required

However, this Court in the above said case observed that since there is vacuum in the law to provide a period of limitation under Section 11 of the Act 1996 the Courts have taken recourse to the position that the limitation period would be governed by Article 137 of the Limitation Act, 1963 which provides a period of three years from the date when the right to apply accrues. This Court considered this as an unduly long period for filing an application under Section 11, since it would defeat the very object of the Act 1996, which provides for expeditious resolution of commercial disputes within a time bound period. The Act has been amended in 2015 and 2019 respectively to provide for further time limits to ensure that the arbitration proceedings are conducted and concluded

expeditiously. Section 29A mandates that the arbitral tribunal will conclude the proceedings within a period of 18 months. In view of the legislative intent, the period of 3 years for filing an application under Section 11 would run contrary to the scheme of the Act.

This Court, therefore, considered it necessary for the Parliament to effect an amendment to Section 11 of 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. [Reference: Article titled as 'Limitation for Filing Application for Appointment of Arbitrator' by Mr. M. Govindarajan]

48. In ***Secunderabad Cantonment Board v. B. Ramachandraiah and Sons,*** reported in (2021) 5 SCC 705, while taking note of both ***BSNL*** (supra) and ***Geo Miller*** (supra), it is held as under:

> ***"19.*** *Applying the aforesaid judgments to the facts of this case, so far as the applicability of Article 137 of the Limitation Act to the applications under Section 11 of the Arbitration Act is concerned, it is clear that the demand for arbitration in the present case was made by the letter dated 7-11-2006. This demand was reiterated by a letter dated 13-1-2007, which letter itself informed the appellant that appointment of an arbitrator would have to be made within 30 days. At the very latest, therefore, on the facts of this case, time began to run on and from 12-2-2007. The appellant's laconic letter dated 23-1-2007, which stated that the matter was under consideration, was within the 30-day period. On and from 12-2-2007, when no arbitrator was appointed, the cause of action for appointment of an arbitrator accrued to the respondent and time began running from that day. Obviously, once time has started running, any final rejection by the appellant by its letter dated 10-11-2010 would not give any fresh start to a limitation period which has already begun running, following the mandate of Section 9 of the Limitation Act. This being the case, the High Court was clearly in error in stating that since the applications under Section 11 of*

the Arbitration Act were filed on 6-11-2013, they were within the limitation period of three years starting from 10-11-2020. On this count, the applications under Section 11 of the Arbitration Act, themselves being hopelessly time-barred, no arbitrator could have been appointed by the High Court."

(Emphasis supplied)

49. ***NTPC Ltd. v. SPML Infra Ltd.*** reported in 2023 SCC Online SC 389, noted that an overarching principle with respect to the pre-referral jurisdiction under Section 11(6) of the Act 1996 as laid down in ***Vidya Drolia and Ors. v. Durga Trading Corporation*** reported in (2021) 2 SCC 1, and following the decision in ***Vidya Drolia's*** case, it has been consistently held by the Courts that the arbitral tribunal was the preferred first authority to determine and decide all questions of non-arbitrability. The Court held that:

*"**25. Eye of the Needle**: The above-referred precedents crystallise the position of law that the pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the referral court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.*

26. *As a general rule and a principle, the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the referral court may reject claims which are manifestly and ex-facie non-arbitrable [Vidya Drolia supra note 7, para 154.4.]. Explaining this position, flowing from the principles laid down in Vidya Drolia (supra), this Court in a subsequent decision in Nortel Networks (supra) held [Nortel Networks supra note 22, para 45.1.]:*

"45.1 ...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..."

27. *The standard of scrutiny to examine the non-arbitrability of a claim is only prima facie. Referral courts must not undertake a full review of the contested facts; they must only be confined to a primary first review [Vidya Drolia supra note 7, para 134.] and let facts speak for themselves. This also requires the courts to examine whether the assertion on arbitrability is bona fide or not [ibid.]. The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable [Nortel Networks supra note 22, para 47.]. On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration [Vidya Drolia supra note 7, para 154.4.].*

28. *The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the referral court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable [*ibid para 154.4.*]. It has been termed as a legitimate interference by courts to refuse reference in order to prevent wastage of public and private resources [[*ibid para 139*]. Further, as noted in Vidya Drolia (supra), if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court [ibid]. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator [DLF Home Developers Limited* v. *Rajapura Homes Pvt. Ltd.*, 2021 SCC OnLine SC 781, paras 18, 20.*], as explained in DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd."*

(Emphasis supplied)

50. The learned counsel appearing for the petitioner also placed reliance on a decision rendered by the Delhi High Court in the case of ***Welspun Enterprises Ltd. v. NCC Ltd.*** reported in (2022) 295 DLT 286 wherein, the High Court observed as under:

> *"**58.** In view of the above, the period of limitation would run when a party acquires a right to refer the disputes to arbitration. Clearly, if the arbitration agreement requires the parties to exhaust the dispute resolution process as a pre-condition for invoking arbitration, the right to refer the dispute to arbitration would arise only after the parties have exhausted the said procedure. The counterparty could raise a valid objection to any step taken to refer the disputes to arbitration in avoidance of the agreed pre-reference dispute resolution procedure. If the parties have agreed that they would first endeavour to resolve the disputes amicably in a particular manner, it is necessary for them to first exhaust that procedure before exercising any right to refer the disputes to arbitration.*
>
> ***59.** In Hari Shankar Singhania v. Gaur Hari Singhania [(2006) 4 SCC 658], the Supreme Court categorically held that a reference to arbitration "is required to be filed within a period of three years when the right to apply accrues". It is, therefore, crucial to determine when such 'right to apply' accrues in a case. As per the Court, the right to apply would accrue when differences between the parties to the arbitration agreement were evident - when the parties reach a 'breaking point', that is, when a settlement with or without conciliation is no longer possible. Pertinently, the Court noted that the limitation period would not start so long as the parties were in dialogue even if differences surfaced during such period, as an interpretation to the contrary would inevitably "compel the parties to resort to litigation/arbitration even where there is serious hope of the parties themselves resolving the issues". Thus, the right to apply can be said to have accrued "only on the date of the last correspondence between the parties and the period of limitation commences from the date of the last communication between the parties."*

51. The learned counsel appearing for the petitioner also placed reliance on a decision rendered by the Calcutta High Court in ***Zillon Infraprojects Pvt.***

Ltd. v. Bharat Heavy Electricals Limited reported in 2023 SCC OnLine Cal 756, wherein, the High Court observed as under:

> *"**33.** Therefore, after a careful perusal of the aforesaid facts, it would not be incorrect to state that the cause of action herein has been of a 'continuous' nature. The claims of the petitioner never attained finality, and remained a 'live claim' as the parties were in mutual discussion to resolve the disputes between them. The arbitration petition was filed on July 28, 2021 that is within a period of one and half years from the respondent's last communication vide email dated January 09, 2020, and within a period of two and half years from the issuance of Section 21 notice dated January 16, 2019.*
>
> *Xxx xxx xxx*
>
> ***35.** Therefore, the limitation period will not be operative against the petitioner from February 05, 2019 onwards, and hence, the present petition is well within time and not barred by limitation. ..."*

FINAL ANALYSIS

52. 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.

53. Mookerjee, J. in ***Dwijendra Narain Roy v. Joges Chandra De and others***, reported in AIR 1924 Cal 600 has explained the true test to determine when a cause of action could be said to have accrued observing as under:

> *"**10.** ...The substance of the matter is that time runs when the cause of action accrues and a cause of action accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed ; Coburn v. Colledge [(1897) 1 Q.B. 702] ; Gelmani v. Morriggia [(1913) 2 K.B. 549]. The cause*

of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief : Whalley v. Whalley [(1816) 1 M.R. 436]. The statute does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result. ...."

(Emphasis supplied)

54. "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 and Another v. Partab Singh and Others***, 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."

(Emphasis supplied)

55. Cause of action becomes important for the purposes of calculating the limitation period 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.

56. *Russell on Arbitration* by Anthony Walton (19th Edn.) at pp. 4-5 states that the period of limitation for commencing an arbitration runs from the date

on which the "cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued:

> *"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 on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued."*

Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.

57. 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.

58. Whether any particular facts constitute a cause of action has to be determined with reference to the facts of each case and with reference to, the substance, rather than the form of the action. If an infringement of a right happens at a particular time, the whole cause of action will be said to have arisen then and there. In such a case, it is not open to a party to sit tight and not to file an application for settlement of dispute of his right, which had been infringed, within the time provided by the Limitation Act, and, allow his right to be extinguished by lapse of time, and thereafter, to wait for another cause of action and then file an application under Section 11 of the Act 1996 for establishment of his right which was not then alive, and, which had been long extinguished because, in such a case, such an application would mean an application for revival of a right, which had long been extinguished under the Act 1963 and is, therefore, dead for all purposes. Such proceedings would not be maintainable and would obviously be met by the plea of limitation under Article 137 of the Act 1963.

59. We once again go back to the facts of the present case. Even according to the petitioner, the disputes arose between the parties in relation to the wrongful encashment of bank guarantee *vide* letter dated 16.02.2016 for Euro 201,793.75 ("BG") and for wrongful imposition of liquidated damages to the tune of Euro 399,0240.10. We are at one with the learned ASG that this was the "Breaking Point". What is more important is the fact

that the respondent on 26.09.2016, deducted the amount towards recovery of the liquidated damages. The requisite amount was credited into the Government account in accordance with the instructions contained in the letter dated 11.08.2016. This was the end of the matter. To say that even thereafter, the petitioner kept negotiating with the respondent in anticipation of some amicable settlement would not save the period of limitation.

60. In the aforesaid context, we deem fit to reproduce the entire letter dated 24.02.2016 addressed by the respondent to the petitioner. The letter reads thus:

> *"**BY FAX***
> *Integrated HQs of MoD (Army)*
> *Master General of Ordnance Branch*
> *Procurement Progressing Organisation*
> *Room No. 230, B Wing, Sena Bhavan*
> *DHQ PO, New Delhi – 110011*
>
> *78953/SMG/GS/WE-4/PPO/D(MC)876* *24 Feb 2016*
>
> *M/s B&T Switzerland*
> *PO Box 174, 3604 Thun*
> *Switzerland*
> *Fax : 0041 33 3346701*
> *Local : 46088802*
>
> ***CONTRACT NO. 78953/SMG/GS/WE-4 DATED 27 MAR 2012 FOR PROCUREMENT OF QUANTITY 1568 SUB MACHINE GUN UNDER FTP***
>
> *1. Refer your letter No B&T/1568/2016 dated 19 Feb 2016.*
>
> *2. Subject instructions for WBG encashment have been issued, after due scrutiny and analysis of your justification forwarded vide letter B&T/1568/10-26 dated 24 Oct 2014, with approval of competent authority at MoD.*

3. Thus, you may approach MoD for requisite action/directions please.

(Apratim Sharma)
Lt Col
AMGO (Import 1)
For DDG PPO"

61. The plain reading of the aforesaid letter would indicate that the disputes between the parties had cropped up way back in the year 2014 itself. This is evident by the date 24.10.2014 figuring in the aforesaid letter dated 24.02.2016. The letter indicates that after the disputes arose between the parties, the petitioner tried to offer its explanation and put forward its case *vide* letter dated 24.10.2014. The respondent by letter dated 24.02.2016 clarified or rather informed the petitioner that the justifications put forward by the petitioner *vide* its letter dated 24.10.2014 were duly considered and thereafter, a final decision was taken for encashment of the liquidated damages. Therefore, the petitioner is not justified in saying that it continued to negotiate till 2019. The mere bald assertion in this regard is not sufficient as observed by this Court in ***Geo Miller*** (supra). The entire history of the negotiation between the parties must be specifically pleaded and placed on record. It is only after the entire history of negotiation is pleaded and placed on record that the Court would be in a position to consider such history so as to find out what was the "Breaking Point" at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration.

62. At the cost of repetition, we state that when the bank guarantee came to be encashed in the year 2016 and the requisite amount stood transferred to the Government account that was the end of the matter. This "Breaking Point"

should be treated as the date at which the cause of action arose for the purpose of limitation.

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

64. In ***Panchu Gopal Bose*** **v.** ***Board of Trustees for Port of Calcutta*** reported in (1993) 4 SCC 338, this Court had held that the provisions of the Act 1963 would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party, in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator. The question was when the cause of arbitration arises in the absence of issuance of a notice or omission to issue notice for a long time after the contract was executed? Arbitration implies to charter out timeous commencement of arbitration availing of the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aids promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. It was further held that where the arbitration agreement does not really exist or ceased to exist or where the dispute applies outside the scope of arbitration agreement allowing the claim, after a considerable lapse of time, would be a harassment to the

opposite party. It was accordingly held in that case that since the petitioner slept over his rights for more than 10 years, by his conduct he allowed the arbitration to be barred by limitation and the Court would be justified in relieving the party from arbitration agreement under Sections 5 and 12(2)(*b*) of the Act. [See: ***State of Orissa v. Damodar Das,*** (1996) 2 SCC 216]

65. The observations made by this Court in ***Panchu Gopal*** (supra) in paras 10, 11, 12, 13, 14 and 15 respectively, are also relevant. The observations read as under:

> ***"10.*** *In West Riding of Yorkshire County Council v. Huddersfield Corpn. [(1957) 1 All ER 669] the Queen's Bench Division, Lord Goddard, C.J. (as he then was) held that the Limitation Act applies to arbitrations as it applies to actions in the High Court and the making, after a claim has become statute-barred, of a submission of it to arbitration, does not prevent the statute of limitation being pleaded. Russel on Arbitration, 19th Edn., reiterates the above proposition. At page 4 it was further stated that the parties to an arbitration agreement may provide therein, if they wish, that an arbitration must be commenced within a shorter period than that allowed by statute; but the court then has power to enlarge the time so agreed. The period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned.*
>
> ***11.*** *Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. 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 on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.*
>
> ***12.*** *In Russell on Arbitration, at pages 72 and 73 it is stated thus:*

"Disputes under a contract may also be removed, in effect, from the jurisdiction of the court, by including an arbitration clause in the contract, providing that any arbitration under it must be commenced within a certain time or not at all, and going on to provide that if an arbitration is not so commenced the claim concerned shall be barred. Such provisions are not necessarily found together. Thus the contract may limit the time for arbitration without barring the claim depriving a party who is out of time of his right to claim arbitration but leaving open a right of action in the courts. Or it may make compliance with a time-limit a condition of any claim without limiting the operation of the arbitration clause, leaving a party who is out of time with the right to claim arbitration but so that it is a defence in the arbitration that the claim is out of time and barred. Nor, since the provisions concerned are essentially separate, is there anything to prevent the party relying on the limitation clause waiving his objection to arbitration whilst still relying on the clause as barring the claim."

At page 80 it is stated thus:

"An extension of time is not automatic and it is only granted if 'undue hardship' would otherwise be caused. Not all hardship, however, is 'undue hardship'; it may be proper that hardship caused to a party by his own default should be borne by him, and not transferred to the other party by allowing a claim to be reopened after it has become barred. The mere fact that a claim was barred could not be held to be 'undue hardship'."

13. *The Law of Arbitration by Justice Bachawat in Chapter 37 at p. 549 it is stated that 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 claim accrues, so also 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 action' in the Limitation Act should be construed as arbitration and cause of arbitration. The cause of arbitration, therefore, arises when the claimant becomes entitled to raise the question, i.e. when the claimant acquires the right to require arbitration. The limitation would run from the date when cause of arbitration would have accrued, but for the agreement.*

14. *Arbitration implies to charter out timeous commencement of arbitration availing the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aid the promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. The question, therefore, as posed earlier is whether the court would be justified to permit a contracting party to rescind the contract or the court can revoke the authority to refer the disputes or differences to arbitration. Justice Bachawat in his Law of Arbitration, at p. 552 stated that "in an appropriate case leave should be given to revoke the authority of the arbitrator". It was also stated that an ordinary submission without special stipulation limiting or conditioning the functions of the arbitrator carried with it the implication that the arbitrator should give effect to all legal defences such as that of limitation. Accordingly the arbitrator was entitled and bound to apply the law of limitation. Section 3 of the Limitation Act applied by way of analogy to arbitration proceedings, and like interpretation was given to Section 14 of the Limitation Act. The proceedings before the arbitration are like civil proceedings before the court within the meaning of Section 14 of the Limitation Act. By consent the parties have substituted the arbitrator for a court of law to arbiter their disputes or differences. It is, therefore, open to the parties to plead in the proceedings before him of limitation as a defence.*

15. *In Mustiu and Boyd's Commercial Arbitration (1982 Edn.) under the heading "Hopeless Claim" in Chapter 31 at page 436 it is stated thus:*

> *"There is undoubtedly no jurisdiction to interfere by way of injunction to prevent the respondent from being harassed by a claim which can never lead to valid award for example in cases where claim is brought in respect of the alleged Arbitration agreement which does not really exist or which has ceased to* exist. *So also where the dispute lies outside the scope of arbitration agreement.""* (Emphasis supplied)

66. The case on hand is clearly and undoubtedly, one of a hopelessly barred claim, as the petitioner by its conduct slept over its right for more than five years. Statutory arbitrations stand apart.

67. In view of the aforesaid, this petition fails and is hereby rejected.

68. Pending application(s) if any shall stand disposed of.

.....CJI.
(DR. DHANANJAYA Y. CHANDRACHUD)

.....J.
(J. B. PARDIWALA)

NEW DELHI;
MAY 18, 2023.