



## FINDINGS OF THE COURT

### **Limitation for filing an application under Section 11 of the Act.**

- SC observed that Section 11 of the Act did not prescribe any time period for filing an application under Section 11(6) of the Act. The said vacuum was thus to be filled by resorting to Limitation Act, 1963 (**Limitation Act**) as per Section 43 of the Act.<sup>1</sup>
- However, since none of the Articles in the Schedule to the Limitation Act provided the time period for filing an application under Section 11, the SC noted that Article 137 of the Limitation Act would apply to such applications.<sup>2</sup> Therefore, the applicable period of limitation is 3 years starting from the date of refusal to appoint the arbitrator, or on the expiry of 30 days from receipt of notice requesting appointment, whichever is earlier.
- Nonetheless, taking note of the fact that the Act contained various provisions<sup>3</sup> for expeditious resolution of disputes, the SC opined that the 3 years period as per Article 137 of the Limitation Act was unduly long and defeated the very object of the Act. Thus, the SC concluded that it was necessary for the Parliament to amend Section 11 and prescribe a specific period of limitation for making an application under Section 11 of the Act.

### **Whether under Section 11 of the Act, the court is obligated to appoint an arbitrator even where the claims are *ex facie* time barred.**

- The SC initiated its discussion in this regard by tracing the legislative history of Section 11. Taking note of its decisions post the 2015 Amendments in *Duro Felguera SA v. Gangavaram Port Ltd.*<sup>4</sup> (**Duro Felguera**), *Mayavati Trading Company Private Ltd. v. Pradyut Dev Burman*<sup>5</sup> (**Mayavati Trading**) and *Uttarakhand Purv Sainik Kalyan Nigam v. Northern Coal Field Limited*,<sup>6</sup> the SC observed that the present legislative policy was to minimize judicial intervention at the appointment stage. Contrary to the position prior to the 2015 Amendment, post the 2015 Amendment, all that the court was required to examine was whether an arbitration agreement was in existence. All other preliminary or threshold issues were to be left for the arbitrator to decide under Section 16 as per the *kompetenz-komptenz* principle.
- After delineating its scope of enquiry under Section 11, SC analyzed its powers to entertain issues of limitation at the stage of Section 11 as follows:
  - There exists a distinction between jurisdictional and admissibility issues. Jurisdictional issues pertain to the power and authority of the arbitrators to hear and decide a case.<sup>7</sup> Admissibility issues on the other hand related to the procedural requirements.<sup>8</sup>
  - By placing reliance upon *Swisborough Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho*<sup>9</sup> and the subsequent judgement of *BBA v. BAZ*,<sup>10</sup> the SC held that the “tribunal versus claim” test should be applied for determining whether an issue pertained to admissibility or to jurisdiction. The “tribunal versus claim” test

<sup>1</sup> THE SC FURTHER PLACED RELIANCE UPON PARA 45 OF *CONSOLIDATED ENGINEERING V. PRINCIPAL SECRETARY IRRIGATION*, (2008) 7 SCC 169.

<sup>2</sup> IN THIS REGARD, THE SC PLACED RELIANCE UPON *GEO MILLER & CO. PVT. LTD. V. CHAIRMAN, RAJASTHAN VIDYUT UTPADAN NIGAM LTD.*, (2020) 14 SCC 643; *LEAF BIOTECH V. MUNICIPAL CORPORATION NASHIK*, (2010) 6 MAHLJ 316; *DEEPPHARSHAN BUILDERS PVT. LTD. V. SAROJ*, (2019) 1 AIR BOM R 249; *PRASAR BHARTI V. MAA COMMUNICATIONS*, (2010) 115 DRJ 438 AND *GOLDEN CHARIOT V. MUKESH PANIKA*, 2018 SCC ONLINE DEL 10050, SLP (C) NO. 40627/2018 AGAINST THE SAID DECISION WAS ALSO DISMISSED ON 31.01.2019.

<sup>3</sup> SECTIONS 8, 9(2), 11(13), 13, 16(2), 29A, 34(3) AND 34(6) OF THE ACT.

<sup>4</sup> (2017) 9 SCC 729

<sup>5</sup> (2019) 8 SCC 714

<sup>6</sup> (2020) 2 SCC 455

<sup>7</sup> ISSUES SUCH AS LACK OF CONSENT, DISPUTE BEING OUTSIDE THE SCOPE OF ARBITRATION AGREEMENT, EXISTENCE AND VALIDITY OF ARBITRATION AGREEMENT.

<sup>8</sup> ISSUES SUCH AS SUCH AS BREACH OF THE PRE-ARBITRATION REQUIREMENTS, CLAIMS BEING TIME BARRED OR PROHIBITED UNTIL SOME PRE-CONDITION IS FULFILLED.

<sup>9</sup> (2019) 1 SLR 263

<sup>10</sup> [2020] SGCA 53

asks whether the objection is targeted at the tribunal (i.e. whether the claim should not be arbitrated due to a defect or omission to consent to arbitration), or at the claim (i.e. whether the claim itself is defective).

- According to the SC, limitation is an issue concerning the “admissibility” of the claim and therefore must be decided by the arbitral tribunal either as a preliminary issue or at the final stage.
- In *Vidya Drolia v. Durga Trading Corporation*<sup>11</sup> (**Vidya Drolia**) the SC had held that the Court must undertake a primary first review to weed out “manifestly *ex facie* non-existent and invalid arbitration agreements or non-arbitrable disputes”. The SC clarified that *Vidya Drolia* was merely an affirmation of the position of law expounded in *Duro Felguera* and *Mayavati Trading* and did not resurrect the pre-2015 Amendment position which allowed for a wider scope of enquiry under Section 11 as held in *SBP & Co. v. Patel Engineering*.<sup>12</sup> In view of the above, SC concluded that it was only in rare and exceptional cases, where the claims were *ex facie* time barred and it was manifest that there was no subsisting dispute that the court could refuse to make reference under Section 11 of the Act.
- In the circumstances of the case, SC found that the present claim of Nortel was a case of deadwood since the cause of action clearly arose on August 04, 2014 i.e. when the claims made by Nortel were rejected by BSNL. Nortel had not brought any evidence to demonstrate a cause of action later than August 04, 2014 and hence the Arbitration Notice issued 5.5. years later was *ex-facie* time barred. Accordingly, Impugned Order #1 and Impugned Order #2 were set aside, and the appeal was allowed.

### **ANALYSIS AND CONCLUSION**

- The decision in *Mayavati Trading* had made it quite clear that court scrutiny at the time of appointing arbitrators is limited to examining the existence of an arbitration agreement and that the position prior to the 2015 Amendment has been legislatively over-ruled. However, the recent decision in *Vidya Drolia* seemed to have expanded the scope of scrutiny by terming such exercise as *an intense yet summary prima facie review*. Additionally, in *Vidya Drolia* the court had equated the scrutiny under Section 11 of the Act to the review under Section 8 of the Act, by stating that *existence* of an arbitration agreement was often intertwined with the *validity* thereof. The said observation in *Vidya Drolia* has already been doubted and referred to a larger bench of the SC for adjudication in *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.*<sup>13</sup> Nonetheless, based on *Vidya Drolia*, another judgement in *Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engineering Pvt. Ltd.*<sup>14</sup> has held that the threshold for interference under Section 8 ought to be now read into Section 11(6-A) of the Act.
- While in the present case, the SC has made it clear that interference at the stage of Section 11 shall only be merited in exceptional and rare cases where either the claim is *ex-facie* time barred or it is manifest that there exists no subsisting dispute, there is scope for a recalcitrant respondent to play upon the language in the decisions in *Vidya Drolia* and *Pravin Electricals*. A well-defined and summary clarification is now the need of the hour from the larger bench.
- It must also be mentioned that the SC has rightly pointed out that the 3 years period as stipulated in Article 137 of the Limitation Act for making an application under Section 11 of the Act, is against the very objectives of the Act. It cannot be denied that such an extended period of limitation is routinely taken undue advantage of by recalcitrant respondents. An amendment to the Act which shortens the period of limitation for Section 11 would indeed be beneficial for the Indian arbitration regime.

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<sup>11</sup> (2021) 2 SCC 1

<sup>12</sup> (2005) 8 SCC 618

<sup>13</sup> 2021 SCC ONLINE SC 13

<sup>14</sup> 2021 SCC ONLINE SC 190