IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ARB-127-2019

M/s The Assan Co-op L & C Society, Bahadurgarh, District Jhajjar

... Petitioner

Versus

Haryana Vidyut Prasaran Nigam Ltd. (HVPNL)

... Respondent

(2)

CWP-13539-2021

M/s The Assan Co-op L & C Society, Bahadurgarh, District Jhajjar

... Petitioner

Versus

Haryana Vidyut Prasaran Nigam Ltd. (HVPNL)

... Respondent

Reserved on: 01.10.2021
Pronounced on: 03.11.2021

CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA

Present: Mr. Vaibhav Gupta, Advocate for the petitioner.

Mr. Prateek Mahajan, Advocate for the respondent.

G.S. Sandhawalia, J.

The present order shall dispose of ARB-127-2019 and CWP-13539-2021, since common question of law and facts are involved.

2. In ARB-127-2019 the petitioner seeks appointment of an Arbitrator under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') on the ground that Clause-25A of the contract (Annexure P-1) having been executed between the parties provides for the same. The contract was for special repair and maintenance of colony and roads at 132 KV S/Station HVPNL, Fazilpur, Sonipat entered on 01.09.2016

and as per the terms and conditions mentioned in the contract alongwith terms and conditions mentioned in the allotment letter dated 01.09.2016 (Annexure P-2).

3. The same has been opposed by the Nigam on the ground of limitation that mainly the claim was made on 12.11.2018 (Annexure P-4) beyond the period of six months prescribed in the contract. Clause 25A (4) was also relied upon that no other person than the one appointed by MD/Chief Engineer shall act as an arbitrator and the matter shall not be liable to be referred to arbitration, if for any reason it was not possible to appoint such an arbitrator and the parties are free to avail the civil remedy.

4. In CWP-13539-2021 challenge has been raised to the Clause 25A (7) on the ground that it arbitrary and against the object of the 1996 Act and liable to be quashed, since it provided a clause for furnishing pre-deposit security fee @ 3% of the total amount claimed. The same was to be adjusted against the cost or any amount awarded against the contractor and remaining amount was to be refunded to the contractor within one month from the date of the award.

5. Counsel for the contractor/petitioner, Mr. Gupta has relied upon the judgment passed in **'M/s ICOMM Tele Ltd. Vs. Punjab State Water Supply & Sewerage Board and another', 2019 (4) SCC 401,** to submit that in similar circumstances Clause 25 (vii) had been struck down by the Apex Court while setting aside the judgment of this Court, which had dismissed the writ petition by holding that the tender condition

cannot be said to be arbitrary. Accordingly, it was held that pre-deposit of 10% would discourage arbitration and would be contrary to the object of de-clogging the Court system. Reliance has also been placed upon the judgment passed in **'M/s Geo Miller & Co. Pvt. Ltd. Vs. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.', 2019 AIR (SC) 4244,** to submit that it was held that there was three year limitation period and therefore, the claim was well within the prescribed period. Reliance is placed upon **'Sunil Goyal Vs. Haryana State Agriculture Marketing Board and others' 2011 (3) RCR (Civil) 36** wherein it was held that agreements in restraint of legal proceedings were void under Section 28 of the Contract Act.

6. Mr. Mahajan, on the other hand has vehemently relied upon the judgment passed in **'Newton Engineering and Chemicals Ltd. Vs. Indian Oil Corporation Limited and others', 2013 (4) SCC 44** to submit that it was open to the petitioner to approach the Civil Court for redressal of its grievances in accordance with law. He relied upon the judgment passed in **'TRF Limited Vs. Energo Engineering Projects Limited', 2017 (8) SCC 377** to submit that no arbitrator was liable to be appointed if the Corporation felt it was not possible to appoint an arbitrator. It is, accordingly, submitted that in the absence of depositing pre-deposit amount of 3%, the claim for arbitration is not justifiable as per agreement inter se the parties in the form of Clause 25A (7) and he sought to distinguish the judgment passed in **M/s ICOMM Tele Ltd. (supra).** Reliance was placed upon the judgment passed by the Three

Judges Bench of the Apex Court in **'S.K. Jain Vs. State of Haryana and another' 2009 (2) SCC (Civil) 163,** wherein the dismissal of the writ petition by this Court upholding the clause of pre-deposit amount, was upheld. It is, thus, submitted that the Larger Bench judgment should prevail while distinguishing the subsequent judgment passed in **M/s ICOMM Tele Ltd. (supra).** It is submitted that in **M/s ICOMM Tele Ltd. (supra),** the contractor continued to loose money and that was as per the said clause and that is why the earlier judgment had been distinguished by the subsequent judgment.

7. The pleadings in the arbitration case would go on to show that the contractor had stated that he had successfully completed the contract work within 5½ months which was to be reckoned after 15 days of issuing the letter of allotment. The arbitration clause had been invoked on 05.09.2018 (Annexure P-3) by filing it before the Executive Engineer and then before the Chief Engineer of the Corporation on 12.11.2018 (Annexure P-4). The said claim was rejected on 17.01.2019 (Annexure P-5) on the ground that the scheduled date of completion was 16.02.2017, but work was completed on 17.03.2017 and, therefore, penalty of 2% of Rs.3,31,987/- was deducted from the final bill. It was further mentioned that the claim was made after a gap of 1½ years and no representation had been made to the SE (Civil) and fall back had been made on Clause 25A (10) on the ground that the same had to be made within six months. Another request was made on 18.02.2019 (Annexure P-6), wherein the plea taken was that the final bill was still unpaid and the prayer for

appointment of an arbitrator was made, which was rejected vide letter dated 08.04.2019 (Annexure P-7) leading to the filing of the arbitration petition on 24.04.2019.

8. The plea taken in the written statement was that the petitioner was required to complete the work by 16.02.2017 but he had completed the same on 02.03.2017 and, there was a delay of two weeks from the scheduled date of completion of work. The last payment was made on 28.02.2017 and the final bill was prepared on 24.03.2017, which was negative on account of penalty imposed @ 2% per week because of delay in the completion of work. The request for appointment of arbitrator had been made on 12.11.2018 beyond the period of six months as prescribed in the agreement and dismissal of the petition was sought. Apart from that the plea taken was that security fees had to be deposited @ 3% of the total amount and no such security had been furnished by invoking the arbitration clause, which is the violation of the clause itself. It was also alleged that the petitioner had filed a representation with the Executive Engineer on 05.09.2018 and to the Chief Engineer on 12.11.2018 much before the expiry of the prescribed period of 90 days when Executive Engineer was making efforts to settle the dispute and, therefore, the petitioner has violated the provisions of arbitration clause. Resultantly, fall back on Clause 25A (4) was made that the matter was not liable to be referred to arbitration and it was open for the parties to avail the civil remedy.

9. In the CWP-13539-2021 Clause 25A (7) is subject matter of

challenge.

Clause 25A of the Contract (Annexure P-1) reads as under:-

> "If any question, dispute, difference of opinions whatsoever arises in any way connected with or arising out of instrument for meaning or operation of any part thereof or the rights, duties or liabilities of either party, including the termination of the contract by either party and correctness thereof at any stage whatsoever it shall be referred to arbitration of MD/Chief Engineer of HVPNL or his nominee not below the rank of Superintending Engineer subject to the following conditions:-
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> 1. That in the first instance, before referring the matter to arbitration, it shall be referred by the contractor to be settled by the Engineer-In-Charge of the work at time of such reference in writing. The Engineer-in-charge shall convey his decision or that of the competent authority in writing to contractor with in a period of 90 days from such a request in writing by the contractor. The decision given by the Engineer-In-charge or competent authority shall be final and binding upon the contractor except where he moves the Engineer-in-charge in writing for reference or such a claim or dispute to arbitration with in a period of 60 days of his receipt of decision of the Engineer-in-charge or of the competent authority in writing. Incase the contractor fails to make such a written request with in the stipulated period, the decision so conveyed to him by the Engineer-in-charge will be final and will not be a subject matter of arbitration at all. In case the Engineer-in-charge fails to convey his decision or that of the competent authority in writing with in a period of ninety days as referred to above, the contractor may make a request to the MD/ Chief Engineer of HVPNL with in 60 days of expiry of the said 90 days to refer the matter to arbitration and the same shall be referred to arbitration in the manner provided herein after. The work under the contract shall not be stopped and shall continue during the

arbitration proceedings.

2. The reference of dispute or difference referred to above for arbitration to an officer not below the rank of a Superintending Engineer of HVPNL shall be by designation. It will not be a valid objection to any such reference to the arbitration that the arbitrator so appointed is a servant of HVPNL, or he had to deal with the matter to which the contract relates or that the said arbitrator has expressed his views on all or any of the matters in dispute.

3. That in case the Arbitrator appointed initially is transferred or dies his successor in office shall be deemed to be an Arbitrator as if he had been appointed initially by the MD/ Chief Engineer of HVPNL. In case the Arbitrator is unwilling to act as an Arbitrator for any reason what so ever the MD/CE shall be competent to appoint or nominate any other officer not below the rank of Superintending Engineer as the Arbitrator. The Arbitrator so appointed shall be competent to proceed with the reference as if he had been appointed as the Arbitrator initially.

4. That no person other than the one appointed by MD/ Chief Engineer of HVPNL shall act as on Arbitrator and, if for any reason it is not possible to appoint such an Arbitrator, the matter shall not be referable to arbitration and the parties shall be at liberty to avail of civil remedy.

5. The Arbitrator shall give a reasoned and speaking award in case the total amount allowed to either party against the other in the award whether originally or as a counter-claim exceeds Rs.25000/- and in case the claim is below a total sum of Rs.25,000/- it shall be up to the Arbitrator to give a reasoned award or not. The Arbitrator shall give his award against each claim separately made by either party.

6. That the Arbitrator shall award the claims and counter claim put forward by both the parties and not withstanding that any particular party has got the Arbitrator appointed. This shall be

subject to the provisions of this arbitration clause as a whole.

7. In case the party invoking the arbitration is the contractor, the reference for arbitration shall be maintainable only after the contractor furnishes to the satisfaction of Engineering-In-Charge a case security fee deposited @ 3% of the total amount claimed by him. The sum so deposited by the contractor shall on the termination of the arbitration proceedings be adjusted against the cost and any amount awarded against the contractor. The remaining amount shall be refunded to the contractor with-in one month from the date of the award.

8. That the stamp fee due on the award shall be payable by the party at the discretion of the Arbitrator and in the event of such party failing to pay the stamp fee, it shall be recoverable from any sum due to such party under this contract or other contract.

9. The venue of the arbitration shall be such place or places as may be fixed by the Arbitrator from time to time at his sole discretion.

10. Neither party shall be entitled to bring a claim for arbitration if no move in writing has been made for that purpose to the MD/Chief Engineer of HVPNL with-in 6 months:-

a) Of the date of completion of work as certified by the Engineer in charge or

b) Of the date of abandonment of work or

c) Of its non-commencement with in 6 months from the date of abandonment, or written order by the Engineer in charge or his representative to commence the works as applicable or

d) Of the completion of work through any alternative agency or means after withdrawal of work from the contractor as a whole or in part and or its recession, or

e) Of receiving any intimation from the Engineer-in-charge that final payment due to or recovery form the contractor has been determined.

> Which ever of (a) to (e) above is the latest in the matter of time. And if the matter is not referred to arbitration with in period prescribed above, all the rights and claims of the parties against each, under the contract shall; be deemed to have been forfeited absolutely and barred by time.
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> 11. That the pendency of arbitration proceeding shall not disentitle the Nigam or the competent Authority to terminate the contract and make alternate arrangement for completion of work. This shall be subject to the liabilities of the parties toward each other under this contract.
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> 12. The Arbitrator shall be deemed to have entered the reference on the day fixed by the Arbitrator for the appearance of the parties for the first time. The time for making and publishing the award by the Arbitrator may be extended from time to time with the mutual written consent of the party.
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> 13. Subject to the stipulation made in this clause the arbitration proceeding shall be conducted in accordance with the provision of the arbitration act, 1940.
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> Competent Authority means whole Time Director/Chief Engineer/Superintending Engineer/Engineer- In- Charge according to financial implication involved and the competency under delegation of powers Engineer-In-Charge means the Executive Engineer under whom the work is to be executed."

10. A perusal of the same would go on to show that the matter is to be referred to the arbitration of the Managing Director/Chief Engineer of the Nigam or his nominee who is not to be below the rank of Superintending Engineer, which was subject to various conditions. As per sub-clause (1) firstly the matter was to be settled by the Engineer-In-Charge and he was required to convey his decision within a period 90 days. The decision given as such was to be final and had to be challenged

within a period of 60 days. In case, the Engineer-In-Charge failed to convey his decision within 90 days, the contractor could make a request to the MD/Chief Engineer of the Nigam within the expiry of 90 days to refer the matter to arbitration. As per sub-clause (2) reference could not be made to an officer below the rank of a Superintending Engineer and by designation and further power to nominate any other officer in case the arbitrator appointed is unwilling to act as an arbitrator, as per sub-clause (3). Sub-clause (4) provides that no other person appointed by the MD/Chief Engineer shall act an as arbitrator and had also the clause that if for any reason it is not possible to appoint such an arbitrator, the matter was not to be referred to arbitration, but the parties would be at liberty to avail the civil remedy. Sub-clause (7) provides the furnishing of the security fee @ 3% of the total amount claimed by contractor and the sum so deposited by the contractor was to be adjusted against the costs and any amount awarded against the contractor on the termination of the arbitration proceedings. The remaining amount was to be refunded to the contractor. Sub-clause (10) provided the limitation period to the extent that neither party shall be entitled to make a claim for arbitration if no move in writing has been made within six months, on the completion of work, date of abandonment of work or non-commencement of work or the completion of work through the alternative agency or receiving any intimation from the Engineer-In-Charge or recovery from the contractor is determined. Strangely sub-clause (13) refers to Arbitration Act, 1940, even though the allotment is of the year 2016.

11. The authority as such of the Managing Director to act an arbitrator or his nominee has been diluted in totality by the Apex Court in a string of judgments. Reliance can be placed upon the judgment passed in **'M/s Voestalpine Schienen Gmbh Vs. Delhi Metro Rail Corporation Ltd.', 2017 AIR (SC) 939.** The dispute as such in the said case was with the Delhi Metro Rail Corporation Ltd., which had awarded the contract for supply of rails to an Austria based company having its branch office in Gurgaon. While the clause of arbitration as such provided that the Corporation had to furnish names of 5 persons to the petitioners to nominate the arbitrator which was not acceptable by the foreign company on the ground that they would not qualify as independent arbitrators as they consisted of engineers of the respondent or of Government Department or Public Sector Undertakings. The company as such had nominated a retired Judge of the Apex Court as a sole arbitrator and requested the respondents for its consent which was not agreed. The Corporation had forwarded the name of its nominee arbitrator and asked the company to appoint its nominee from the panel of four persons, which led to the filing of the petition before the Apex Court. While examining the provisions of Section 12 of the Act, the 7th Schedule and adjudicating the issues of neutrality of arbitrators, it was held that independence and impartiality of the arbitrator are the hallmarks of the arbitration proceedings. It was held that though the panel of arbitrators drawn by the Corporation were Government employee, they cannot be treated as employee or consultants or advisors of the

Corporation and had worked in the Railways or Central Government or Central Public Works Department or Public Sector Undertakings. It was also held that the reason for empaneling these persons was to ensure the technical aspects of the dispute are suitably resolved by utilising their expertise to act as an arbitrator. Resultantly, it was noticed that a list of 31 persons had been given by the Corporation giving a very wide choice to nominate its arbitrators.

12. In **TRF Limited (supra)** the dispute was qua purchase order inter se the parties and the encashment of the bank guarantee. The High Court had upheld the appointment of the sole arbitrator which had been done by the Managing Director, who was a Former Judge of the Supreme Court. The challenge as such that the Managing Director could not nominate had been rejected. While referring to the provisions of Section 12, 6th Schedule and 7th Schedule and referring to various judgments, the Apex Court reversed the order of the High Court. Relevant portion of the said judgment reads as under:-

> "57. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of

> the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

13. In **'Bharat Broadband Network Limited Vs. United Telecoms Limited', 2019 (5) SCC 755,** dispute had arisen with the appellant, who had nominated the sole arbitrator. Keeping in view the judgment passed in **TRF Limited (supra)**, the appellant itself challenged the appointment by filing an application before the arbitration for withdrawal, which was rejected. The petition filed before the High Court of Delhi was rejected on the ground that the person who had appointed the arbitrator was estopped from raising the plea. The matter was taken to the Apex Court, which had allowed the appeal and set aside the judgment of the High Court and held that arbitrator was unable to perform his function as an arbitrator and left it open for the High Court to appoint a substitute arbitrator with the consent of both the parties.

14. The said view has thereafter been followed in **'Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd.', 2020 AIR (SC) 59,** wherein the dispute was regarding a design consultant of New York with the respondent and designing of All India Institute of Medical Sciences at Guntur, Andhra Pradesh. The arbitrator was to be

appointed by CMD of the respondent, which was challenged on the ground that Chairman and Managing Director would be interested in the outcome of the decision. Therefore, he could not nominate any person to act as an arbitrator, once the identity of the Managing Director was lost. Resultantly, the appointment was set aside and an independent arbitrator namely Justice A.K. Sikri (retired) was appointed to decide the disputes. Relevant portion of the said judgment reads as under:-

> "15. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant Clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to act as an arbitrator. The Managing Director thus had two capacities under said Clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.
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> We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and

arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.

16. But, in our view that has to be the logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the

> course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited."

15. Thus, it would be clear that the jurisdiction as such with the respondent-Nigam to appoint an nominated arbitrator has been taken away, in view of the said judgments and, therefore, the petitioner is well justified to approach this Court for the said purpose.

16. The issue now arises as to whether the claim would be held to be barred by limitation and whether the clause providing for pre-deposit is liable to be sustained or not.

17. The argument raised by Mr. Mahajan that limitation would stand in the way of this Court to appoint an arbitrator as the claim is belated, is without any basis. It is not disputed that the work was completed on 17.03.2017 though beyond the scheduled date of completion i.e. 16.02.2017. Resultantly, penalty of 2% was put and deduction was made of Rs.3,31,987/- from the final bill. The petitioner had filed the application on 05.09.2018 to the Executive Engineer and on account of non-decision of the claim of the petitioner, an application had then been moved to the Chief Engineer on 12.11.2018 (Annexure P-4).

18. A perusal of the same would go on to show that the matter was not settled by the said officers and the same was liable to be referred for arbitration for redressal of the grievances. In the subsequent

communication the petitioner had also in para no.4 agreed that security amount of 3% which was to be deposited as per terms and conditions of the agreement would be deposited prior to the Learned Arbitrator entering into reference. Thus, it cannot be said that there was any inordinate delay on the part of the contractor as the claim was made after a gap of 1½ years.

19. In the case of **Sunil Goyal (supra)** this Court was seized with a issue whereby request for appointment of an arbitrator had been rejected on the ground that the application was filed beyond the period of 180 days from the date of making the final bill. While placing reliance upon the amended provisions of Section 28 of the Contract Act, 1872, it was held that adjudication of disputes arising out of a contract cannot be restricted by an agreement, which would not substitute the limitation in place of the period laid in the general law of limitation and same would be void to that extent. Resultantly, the petition for appointment of an arbitration was allowed.

20. Reliance can also be placed upon the judgment passed in **M/s Geo Miller & Co. Pvt. Ltd. (supra)** wherein a Three Judges Bench of the Apex Court has held that the breaking point has to be found out between the parties to determine the cause of action for the purposes of limitation and that Article 137 of the first schedule of the Limitation Act, 1963 would be applicable which provides 3 years limitation from the date of which the cause of action arises or when the claim is sought to be arbitrated first. It was held that an unreasonable long period for referring

the dispute to arbitration merely on account of the respondent's failure to settle the claim could not be a defence. Resultantly, in the said case since the delay was of 14 years, it was held that claim was time barred while upholding the order of the High Court. Relevant portion of the said judgment reads as under:-

> "Section 43(1) and (3) of the 1996 Act is in *pari materia* with Section 37(1) and (4) of the 1940 Act. It is well-settled that by virtue of Article 137 of the First Schedule to the Limitation Act, 1963 the limitation period for reference of a dispute to arbitration or for seeking appointment of an arbitrator before a Court under the 1940 Act **(See State of Orissa and Another v. Damodar Das, (1996) 2 SCC 216)** as well as the 1996 Act **(See Grasim Industries Limited v. State of Kerala, (2018) 14 SCC 265)** is three years from the date on which the cause of action or the claim which is sought to be arbitrated first arises.
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> In Damodar Das (supra), this Court observed, relying upon Russell on Arbitration by Anthony Walton (19th Edn.) at pages 45 and an earlier decision of a twoJudge bench in **Panchu Gopal Bose v. Board of Trustees for Port of Calcutta, (1993) 4 SCC 338**, that the period of limitation for an application for appointment of arbitrator under Sections 8 and 20 of the 1940 Act commences on the date on which the "cause of arbitration" accrued, i.e. 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.
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> 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.
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> 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 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."

21. The said judgment has been noticed in **'Bharat Sanchar Nigam Ltd. and another Vs. M/s Nortel Networks India Pvt. Ltd.', 2021 (2) RCR (Civil) 337** and the Apex Court rather recommended that this period of limitation should be reduced by the legislature and the limitation would run from the date of failure to appoint the arbitrator. The appointment which had been made by the High Court after invoking

the clause of arbitration after 5 years was set aside on the ground that there was an inordinate delay. Relevant portion of the said judgment reads as under:-

> "17. Given the vacuum in the law to provide a period of limitation under Section 11 of the Arbitration and Conciliation 1996, the Courts have taken recourse to the position that the limitation period would be governed by Article 137, which provides a period of 3 years from the date when the right to apply accrues. However, this is an unduly long period for filing an application u/S. 11, since it would defeat the very object of the Act, which provides for expeditious resolution of commercial disputes within a time bound period. The 1996 Act has been amended twice over in 2015 and 2019, 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.
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> It would be necessary for Parliament to effect an amendment to Section 11, prescribing a specific period of limitation within which a party may move the court for making an application for appointment of the arbitration under Section 11 of the 1996 Act."

22. It is to be noticed that in the present case the rejection to appoint an arbitrator was only on 08.04.2019 (Annexure P-7) on the ground of limitation and the present petition was filed on 24.04.2019 and therefore, there is no such inordinate delay and the objection raised by the respondent is without any basis, keeping in view the above discussion.

23. Resultantly, the issue of pre-deposit now arises. Counsel for

the petitioner has heavily relied upon the judgment passed in **M/s ICOMM Tele Ltd. (supra),** which has been rightly distinguished by the learned counsel for the respondent. The issue of pre-deposit was subject matter of consideration before two Division Benches. Firstly in the case of **'National Building Construction Corporation Ltd. and another Vs. State of Haryana and another' 2007 (2) PLR 708,** challenge had been raised to the clause of deposit of the 10% of the amount claimed as per Clause 25 (viii) of the contract before arbitration proceedings could be invoked. The same was rejected on the ground that it was a laudable object that no one can file frivolous claims before the arbitrator and there is no irrationality in imposing the said condition. Even otherwise the clause was found not unreasonable or unconscionable and there being no unequal bargaining power of the party to the contract.

24. Thereafter, in **'S.K. Jain Vs. State of Haryana and another', 2008 AIR (Punjab) 30** the challenge was to the clause of 7% of the total amount claimed. While placing reliance upon the judgment of the Apex Court in **'Municipal Corporation, Jabalpur & others Vs. M/s Rajesh Construction Co.', 2007 (5) SCC 344,** the writ petition was dismissed. The said judgment was upheld by the Apex Court in **'S.K. Jain Vs. State of Haryana and another' 2009 (2) SCC (Civil) 163** by holding that there is logic in providing the said cap. Relevant portion of the said judgment reads as under:-

> "12. It has been submitted by learned counsel for the appellant that there should be a cap in the quantum payable in

> terms of sub-clause (7) of Clause 25-A. This plea is clearly without substance. It is to be noted that it is structured on the basis of the quantum involved. Higher the claim, the higher is the amount of fee chargeable. There is a logic in it. It is the balancing factor to prevent frivolous and inflated claims. If the appellants' plea is accepted that there should be a cap in the figure, a claimant who is making higher claim stands on a better pedestal than one who makes a claim of a lesser amount."

25. In **M/s ICOMM Tele Ltd. (supra)** the objectionable clause 25 (viii) was struck down which was for 10% deposit. In the event of an award in favour of the claimant, the deposit was to be refunded to him in proportion to the amount awarded with regard to the amount claimed and the balance if any was to be forfeited and paid to the other party. Resultantly, the Apex Court came to the conclusion that nine times of the deposit could be forfeited by the parties who lost in the arbitration proceedings and despite the fact that the party has an award against it. Thus, the clause was held to be wholly arbitrary. Relevant portion of the said judgment reads as under:-

> "23. The important principle established by this case is that unless it is first found that the litigation that has been embarked upon is frivolous, exemplary costs or punitive damages do not follow. Clearly, therefore, a "deposit-at-call" of 10% of the amount claimed, which can amount to large sums of money, is obviously without any direct nexus to the filing of frivolous claims, as it applies to all claims (frivolous or otherwise) made at the very threshold. A 10% deposit has to be made before any determination that a claim made by the party invoking arbitration is frivolous. This is also one important

> aspect of the matter to be kept in mind in deciding that such a clause would be arbitrary in the sense of being something which would be unfair and unjust and which no reasonable man would agree to. Indeed, a claim may be dismissed but need not be frivolous, as is obvious from the fact that where three arbitrators are appointed, there have been known to be majority and minority awards, making it clear that there may be two possible or even plausible views which would indicate that the claim is dismissed or allowed on merits and not because it is frivolous. Further, even where a claim is found to be justified and correct, the amount that is deposited need not be refunded to the successful claimant. Take for example a claim based on a termination of a contract being illegal and consequent damages thereto. If the claim succeeds and the termination is set aside as being illegal and a damages claim of one crore is finally granted by the learned arbitrator at only ten lakhs, only one tenth of the deposit made will be liable to be returned to the successful party. The party who has lost in the arbitration proceedings will be entitled to forfeit nine tenths of the deposit made despite the fact that the aforesaid party has an award against it. This would render the entire clause wholly arbitrary, being not only excessive or disproportionate but leading to the wholly unjust result of a party who has lost an arbitration being entitled to forfeit such part of the deposit as falls proportionately short of the amount awarded as compared to what is claimed.

26. It was on such account the observations were made that the pre-deposit would discourage arbitration and the said clause as such was struck down by the distinguishing the judgment passed in **S.K. Jain (supra).** Even otherwise it is settled principle that this Court is bound by the view of the Larger Bench of the Apex Court which is S.K. Jain's case which is a Three Judges Bench and, therefore, the claim as such for

striking down of 3% deposit clause would not arise. It is to be noticed that the petitioner himself had at the initial stage while applying to the Chief Engineer on 12.11.2018 had agreed that the 3% of the claimed amount would be deposited prior to the learned Arbitrator entering into reference. Even otherwise in the case of **Municipal Corporation, Jabalpur (supra)**, the Apex Court had held that the appointment of the arbitrator by the High Court would not be tenable because the contractor had not furnished the security as envisaged. Therefore, the Arbitration Board had not been constituted by the Corporation and neither the arbitrator could be appointed by the High Court. Resultantly, it was directed that the Corporation shall constitute an Arbitration Board on furnishing of the security of the sum to be determined by the Corporation and the Arbitration Board would proceed from the stage the earlier arbitrator was appointed by the High Court. It was held that the arbitrator could not be appointed inconsistently with the arbitration agreement. Resultantly, the interest of the respondent-Nigam can be protected to the extent that the arbitrator shall only enter into reference provided the requisite security is furnished to the tune of 3% of the amount claimed.

27. Accordingly, CWP-13539-2021 is dismissed wherein relief of quashing the Clause 25A (7) has been sought.

28. Keeping in view the above discussion, ARB-127-2019 is allowed and Chief Justice A.K. Mittal (retd.) resident of #26 Sector-4, Chandigarh, Mobile No.9780008112, is appointed as an Arbitrator. The learned Arbitrator is requested to enter into reference only on furnishing

of proof of the 3% deposit in terms of the condition imposed by the respondent-Nigam. The arbitrator shall file the requisite declaration under Section 12 of the Act read with the fifth and sixth schedule in order to disclose his independence and impartiality to settle the dispute between the parties. The Arbitrator is also requested to complete the proceedings within the time specified under Section 29A of the Act. The fees of the Arbitrator shall be paid in accordance with the provisions of the Act and the Rules.

29. Copy of the order be forwarded to the said Arbitrator at the given address and to counsel for the parties also. After seeking the consent of the Arbitrator, the parties are directed to appear before the Arbitrator on 29.11.2021 at 10.00 a.m.

(G.S. SANDHAWALIA)
JUDGE

November 03, 2021
Naveen

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No