

TWO LIMITATIONS HAVE TO BE SEEN BY COURTS WHILE APPOINTING AN ARBITRATOR

In a recent Judgment dated 1st of March 2024, in the matter of Arif Azim Co¹, the Supreme Court of India while dealing with an Application under S.11(6) of the Act, seeking to appoint an arbitrator in a matter of International Adhoc arbitration held that the appointing Court has to consider two limitation periods one starting from the date of cause of action till the date of commencement of the arbitration and the 2nd is to be calculated from the date of commencement of Arbitration till the filing of the Section.11 application. The purpose of the said two limitations is to check if the arbitration commenced within 3 years from the date of cause of action and also find if the application seeking arbitrator was filed within 37 months from the date of commencement of Arbitration. The Court held that there can be two types of objections that can be raised at the stage of 11 (6) of the act, “jurisdictional issues/ objections” and the 2nd objection can be issues like limitation which can be classified as “admissibility issues”. It was further held that although, limitation is an admissibility issue, yet it is the duty of the Courts to prima-facie examine and reject the non- arbitrable or dead claims, so as to protect the other party from being drawn into a time consuming and costly [arbitration process](#).

The Bench also referred to various cases including Vidya Drolia² to explain the scope of the preliminary examination of limitation at the time of appointment of the arbitrator and held *“limitation law is procedural and normally disputes being factual, would be for the Arbitrator to decide guided by the facts found and law applicable. The Court at the referral stage can interfere only when it is manifest that the claims are exfacie time barred and dead or there is no subsisting dispute. All other cases should be referred to the Arbitral tribunal for decision on merits”*.

¹ Arif Azim Co Limited Vs Aptech Limited (2024) SCC Online SC 15

² Vidya Drolia Vs Durga Trading Corporation, (2021) 2SCC 1

The Bench also referred to Geo Miller³, where the cause of action for bringing claim arose in 1983, this Court refused to appoint an arbitrator as the application seeking appointment of arbitrator was filed much later in 2003, that is after a delay of almost twenty years. In the said matter the final bill was handed over and the payment became due on 10.08.1992 and the appellant served notice for appointment of arbitrator in 2002 and requested for appointment of arbitrator only by the end of 2003, it was held that the claim was barred by Limitation. Moreover it was also held that 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 seeking appointment of Arbitrator before a court under the 1940 as well as 1996 Act is three years from the date on which the cause of action or the claim which is sought to be arbitrated first arises.

The Court also referred to BSNL case⁴, where the notice invoking arbitration was issued after 5 years and six months after the rejection of the claims on 04.08.2014 and hence the notice invoking arbitration was ex facie time barred and hence the matter was not referred to arbitration. The Court also held that unless, there is a pleading and proof specifically adverted to applicable Section and how it extends the limitation from the date on which the cause of action originally arose and how it got extended. It was also held that the period of arbitration for issuing notice of arbitration would not get extended by mere exchange of letters between the parties. The Court also referred to S.S. Rathore⁵, Union of India⁶ & CLP India⁷ cases which held that mere settlement discussions do not extend the limitation when cause of action already arose. For Example: where a final bill is rejected by making deductions or otherwise.

The Court further reconfirmed that there is no doubt as to the applicability of Limitation Act, 1963 to arbitration proceedings in general and that of Article 137

³ Geo Miller Vs Chairman, Rajasthan Vidyut Board (2020) 14 SCC 643

⁴ BSNL Vs Nortel Networks India Private limited (2021) 5 SCC 738

⁵ S.S. Rathore Vs State of MP (1989) 4 SCC 582

⁶ Union of India Vs Har Dayal (2010) 1 SCC 394

⁷ CLP India Limited Vs Gujarat Urja Vikas Nigam Limited (2020) 5 SCC 185

of the Limitation Act, 1963 to a petition under Section 11(6) of the Act, 1996 in particular. It also held that under Section 21 of the Act, issuance of the request/notice to the Respondent with claims and seeking to go for arbitration is mandatory to establish the commencement of arbitration. In Milkfood⁸ it was held that for the purpose of the Limitation Act, an Arbitration is deemed to have commenced when one party to arbitration agreement serves on the other a notice requiring the appointment of an arbitrator. In Secundrabad Contonment Board case the Supreme Court of India held that Article 137 of the Limitation Act shall apply to Section 11 proceedings and the cause of action arises immediately on the 31st day from the date of receipt of the arbitration notice and hence from that 31st day within 36 months the application under Section.11 should have been filed. Hence the Court has held that the Court appointing Arbitrator should prima facie look into both the above said two types of limitations and if the matter is hopelessly time barred in any of the two aspects, the Court can reject the application under Section.11 of the Act.

⁸ Milk food Ltd Vs GMC Ice Cream (2004) 7 SCC 288