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Supreme Court lays down two-pronged test for considering issue of limitation for appointment of arbitrators; suggests Parliament should amend 'unduly long period' available for seeking arbitrators' appointment

In the recent decision of ***Arif Azim Co. Ltd. v. Aptech Ltd.***[1] , the Hon'ble Supreme Court of India ("**Supreme Court**") held that while considering the issue of limitation at the stage of appointment of arbitrators, courts should satisfy themselves on *first*, whether the petition seeking arbitrators' appointment is barred by limitation, and *second*, whether the claims sought to be arbitrated are *ex facie* dead and barred by limitation. The Supreme Court held that courts may refuse to appoint an arbitrator if either of these questions are answered against the party seeking appointment.

In the facts of the case, the Supreme Court concluded that both, the Petitioner's claims and its petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), were not barred by limitation. However, the Supreme Court observed that the period of 3 (three) years available for seeking appointment of an arbitrator is an unduly long period, which goes against the spirit of the Arbitration Act. Accordingly, the Supreme Court suggested that the Parliament should consider amending the Arbitration Act to prescribe a specific period of limitation for approaching courts for appointment of arbitrators.

Brief Facts

The parties' relationship: On March 21, 2013, the petitioner and the respondent executed various franchise agreements, whereby the Petitioner was granted a non-exclusive license to set up a training centre in Kabul, Afghanistan for imparting training in relation to content and courses developed by the Respondent.

Additional work: Later, in 2016, the Indian Council for Cultural Relations, Delhi ("**ICCR**") selected the respondent for providing a short-term english training course to Afghans who had been selected for admission in Indian universities. This course was also implemented and provided by the petitioner in Kabul in 2017.

The 'breaking point': Thereafter, disputes arose between the parties. On March 20, 2018, the Respondent called upon the Petitioner to pay amounts outstanding on account of royalties under the franchise agreements. In its response dated March 23, 2018, the petitioner called upon the respondent to make payments for the additional course provided by the petitioner at the respondent's behest in 2017. On March 28, 2018, the respondent stated that the reason for the payments being delayed was that it had not received the corresponding payments from the ICCR, and once again called upon the petitioner to make the royalty payments under the franchise agreements.

[1] 2024 SCC OnLine SC 215

Legal notice: Ultimately, the petitioner issued a legal notice on August 26, 2021, calling upon the respondent to pay dues for the additional ICCR course provided by the petitioner.

Notice invoking arbitration: The parties participated in a round of mediation proceedings, which failed in 2022. After the failure of mediation, the Petitioner invoked arbitration through notice dated November 24, 2022. In this notice, the petitioner called upon the respondent to pay its outstanding dues and appointed its nominee arbitrator. Since the respondent failed to appoint its own nominee arbitrator, the Petitioner filed a petition under Section 11(6) of the Arbitration Act on April 19, 2023, before the Supreme Court.

Issues

After hearing the parties, the Supreme Court framed 2 (two) issues for consideration:

1. Whether the Limitation Act, 1963 ("**Limitation Act**") is applicable to a petition under Section 11(6) of the Arbitration Act. If yes, whether the present petition was barred by limitation.
2. Whether the court may refuse to make a reference under Section 11 of the Arbitration Act where the claims were *ex facie* and hopelessly time barred.

Findings

Issue (1): Proceeding on the premise that the issue of limitation is of threshold importance and ought to be decided at the pre-reference stage, the Supreme Court found that:

1. Since neither Section 11(6) of the Arbitration Act nor the Schedule to the Limitation Act prescribe any period of limitation for seeking appointment of arbitrators, the same would fall under Article 137 (i.e. the residual provision) of the Limitation Act, and parties would have a period of 3 (three) years from when the right to apply accrues.
2. Courts are not bound to appoint arbitrators unless the mechanism prescribed under Section 11(6) (which *inter alia* provides for invocation of arbitration through a notice) is exhausted. However, once the procedure laid down under Section 11(6) of the Arbitration Act is exhausted by the party and the application passes all other tests of limited judicial scrutiny, the court becomes duty-bound to appoint an arbitrator. In terms of Hohfeld's Scheme of Jural Relations, a claimant's 'right to apply' for appointment of arbitrators is correlated with the court's 'duty to appoint' arbitrators, both of which would arise only after the steps contemplated by Section 11(6) of the Arbitration Act are completed.
3. Therefore, the limitation period for appointing an arbitrator would commence after a valid arbitration notice was issued, and the opposing party fails or refuses to make an appointment as per the procedure agreed between the parties.
4. In the facts of the case, the petitioner invoked arbitration through notice dated November 24, 2022 (delivered on 29 November 2022). The respondent failed to nominate its arbitrator by December 28, 2022. The petitioner would, thus, have a period of 3 (three) years from December 28, 2022 to apply for appointment of arbitrators under Section 11(6) of the Arbitration Act.

Issue (2): At the outset, the Supreme Court observed that there are 2 (two) kinds of issues that may be raised at the stage of appointment of arbitrators under Section 11(6) of the Arbitration Act:

1. *First*, 'jurisdictional issues/objections' – issues pertaining to the power and authority of the arbitrators to hear and decide a case, such as objections as to competence of arbitrators, existence or validity of the arbitration agreement, absence of parties' consent to submit disputes to arbitration, and scope of the arbitration agreement.

2. *Second*, 'admissibility issues/objections' – issues as to the nature of the claim, failure to fulfil procedural requirements or pre-arbitration steps, and issues of limitation.

Finding that though the issue of limitation is one of admissibility, the Supreme Court held that it is the duty of courts to *prima facie* examine and reject non-arbitrable or dead claims, so as to protect the opposing party from being drawn into a time-consuming and costly arbitration process.

After conducting an extensive analysis of various decisions,[2] the Supreme Court found that:

1. Mere failure to pay may not give rise to a cause of action. However, once a party asserts its claim and the opposing party denies the claim or fails to reply, the cause of action will arise after such denial or failure.
2. It is important to find the 'breaking point' at which a reasonable party would have abandoned efforts at arriving a settlement and contemplated invocation of arbitration. This breaking point would be the date on which cause of action can be said to have commenced.
3. In the facts of the case, the rights of the petitioner can be said to have been crystallised on March 28, 2018, when the respondent failed to make payment towards the additional ICCR course provided by the petitioner.
4. In ordinary circumstances, the petitioner would have a period of 3 (three) years from March 28, 2018, i.e., by March 27, 2021 for raising its claims. However, in terms of the directions passed in Suo Motu Civil Writ Petition No. 03/2020, the time period between March 15, 2020 –February 28, 2022 would stand excluded for the purposes of limitation, and the balance period of limitation available to the petitioner on March 15, 2020 would become available from March 1, 2022. Taking this into account, the period of limitation available to the Petitioner was to end on March 13, 2023.
5. Arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other a notice requiring the appointment of an arbitrator – the issuance/ service of such notice is determinative of the commencement of the arbitral proceedings.
6. In the present case, the arbitration notice was received by the Respondent on November 29, 2022, well within the time period available to the Petitioner for raising its claims. Therefore, the claims cannot be said to be *ex facie* time barred or dead as on the date of commencement of arbitration.

JSA Analysis and Conclusion

This judgment consolidates the law on limitation applicable for seeking appointment of arbitrators. After conducting an exhaustive analysis of precedent, it reiterates that: (a) the 'breaking point' between the parties would be considered as the date of commencement of the cause of action for raising claims; (b) arbitral proceedings may be commenced within a period of 3 (three) years from the 'breaking point'; (c) the date of service of the arbitration notice would be considered as the date on which arbitral proceedings commenced; and (d) where the opposing party fails or refuses to comply with the arbitration notice, another period of 3 (three) years from the date of such failure or refusal would be available to the claimant for seeking appointment of arbitrator(s).

Significantly, the Supreme Court also notes that applications for appointment of arbitrator(s) are governed by the 3 (three) year period provided by the residual provision under the Limitation Act only because of a legislative vacuum. The Supreme Court rightly observes that this period is unduly long and goes against the spirit of the Arbitration Act, one of the prime objections of which is speedy resolution of disputes. Accordingly, the Supreme Court has suggested that the Parliament should consider introducing amendments for prescribing a specific period of limitation for filing applications under Section 11 of the Arbitration Act. We feel this suggestion is quite welcome and aligned not only with the stated legislative intent of the Arbitration Act, but also the commercial interests of private parties. If the

[2] *SBP & Co. v. Patel Engineering Ltd.*, (2005) 8 SCC 618; *Geo Miller & Company Private Limited v. Chairman, Rajasthan Vidyut Nigam Utpadan Nigam Limited*, (2020) 14 SCC 643; *BSNL v. Nortel Networks India*, (2021) 5 SCC 738; *Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1; *NTPC Ltd. v. SPML Infra Ltd.*, (2023) 9 SCC 385; *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority*, (1988) 2 SCC 338; *Milkfood Ltd. v. GMC Ice Cream*, (2004) 7 SCC 288.

suggestion of the Supreme Court is implemented by the Parliament, a number of negligent litigants could be weeded out, and precious judicial time could be used only for adjudication of genuine interests and disputes.

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