

CAN A REQUEST-APPLICATION UNDER SECTION 11 OF THE ARBITRATION AND CONCILIATION ACT, 1996 BE DISMISSED AS BARRED BY LIMITATION ?

1. INTRODUCTION

Justice Ruma Paul former Judge of the Supreme Court of India in the foreword to the 5th Edition 2010 of Justice R.S. Bachawat's Law of Arbitration and Conciliation Wrote thus :-

“Again when lawyers in the higher Courts preface their arguments with “Your Lordship (or Lordyship) knows’ it only underlines the fiction that Judges are deemed to know the law on every subject. Aberrant decisions are sometimes the outcome of this fiction and sometimes because Judges are inadequately informed by the bar.”

Having stumbled on NORTH EASTERN ELECTRIC POWER CORPORATION LIMITED –VS- TEXMACO LIMITED (M/S), 2011 (3) GLT 830, (2011)4 GLR 570 dated 29.04.2011 of the Gauhati High Court, the writer felt that “aberrant decisions” emanating from several High Courts abound on the question forming the title of this essay. NORTH EASTERN (Supra) appears to the writer to belong to the group of such “aberrant decisions” primarily because the High Court was “inadequately informed by the bar”. The Judgment proceeded on the concession of the parties that a request to the Chief Justice or his designate under Section 11 of the Arbitration and Conciliation Act, 1996 (1996 Act hereinafter) is governed by Article 137 of the Limitation Act, 1963. This essay is an attempt to have a critical look at the “aberrant decisions” in this regard and to reach a correct answer to the question. One may explore the concession of counsels in NORTH EASTERN (Supra) first.

2. THE CONCESSION OF COUNSELS

In para 9 of NORTH EASTERN (Supra) “the core issue” in the case has been stated to be whether the claim is time barred but instead of determining the said issue because of the concession of the counsels the High Court went on to determine the starting point of limitation under Section 137 of the Limitation Act, 1963 for the application under Section 11 of the 1996 Act. The learned Counsel for the applicant relied on eight decisions of the Supreme Court and one decision of a Division Bench of the Delhi High Court. The learned Counsel for the respondent relied on AIR 1959 S.C. 1362, AIR 1955 Cal 65 and AIR 1974 Delhi 223. The High Court considered only two among the eight Supreme Court Judgments

relied on by the learned Counsel for the applicant and referred to and considered three more Supreme Court decisions found by the High Court. Of these twelve Supreme Court Judgments from the year of the Report itself it is evident that the three of them namely MAJOR (Retd.) INDER SINGH REKHI -VS- DELHI DEVELOPMENT AUTHORITY (1988)2 SCC 338, UNION OF INDIA -VS- KISHORILAL, AIR 1959 SC 1362 and S. RAJAN -VS- STATE OF KERALA (1992)3 SCC could not have and in fact did not have anything to do with limitation of a request/application under Section 11 of the 1996 Act simply because the 1996 Act containing Section 11 therein did not even enter the Statute Book on the dates the above judgments were delivered.

INDIAN OIL CORPORATION (2009)8 SCC 520, NATIONAL INSURANCE CO. (2009)1 SCC 267 and the Seven Judge Bench decision of the Supreme Court namely SBP & CO. -VS- PATEL ENGINEERING LTD. (2005)8 SCC 618 all relied on by the Counsel for the petitioner deal with different aspects of the arbitration agreement and of Section 11 of the 1996 Act but do not go anywhere near speaking of law of limitation in relation to an application under Section 11 of the 1996 Act. Even the matters to be considered by the Chief Justice indicated in SBP & CO.(supra) and as analysed in NATIONAL INSURANCE (Supra) which was extracted by the High Court do not contain any mention of any bar of limitation of the application to the Chief Justice under Section 11 of the 1996 Act. Same conclusion stares one in the face from the extract of INDIAN OIL CORPORATION -VS- SPS ENG. LTS. (2011)3 SCC 507 found by the High Court. BRANCH MANAGER, MAGMA LEASING (2009) 10 SCC 103 is all about Section 7 and 8 of 1996 Act and not about Section 11 thereof.

In SHRI RAM MILLS LTD. (2007)4 SCC 599 the question involved and decided by the Supreme Court was whether there was a live issue between the parties requiring arbitration and whether the claim is time barred. Incidentally the counsels argued that the application under Section 11(6) of the 1996 Act is time barred but the Supreme Court did not agree. HARI SHANKAR SINGHANIA (2006)4 SCC 658 was quoted only to support the point that the claim cannot be said to be barred, though in HARI SHANKAR (Supra) itself the said statement has been made in connection with the bar of limitation of an application to court under Section 20 of the Arbitration Act 1940 repealed by the 1996 Act. STEEL AUTHORITY OF INDIA (1999) 8 SCC 122 and UTKAL COMMERCIAL CORPORATION (1999)2 SCC 571 also deal with Section 8 and or 20 of the repealed Act and do not speak of any bar of limitation in relation to an application under Section 11 of the 1996 Act. Thus unless it can be said that legal theory on precedent

permits application of the decision under the repealed Act to be applied blindly in reading a bar of limitation in relation to a request application to Chief Justice under Section 11 of the 1996 Act none of the Supreme Court Judgments relied on by the learned counsels and found by the High Court lay any foundation for the concession made by the counsels and acted upon by the High Court.

Indeed the writer has not been able to discover any decision of the Supreme Court either specifically or impliedly laying down that there is a period of limitation for an application to the Chief Justice or his designate under Section 11 of the 1996 Act. However like the Judgment of the Gauhati High Court there again is a Judgment on concession delivered by the Chief Justice of the Supreme Court which will be considered later. Only Judgment that speaks of the bar of limitation and thus lends support to the concession is PRASAR BHARATI -VS- MAA CORPORATION, AIR 2011 Del 26 relied on by the petitioner. There are other judgements in this regard from several High Courts. All this may await consideration of the question whether concession of counsels acted upon by the court can attain the status of law declared by the Supreme Court within Article 141 of the Constitution.

3. EFFECT OF CONCESSIONS

SALMOND ON JURISPRUDENCE, TWELFTH EDITION, Chapter 5 from page 148 to 158 at synopsis 27 dealing with PRECEDENTS lists eight circumstances destroying or weakening the binding force of precedent. Circumstance No. (6) is described thus – “Precedents sub silentio or not fully argued”.

Though the author has not used the word “concession” there the following from page 155 of the book implies the same. The extract proceeds thus :-

“If there is a general exception for unargued cases, the sub silentio rule turns out to be merely a particular application of a wider principle.

A precedent is not destroyed merely because it was badly argued, inadequately considered and fallaciously reasoned. Thus a rather arbitrary line has to be drawn between total absence of argument on a particular point, which vitiates the precedent”.

Concessions are thus another name for total absence of argument on a particular point and they vitiate the precedent. The Supreme Court has ruled on the matter of decisions based on concession at least on three occasions. These are the Five Judge Constitution Bench decision of STATE -VS- S.J. CHOUDHARY (1996)2 SCC 428, the Three Judge Bench decision of STATE OF RAJASTHAN -VS- MAHAVEER OIL INDUSTRY (1999)4 SCC 357

and **KULAWANT KAUR -VS- GURDIAL SINGH MANN (2001)4 SCC 262**. In effect all these say that concessions do not even make precedents. Orders passed on concession are not law declared by the Court and has no authority as a precedent.

4. AN ORDER OF THE CHIEF JUSTICE OF INDIA

HBM PRINT LIMITATION -VS- SCANTRANS INDIA PRIVATE LIMITED (2009) 17 SCC 338 decided on 29th of March 2007 is the only decision known to the writer where the question of limitation for an application under Section 11 of the 1996 Act directly arose but was decided by the Chief Justice of India on concession. The point arose in relation to an international commercial arbitration. Mistakenly the applicant first filed an application for appointment of an arbitrator before the Chief Justice of the Madras High Court on 05.06.2000. The application was withdrawn on 26.08.2004. Thereafter the application for appointment of arbitrator was filed before the Chief Justice of the Supreme Court on 31.01.2005. The main contention of the respondent was that the notice under Section 11(4) of the 1996 Act having been received by the respondent on 25.03.2000 the application for appointment of arbitrator should have been filed on or before 25.04.2003 and having not done so the application is barred by limitation. The petitioner did not contest the bar of limitation but sought relief under Section 14 of the Limitation Act, 1963. The Chief Justice of the Supreme Court found “force in the contention of the petitioner” and held in effect, the petitioner to be entitled to exclude the period spent before the Chief Justice of the Madras High Court. The point about limitation for the application under Section 11 of the 1996 Act was not argued and passed sub silentio. The matter thus was decided on concession.

5. SAMPLES OF ABERRANT DECISIONS FROM THE HIGH COURTS.

(i) Andhra Pradesh High Court

On the 2nd day of September, 1998 a Judge of the Andhra Pradesh High Court as the designate of the Chief Justice of the High Court decided an application under Section 11 of the 1996 Act by holding the same to be barred by Limitation under Article 137 of the Limitation Act, 1963. The judgment **M.V.V. SATYANARAYAN -VS- UNION OF INDIA AND ORS., 1998(5) ALT 262** also **INDIANKANOON.COM**, even refers to the Three Judge Bench decision of the Supreme Court in **KERALA STATE ELECTRICITY BOARD, AIR 1977 S.C. 282** but failed to notice the core of the ratio there which is “that Article 137 of the 1963 Limitation Act will apply to any petition or application under any

Act to a civil court.” The Chief Justice or his designate is not a civil court but only a judicial authority. This is the legal position enunciated by the seven Judge Bench in SBP & CO. (Supra) and later reiterated in RODEMADAN INDIA LTD -VS- INTERNATIONAL TRADE EXPO CENTRE LTD. (2006)11 SCC 651. The same confusion seems to have prompted a Division Bench of the same High Court in PRATHY USHA ASSOCIATES -VS- RASHTRIYA ISPAT NIGAM, 2006(1) ALT 691 also in INDIAN KANOON. COM dated 16th December 2005 where in paragraph 47 one reads the following :

“In view of the decisions of the Apex Court in KERALA STATE ELECTRICITY BOARD’S case and EASTERN COALFIELD’S case it is clear that Article 137 of the Limitation Act would apply to the application filed within three years from the date when the cause of action arose under Section 20 of the Old Act or under Section 11 of the New Act.”

It needs to be emphasised once more that the application under Section 11 of the 1996 Act is not to any Civil Court nor the proceedings before the Chief Justice and his designate under Section 11 of the 1996 Act is an arbitration proceeding.

(ii) Bombay High Court

A few Judgments from the Bombay High Court may now be sampled. In NYANESHWAR BHIKU DHARGALKAR -VS- EXECUTIVE ENGINEER, AIR 2000 Bombay 254 dated 26.02.1999 a few cases under the Arbitration Act 1940 relating to Section 8 and 20 thereof were considered and the application under Section 11 of the 1996 Act is held not to be barred by Limitation. The Judgment implies that a three year period of Limitation applies to an application under Section 11 of the 1996 Act. Forty-eight days later on 16.04.1999 the same Judge decided in M/S R.P. SOUZA AND CO. -VS- CHIEF ENGINEER, AIR 2000 Bom. 74 an application under Section 11 of the 1996 Act again applying the law applicable to applications to Court under Section 8 and or 20 of the Arbitration Act 1940 as enunciated in Supreme Court decisions considering provisions of those Sections of the 1940 Act. Three year period of limitation was again held applicable to an application under Section 11 of the 1996 Act.

In VISHINDAS BHAGCHAND -VS- CHAIRMAN, MAHARASHTRA STATE ELECTRICITY BOARD, 2002(1) MHLJ

222, also in INDIANKANOON.COM an application under Section 11 of the 1996 Act was decided on 7th September 2001. The three year period of limitation again ruled the matter and the application was dismissed as barred by limitation.

Lastly, the Chief Justice of the Bombay High Court decided Arbitration Petition No.15 of 2007 by a judgment pronounced on 1.10.2007 namely ADINATH SAHAKARI SAKHAR KARKHANA -VS- THE TRIVENI ENGINEERING, (2008)1 BOM CR 115 and also in INDIANKANOON.COM, where the shadow of Article 137 and the law under Section 8 and 20 of the Arbitration Act 1940 overwhelmed the matter and the application under Section 11 of the 1996 Act was dismissed as barred by limitation. The most surprising facet of the order is that a Judgment of the Delhi High Court was relied on and the extract thereof even quoted the three Judge Bench decision KERALA STATE ELECTRICITY BOARD, AIR 1977 S.C. 282 but the core of the ratio that is to apply Article 137 the application has to be to a Civil Court and that the Chief Justice or his designate is not a civil Court has been missed.

(iii) Delhi High Court

From many orders passed in request applications under Section 11 of the 1996 Act it appears that the Delhi High Court has been consistent with its persistence in applying Article 137 of the Limitation Act 1963 to the request applications under Section 11 of the 1996 Act. Two among them will suffice as samples. The first one M/S PANDIT MUNSHI RAM, AIR 2001 Delhi 82 of 11.08.2000 and the second one is PRASAR BHARATI, AIR 2011 Delhi 26 dated 08.02.2010 relied on by the petitioner as already indicated in para 2 of the essay. Both these orders, the later one rendered by a Division Bench presided over by the then Chief Justice of the Delhi High Court quote KERALA STATE ELECTRICITY BOARD (Supra) and a lot of Judgments relating to Section 8 and 20 of the Arbitration Act 1940 but missed the point that the Chief Justice or his designate is not a Court, that there is a gulf of difference between the claim being a live issue or being barred by limitation and the application under Section 11 of the 1996 Act being barred by Limitation. Above all the enunciation of the law in this regard by the Seven Judge Bench of the Supreme Court in SBP & CO. (Supra) and in RODEMADAN INDIA (Supra) have not been noticed in all these Judgments. It is worthwhile to highlight here that Section 8 and Section 20 of the Arbitration Act 1940 clearly mention applications to court.

(iv) Patna High Court

Request case No.4 of 198 JAMADAR SINGH -VS- ENGINEER-IN-CHIEF, AIR 2000 Patna 200 decided on 07.04.2000 again read Article 137 of the Limitation Act 1963 as ruling the matter there, applied the law under the Arbitration Act 1940 while dealing with request under Section 11 of the 1996 Act and thus followed the path trodden by the judgments of other High Courts referred to above in this Section.

(v) Jharkhand High Court

In M/S P.B. ENTERPRISES, AIR 2004 Jharkhand 71 dated 05.09.2003 rendered by a Division Bench of the High Court, Article 137 of the Limitation Act 1963 was allowed to thwart a request for appointment of an Arbitration under Section 11 of the 1996 Act.

(vi) Rajasthan High Court

In GEO MILLER AND CO.- VS- THE CHAIRMAN, RAJASTHAN BIDYUT, (2008)2 ArbLR 383 also in INDIANKANOON.COM decided on the 25th January 2007 by a Judge of the Rajasthan High Court an application under Section 11(6) of the 1996 Act was held to be “hopelessly barred by Limitation under Section 43 of the Act of 1996.” The apparent infirmity in the order arose because of the mix up between the claim being barred and the application being barred, mix-up between “Court” and the Chief Justice or his designate and lastly the mix-up of the proceedings under Section 11 of the 1996 Act with Arbitration proceedings before the Arbitrator. All these have already been indicated earlier in this section.

The above survey of the samples highlights a few of the mis construction and misconceptions which served to produce the orders sampled. A summary is attempted in the next paragraph.

6. SUMMARY OF THE MISCONSTRUCTIONS.

The following extract from the Supreme Court of India SUNDARAM FINANCE LTD. VS NEPC INDIA LTD., AIR 1999 S.C. 565, (1999)2 SCC 479 may aptly serve as the key note of the summary :-

“9. The 1996 Act is very different from the Arbitration Act, 1940. The provisions of this act have, therefore, to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconstruction. In other words, the provisions of 1996

Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions, it is more relevant to refer to the UNCITRAL MODEL LAW rather than the 1940 Act.”

Next the detailed analysis of what the Chief Justice or his designate, when approached with request under Section 11 of the 1996 Act, has to do as contained in SBP & CO. -VS- PATEL ENGINEERING LTD. (2005)8 SCC 618, AIR 2006 S.C. 450 dated 26.10.2005 could have served to dispel the misconception and misconstruction in the “aberrant decisions” sampled above. None of the said judgments referred to either of the above decisions. It has to be highlighted here that the seven Judge Bench decision of SBP & Co. (Supra) no where mentions of any Law of Limitation ruling the request application under Section 11 of the 1996 Act. The “aberrant decisions” across the board tended :-

- (1) to mix up the concept of the claim being barred with that of the application being barred.**
- (2) to equate the Chief Justice or his designate with the High Court or the Supreme Court.**
- (3) to miss the real ratio of KERALA STATE ELECTRICITY BOARD, AIR 1977 S.C. 282 which is that Article 137 of the Limitation Act 1963 applies to all applications under any law to a Civil Court only. The Chief Justice or his designate exercising Judicial power to appoint an Arbitrator as per Section 11 of the 1996 Act is not a Court but only a Judicial Authority.**
- (4) to miss that applications under Section 8 or under Section 20 of the Arbitration Act are application to court and that is those applications came under the law of Limitation within Article 137 of the Limitation Act 1963.**
- (5) to confuse the proceedings before the Chief Justice or his designate with arbitration proceedings within Section 43 of the 1996 Act. The Chief Justice or his designate only constitute an Arbitral Tribunal and does not conduct any arbitration proceedings.**

The misconstruction and misconception appear so pervasive that in a recent Edition of a Book on Law of Arbitration and Conciliation one reads the following :

“Despite stray opinions to the contrary, it can be taken as well settled that the Limitation Act is applicable to proceedings under S. 11(6) and Art. 137 of the Limitation Act dealing with the period of limitations for situations not

specifically provided in other Articles will be applicable to determine the time period for limitation.

7. DECISIONS LAYING DOWN THE CORRECT LAW

On the 27th of April, 2005 a Division Bench of the Bombay High Court decided **SINGHAL AND BROTHERS AND ANR -VS- MAHANAGAR TELEPHONE NIGAM LTD., 2005(3) MHLJ 951** also in **INDIANKANOON.COM**. The question posed there was this : Does the Chief Justice or his designate under Section 11 of the Arbitration and Conciliation Act, 1996, have the jurisdiction to dismiss an application for constitution of an arbitral tribunal on the ground that it is barred by limitation or not made within a reasonable time.

The Division Bench answered the above question with a firm negative. There an application under Section 11 of the 1996 Act was dismissed on the ground of bar of three year limitation. The Division Bench held that Article 137 of the Limitation Act applies to applications to Court, that Chief Justice or his designate is not a Court and is not the arbitral Tribunal. It need to be highlighted here that judgment relied on **KONKAN RAILWAY CONSTRUCTION -VS- RANI CONSTRUCTION (P) LTD., (2002) 2 SCC 388**, the Constitution Bench judgment of the Supreme Court dated 30.01.2002 which was overruled by the Seven Judge Bench in **SBP & CO (Supra)** on 26.10.2005. That, however, does not affect the core of the law laid down by the Division Bench. All the other decisions of the Bombay High Court indicated in para 5 are thus overruled and **ADINATH (Supra)** became a judgment per incuriam.

Next on 19th of May 2008 the Chief Justice of the Gauhati High Court decided Arbitration Petition No. 14 of 2005 where both **SBP & CO. (Supra)** and **KERALA STATE ELECTRICITY BOARD (Supra)** were considered quoting extracts from the two decisions. The decision has been reported as **MITRA & CO AND ORS -VS- NATIONAL INSURANCE COMPANY LTD. AND ANOR, (2008) 5 GLR 252**. The categorical holding in the decision is that Article 137 of the Limitation Act , 1963 does not apply and that the Chief Justice or his designate is not a Court. It is unfortunate that the counsels in **NORTH EASTERN (Supra)** made the concession without adequately informing the High Court of this decision.

Next the 25th day of July 2008 the Chief Justice of the Gauhati High Court decided Arbitration Petition No.9 of 2007, reported as **KRISHNA DEVI -VS- UNION OF INDIA, AIR 2009 (NOC)38 (GAU)**. Full Text of the Judgment is available in

AIRWEBWORLS.COM. The petition was dismissed not because of any bar of limitation but because of the reasons as follows “

“Permitting the petitioner to prosecute the present application in my view would be contrary to public policy as it would enable the applicant to agitate a stale claim. Such an application in my view is barred by laches.:

This is squarely in consonance with the enunciation of the law by the Seven Judge Bench in SBP & CO. (Supra).

8. CONCLUSION

Applying the ratio of KERALA STATE ELECTRICITY BOARD (Supra), the principles of interpretation of the provisions of the 1996 Act prescribed in SUNDARAM FINANCE (Supra) and the law declared by the Seven Judge Bench in SBP & CO. (Supra) one has to answer the question considered in this essay in the negative. The question has been so answered in MITRA & CO. AND ORS. (Supra), KRISHNA DEVI (Supra) and SINGHAL AND BROTHERS (Supra). There can be no doubt that not having cited, when possible, above noted Supreme Court decisions, except SBP & CO. (Supra) and the other three decisions directly dealing with the question the bar “inadequately informed” the Chief Justices or designated Judges of the High Courts. The aberrations in the orders under Section 11 of 1996 Act indicated in this essay can be traced substantially to this factor.

To halt further spread of the infection from the “aberrant decisions” as also to declare the law on the exact question posed here a definitive judgment from the Supreme Court appears to be a dire necessity. The essay is concluded with the hope that the Supreme Court would speak sooner than later.