IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present:

The Hon'ble Justice Shekhar B. Saraf

AP/237/2021

B.K. CONSORTIUM ENGINEERS PRIVATE LIMITED

VS

INDIAN INSTITUTE OF MANAGEMENT, CALCUTTA

For the Petitioner:	Mr. Jayanta Kumar Mitra, Sr. Adv.
	Mr. Dhruba Ghosh, Sr. Adv.
	Mr. Sakya Sen, Adv.
	Ms. Dola Adhikari, Adv.
	Mr. Rohit Banerjee, Adv.
	Mr. Sunil Gupta, Adv.
	Mr. Altamash Alim, Adv.
	Ms. Ajeyaa Choudhury, Adv
For the Respondent:	Mr. Sabyasachi Chowdhury, Adv.
	Mr. Bhaskar Mukherjee, Adv.
	Ms. Nafisa Yasmin, Adv.

Last heard on: December 16, 2022
Judgment on: January 19, 2023

Shekhar B. Saraf, J.:

1. The petitioner B. K. Consortium Engineers Private Limited (hereinafter referred to as the 'BKC') has filed this application under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') praying for appointment of a sole arbitrator to adjudicate the disputes which have arisen between the parties.

2. The petitioner has challenged the appointment procedure of the arbitrator, provided in its contract with the respondent Indian Institute of Management, Calcutta (hereinafter referred to as the 'IIMC'), which empowers the IIMC director to appoint a sole arbitrator for dispute resolution between the parties.

Facts

3. The factual matrix of the case is delineated below –

   a. A notice inviting tender dated July 9, 2008 was issued by the respondent for civil work and basic utility works for the proposed residential (hostel) complex at IIMC, Joka. A bid was submitted by the petitioner and in response to the same, a work order was issued on August 29, 2008, in terms of which the project was required to be completed within August 31, 2009, at a total cost of INR 39,03,20,185 (Rupees Thirty-Nine

Crores Three Lakhs Twenty Thousand One Hundred Eighty-Five Only). Subsequently, a formal contract being CDP/6 of 2008-09 was entered into by and between the petitioner and respondent in respect of the said work as stipulated in the said work order.

b. During the course of execution of the work, the respondent, from time to time, introduced additions to the scope of work, and as a result, the value of the contract stood revised to INR 80,23,73,260/- (Rupees Eighty Crores Twenty-Three Lakhs Seventy-Three Thousand Two Hundred Sixty Only). The petitioner sought extension from the respondent on the following grounds –

   i. Delay in handing over clear work site; the piling work being done by another contractor was not completed before September 2009, and hence the clear site area could not be handed over to the petitioner till September 2009;
   ii. Additions and alterations incorporated during the contract period;
   iii. Various changes in the specifications were introduced;
   iv. The execution of the project was suspended for a considerable period. The work resumed only on March 14, 2011.

In view of the aforesaid, the time for completion of work was extended by the respondent from time to time. The last of such extensions was granted till August 31, 2014. The work was completed in all aspects by August 31, 2014.

c. The respondent issued the final bill on March 11, 2016 and the petitioner accepted the same by way of a letter dated March 15, 2016, under the signature of two directors of the petitioner, namely C. Mozumder and U.S. Mozumder. The acceptance stated that "*we accept the final bill and final settlement of all demands against the contract and we will not prefer any claim in future in this regard*". By way of another letter dated March 17, 2016, bearing the signature of B.K. Mozumder, Chairman and Managing Director of the respondent, the acceptance of the final bill was reiterated but in addition to this, a request for price escalation was made. Pursuant to the acceptance of the final bill, the final completion certificate was issued by the respondent on May 5, 2016. It is to be noted here that this was not the first time price escalation requests were submitted to the respondent.

d. On May 16, 2016, the petitioner sent another letter claiming price escalation. It was acknowledged in the said letter that the final bill against work done has been settled, and the retention money against the contract has been refunded by

the respondent. However, the petitioner also stated, in the said letter, that its escalation claim under Clause 10(CC) of the contract has not been settled yet. Surprisingly, it also sought *permission* from the petitioner to invoke arbitration in terms of clause 25 of the said contract.

e. After a brief lull, letter dated August 25, 2017 was sent by the petitioner with respect to the earlier price escalation requests. In response, the respondent replied vide letter September 12, 2017 denying the validity of any such claim in light of the full & final settlement of the claim and bill pertaining to the job contract. It was reiterated by the respondent that "*any claim related to the escalation thus cannot be accepted under the said contract agreement; hence can't be entertained at this stage*". A reply to this was sent by the petitioner vide letter dated September 15, 2017 wherein they claimed to have accepted the final settlement of the bill under coercion.

f. The last in the series of price escalation letters by the petitioner was sent on February 22, 2019 wherein the earlier claims were reiterated. The respondent responded vide its advocate's letter dated March 13, 2020, denying the existence of any claims whatsoever in the first place. It was again clarified by the respondent that basis the terms of the contract and subsequent acceptance of the entire

consideration money in lieu of full and final settlement against the enhanced work order, the respondent was not liable to pay for any further claims.

g. Furthermore, letters dated February 26, 2021, and February 3, 2021, were delivered by the petitioners reiterating their escalation claims.

h. Finally, the petitioner dispatched a Section 21 notice dated March 8, 2021 invoking arbitration. Through the said notice, disputes arising as a result of non-payment of escalation claims were sought to be referred to an arbitrator. In the same notice, the appointment procedure of the sole arbitrator was challenged as invalid under the provisions of Arbitration & Conciliation Act, 1996 and as such, Justice (Retd.) Ashim Kumar Banerjee was nominated by the petitioner as their nominee arbitrator.

i. In response to the aforesaid notice invoking arbitration, the respondent denied the existence of any further dispute and reiterated that all claims have been settled and that the petitioner is not entitled to any further amount from the respondent. However, despite denying the existence of any dispute, the respondent appointed Shri Basab Majumdar, retired DG, CPWD as their *nominee arbitrator*. The respondent

also stated that such appointment was without prejudice to their contentions regarding non-existence of any dispute.

Submissions

4. Mr. Jayanta Kumar Mitra, Senior Advocate, appearing on behalf of the petitioner has put forth the following arguments:

   a. The counsel argued that the resumption of work on March 14, 2011 was accepted by the petitioner subject to its right to receive price escalation under clause 10(CC) of the contract. Further, the counsel stated, there was no contemporaneous denial of such a proposal by the respondent. On this basis and being assured that escalation would be considered, work was resumed and completed to the utmost satisfaction of IIMC on August 31, 2014. The counsel added that the final completion certificate dated May 5, 2016 not only acknowledged the satisfactory completion of work but also the fact that prolongation of the contract period was not attributable to any fault on part of the petitioner. This, as per the petitioner, has been clearly and unambiguously admitted by the respondent.

   b. The counsel submitted that keeping in mind the afore stated admission, the petitioner suffered considerable loss by reason

of being paid on the basis of the rates quoted way back in the year 2008. Therefore, the counsel contended that the petitioner became entitled to invoke the clause 10(CC) of the contract which provided for the escalation as per the formula provided therein. The counsel stated that both time and cost overrun of the project had caused huge financial losses to the petitioner and this issue was brought to the notice of respondent through protracted contemporaneous undisputed correspondence. He argued that the petitioner's bills were never disputed by the respondent and in fact, the petitioner was assured that the same would be taken care after completion of the work.

c. The counsel submitted that pursuant to the request of the petitioner, a sub-committee of IIMC was constituted which held a meeting with the petitioner on November 12, 2012. Here, the claim was discussed in detail and the petitioner was requested to complete the work in all respects with an assurance to settle escalation claim thereafter. Headed that BKC relied upon the said assurance and duly proceeded thereafter to complete the work. It is only after about 14 months from the date of submission of the final bill, the executive engineer of the respondent vide its letter dated March 11, 2016 instructed the petitioner to accept the final bill as prepared by the respondent in their specified format.

Hence, the counsel argued, the petitioner had no option other than to accept the final bill, as prepared by the respondent, under compulsion and duress even though the same did not accommodate their price escalation claims.

d. Continuing his submissions on the point of acceptance of the final bill, the counsel stated that the long-standing dues of the petitioner could not be realized even after repeated persuasions and being under tremendous financial stress, it was impossible for the petitioner to wait for realization of the outstanding sum, and under such circumstances, the petitioner accepted the final bill by way of a letter dated March 15, 2016 undersigned by two directors of the petitioner company. Immediately afterwards, in the letter dated March 17, 2016, the managing director of the petitioner company not only reiterated its acceptance but also reminded the respondent of its price escalation claim.

e. The counsel submitted that the final payment was accepted under duress and hence to overcome the damaging 'No Objection Certificate' issued on March 15, 2016, and after receipt of payment on May 05, 2016, the petitioner superseded the earlier acceptance by way of another communication dated May 16, 2016. The counsel argued that the certificate issued by petitioner through letters dated

March 15, 2016 and March 17, 2016 stood withdrawn in view of the petitioner's fresh communication dated May 16, 2016. Therefore, the counsel contended that the acceptance certificate of the final bill was earlier issued under compelling circumstances and the same cannot tantamount to negation or waiver of the petitioner's right to claim price escalation in terms of clause 10(CC) of the contract.

f. Moving on, the counsel submitted the escalation claim was disputed by the respondent for the very first time on September 12, 2017 and on the grounds that the petitioner had issued a full and final acceptance certificate of the final bill was by way of a letter dated March 15, 2016. The counsel contested that the escalation bill was not separately dealt with nor was specifically rejected by the respondent. The counsel also put forth the argument that since September 12, 2017 was the first time wherein the price escalation claim was disputed by the respondent, the same should be considered as the starting point for the purposes of calculation of limitation period for issuance of Section 21 notice. In support of this contention, reliance was placed upon ***Geo Miller & Company Private Ltd. -v- Rajasthan Vidyut Utpadan Nigam Limited*** reported in ***2019 SCC OnLine SC 1137,*** the relevant paragraph of which has been reproduced below -

"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."

g. Continuing his arguments, the counsel added that the limitation for issuing the said Section 21 notice would expire

on September 12, 2020 but in the light of the Supreme Court order in ***In Re: Cognizance for Extension of Limitation with M.A. No. 29 Of 2022 in M.A. No. 665 Of 2021 in Suo Moto Writ Petition (C) No. 3 Of 2020***, the period from March 15, 2020 till February 28, 2022 stood excluded in computing the limitation period. Therefore, the Section 21 notice issued by the petitioner on March 08, 2021 is well within the limitation period.

h. The counsel submitted that pursuant to the aforementioned letter dated September 12, 2017, the petitioner responded on September 15, 2017 wherein it restated that the final bill was accepted under constraint. The counsel argued that the respondent thereafter never refuted the petitioner's stance and the same being in accordance with the settled position of law as enunciated in various judgments of the Supreme Court which clearly lays down that mere issuance of full and final certificate cannot prevent a contractor to ventilate its legitimate claims arising under a contract.

i. Moving forward, the counsel asserted that the petitioner continued to pursue its claim and the last letter in this connection was the one dated February 22, 2019. This was replied to by the respondent on March 13, 2020 wherein it denied and disputed the liability to pay any amount and in

doing so, as per the counsel, erroneously relied upon acceptance issued on March 15, 2016. Here, the counsel argued that the communications dated March 15, 2016, and March 17, 2016, stood withdrawn pursuant to their correspondence dated May 16, 2016.

j. The counsel submitted that the stand taken by the respondent as indicated in the advocate's notice dated March 13, 2020 was given a go-by and the matter was looked into and considered by a Special Committee comprising of high-level IIMC officials. He drew the attention of the Court towards the fact that the petitioner was invited for a virtual meeting scheduled for January 13, 2021 where it duly presented its escalation claim and pursuant to request of the said committee, written submissions were also submitted on January 20, 2021, and February 3, 2021 together with relevant documents.

k. In response to the respondent's contentions that the claims are time barred and deadwood, the counsel opposed the same and stated that by the virtue of negotiations in such meetings and exchange of documents, the claim stands alive and falls out of the purview of being a deadwood.

l. The counsel contended that by reason of such a legitimate claim being withheld and/or denied, a dispute has arisen between the parties which are referable to arbitration as per the terms of the contract. The counsel further submitted that no intimation was received about the final bill being ready for payment and as such, the period for invoking the arbitration clause has not lapsed. Elaborating further on the point of arbitration, the counsel questioned the appointment procedure as invalid as it empowered the respondent to appoint a sole arbitrator and the same is hit by the disqualification contained in Schedule V to the Arbitration and Conciliation Act, 1996.

m. The counsel in support of his contentions cited the judgment of the Supreme Court in ***Vidya Drolia and Ors -v- Durga Trading Corporation*** reported in ***[2020] 11 S.C.R. 1001*** and advocated that the Court's approach in a Section 11 arbitration petition should be "*when in doubt, do refer*".

n. Next, the counsel relied upon the judgment of the Supreme Court in ***Bharat Sanchar Nigam Ltd. & Anr. -v- M/S Nortel Networks India Pvt. Ltd.*** reported in ***[2021] 2 S.C.R. 644***, and submitted that this Court can deny reference to arbitration in a Section 11 arbitration application '*only if there is not even a vestige of doubt that the disputes are ex-facie*

time-barred and deadwood'. The counsel opined that the present case is not one of complete deadwood as it is clear that the issue herein does not fall within the category of those which are ex-facie time barred and which would have otherwise been liable to be dismissed per the afore-cited judgments.

o. Elaborating upon his contentions, the counsel put forth the judgment of the Supreme Court in the case ***Uttarakhand PurvSainik Kalyan Nigam Ltd. -v- Northern Coal Field Ltd.*** reported in ***[2019] 14 S.C.R. 999.*** The following paragraphs were cited by the counsel:

> *9.8 In view of the legislative mandate contained in Section 11(6A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the Kompetenz-Kompetenz principle.*
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> *9.9. The doctrine of "Kompetenz-Kompetenz", also referred to as "Compétence-Compétence", or "Compétence de la recognized", implies that the arbitral tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues,*

and the existence or validity of the arbitration agreement. This doctrine is intended to minimize judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties.

*

Limitation is a mixed question of fact and law. In ITW Signode India Ltd. v. Collector of Central Excise, a three judge bench of this Court held that the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law."

Seeking support from this judgment, the counsel reminded the Court that the respondent did not raise any dispute regarding the existence of the arbitration clause invoked by the petitioner, and that in the absence of such an objection, this Court has to refer the matter to arbitration and any questions with respect to the jurisdiction or otherwise has to be adjudicated upon and decided by the arbitrator. Further, the respondent had itself acknowledged that the matter in

hand can be referred to arbitration process and had also independently suggested an arbitrator vide its letter dated April 10, 2021.

5. Mr. Sabyasachi Chowdhry, Advocate appearing on behalf of the respondent, has propounded the following arguments:

a. The counsel submitted that the said petition is misconceived, not maintainable and is liable to be dismissed. He contended that the alleged claim, *on the face of the record,* is barred by limitation and even considered otherwise, the said claim is beyond the scope of the contract and therefore, is not maintainable.

b. The counsel asserted that it is a matter of record that all claims under the contract were settled, resulting in final payment on March 15, 2016 which in turn was accepted by the petitioner as '*final settlement'* of all demands against the contract. Not only that, the petitioner undertook to '*not prefer any claim in future in this regard*'. The counsel continued to argue that the respondent vide its letter dated March 17, 2016 iterated their acceptance once again and merely made a '*request*' to consider '*some relief in the form of escalation against the contract*'.

c. The counsel further contended that the dispute subsequently was raised as an *afterthought* to wriggle out of such settlement on the allegation of '*duress*'. The counsel vehemently denied that the petitioner was *'instructed'* by the respondent to accept the final bill in any specified format or under any *'compelling circumstances'*.

d. Be that as it may, the counsel contended that mere bald plea of fraud, coercion, duress or undue influence is not enough and a party who sets up such plea must prima facie establish the said allegation by placing relevant material before the Chief Justice or his designate. He relied upon the decision of the Supreme Court in ***New India Assurance Company Limited -v- Genus Power Infrastructure Limited*** reported in ***2015 2 SCC 424*** in support of his contentions to argue that in the present case, the ratio of the aforementioned case squarely applies, particularly in the context of the letters dated March 15, 2016, and March 17, 2016, whereby the petitioner had accepted the final bill as full and final settlement and had merely made a '*request*' which cannot be subsequently elevated to claim or demand.

e. In any case, he argued that a period of more than three years has lapsed from the date on which the right to sue, if any, had first accrued, i.e., from March 15, 2016 onwards.

Therefore, the counsel added, that on March 8, 2020 when the arbitration was invoked by the petitioner, there could not have been any subsisting dispute between the parties. Moreover, the counsel reasoned that the unilateral letters by the petitioner in geminating the same points will not save limitation and any reply to such letters is not an acknowledgement within the meaning of Article 18 of the Limitation Act, 1963, and consequently, there exists no jural relationship between the petitioner and respondent.

f. The counsel contested that the petitioner is not entitled to invoke clause 10(CC) of the contract and does not have any right to receive any escalation claim under the said clause or otherwise at all. Further, as per clause 17 of the special terms and conditions, no escalation was payable in relation to the said contract for any reasons whatsoever. He contended that the allegations regarding escalation are immaterial and irrelevant, particularly after the contract was revised on September 27, 2013 wherein the total value thereof was enhanced to INR 80.23 crores from the original value of around INR 39 crores.

g. The counsel submitted that in view of petitioner's acceptance of the final bill and the final settlement of all its demands on March 16, 2016, there was no occasion to make any response

thereafter. He observed that the contents of the letter dated September 12, 2017, are self-explanatory and merely reiterated their earlier stated position.

h. The counsel denied that any high level committee was constituted to reconsider the grievance of the petitioner as alleged. In any event, the counsel submitted, the formation of any internal committee will not entitle the applicant to reagitate its stale and dead claim afresh. The counsel states that by repeatedly raising the issue of barred claim in diverse places was to desperately seek a response in an attempt to create evidence.

i. The counsel stated that in light of the principles laid down by the Supreme Court in ***Vidya Drolia and Ors. -v- Durga Trading Corporation*** reported in ***[2020] 11 S.C.R. 1001**,* it is now very well settled that "*the Court at the referral stage can interfere only when it is manifest that the claims are ex-facie time-barred and dead, or there is no subsisting dispute.*" The present petition, he contended, fell within the category of a deadwood and therefore is liable to be dismissed as there does not exist anything in the present dispute which would make it eligible to be referred to arbitration.

j. The counsel submitted that even if the letter dated May 16, 2016 is treated as a *notice* under Section 21 of the Arbitration and Conciliation Act, 1996, then this arbitration petition is also barred by limitation as per Article 137 of the Limitation Act, 1963.

k. Elaborating on the scope of judicial interference in a Section 11 application, the counsel cited the judgment of the Supreme Court in the case of ***Bharat Sanchar Nigam Ltd. & Anr. -v- M/S Nortel Networks India Pvt. Ltd.*** reported in ***[2021] 2 S.C.R. 644*** to argue that "*while exercising jurisdiction under Section 11 as judicial forum, the Court may exercise the prima facie test to screen and knockdown, ex-facie meritless, frivolous and dishonest litigation.*"

l. Lastly, the counsel, in the hearings, placed reliance upon the judgment of Supreme Court in ***Geo Miller & Company Private Limited -v- Rajasthan Vidyut Utpadan Nigam Limited*** reported in ***2019 SCC OnLine SC 1137*** to contend that the petitioner cannot justify the unreasonable delay in invocation of arbitration merely on the grounds of purported settlement discussions. He argued that the breaking point, if any, for invocation of arbitration would be March 11, 2016, i.e, the date when the final bill was issued by the respondent. He further submitted (for argument's sake) that in any event,

the starting day for the limitation point to begin would be May 16, 2016, that is, the date when the petitioner sought to invoke arbitration for the first time. The relevant paragraph has been extracted below–

> *29. 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 it 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."*
>
> (Emphasis supplied)

m. Concluding his arguments, Mr. Chowdhury placed reliance upon the judgment of Supreme Court in ***Secunderabad Cantonment Board –v- B. Ramachandraiah and Sons*** reported in ***(2021) 5 SCC 705***, which further endorses the principles as laid down in ***Vidya Drolia (supra)*** and ***BSNL –v-***

Nortel (supra), to argue that mere exchange of letters or settlement discussions will not be sufficient to stretch the limitation period.

Observations & Analysis

6. I have heard the counsel appearing on behalf of the parties and perused the materials on record.

7. Before delving into other major issues plaguing the present application, I will proceed first with the petitioner's challenge to the appointment procedure of the sole arbitrator as laid down by clause 25 of the contract between the parties. In my view, this challenge is at the centre point of the present petition, which later expands like a banyan tree spreading outwards.

8. In the light of the apex court's pronouncements in ***Perkins Eastman Architects DPC & Another -v- HSCC (India) Ltd.*** reported in ***[2019] 17 S.C.R. 275*** and ***TRF Ltd. -v- Energo Engineering Projects Ltd.*** reported in ***[2017] 7 S.C.R. 409***, it is crystal clear that unilateral appointment of an arbitrator by a party who has some sort of interest in the final outcome or decision is not permissible. The cardinal importance of the independence and neutrality of the arbitral tribunal has been

reiterated by the Supreme Court on multiple occasions. For arbitration to be seen as a viable dispute resolution mechanism and as an alternate recourse to litigation, the independence of arbitration process outside the purview of undue influence and favor needs to be ensured in both letter and spirit. And in case of non-adherence to such principles, the courts must step in. If one takes a careful look, the very basic essence of the principle laid down in the above-mentioned case laws is the natural justice principle of *nemo judex in causa sua* that is 'no one should be made a judge in his own case'. For arbitration decisions to be respected and accepted as decrees of the court, a similar level of integrity in the appointment of arbitrators must be ensured.

9. Keeping the aforesaid principles in mind, this Court is in absolute agreement with arguments advanced by Mr. Mitra that the appointment procedure as per clause 25 of the contract cannot be sustained as it is in direct contravention to the aforecited judicial pronouncements and legal principles.

10. Nonetheless, as the saying goes *it is not the end of the world* or in our case, the end of the matter. Therefore, before proceeding ahead with the appointment of an arbitrator the arguments advanced by Mr. Chowdhury cannot be overlooked and needs to be adjudicated upon by this Court. He argued on the point of limitation and stated that the claims are hopelessly time-barred and the same

would entail this Court to decline referring the matter to arbitration at the first instance.

11. Mr. Mitra, Senior Advocate, appearing on behalf of the petitioner argued that judicial intervention in a Section 11 arbitration application is *limited* to mere examination of the validity and existence of the arbitration agreement. I find myself in disagreement with this argument as in a Section 11 application, the Court is not supposed to undertake a meager cosmetic exercise to examine the existence and/or validity of the arbitration agreement, and then simply refer the matter to arbitration just because the arbitration clause is valid. Had this been the intent of the law makers and the judicial pronouncements on this subject, the determination could have been delegated to an AI-empowered computer system, thereby eliminating the need for applicability of a judicial mind and relieving the courts of the sedulous task of adjudicating such matters.

12. In my view, if it is manifestly evident on the face of it that the issues purported to be referred to arbitration are hopelessly time-barred and/or are non-arbitrable, the courts can intervene and decline reference to arbitration in such cases. The entire objective of judicial intervention, in certain circumstances, has been to ensure the efficacy and utility of the arbitration process. Just like water is crucial to a fish's survival, the presence of an arbitrability

element in a Section 11 application is a must for it to be accepted and referred to an arbitrator for further adjudication. For instance, if a person appears to be dead and when on examination of the pulse, it is palpably evident that there is no life left, one is not supposed to send the body to the operation theatre but rather to a morgue.

13. At this juncture, this Court finds it imperative to broach the Supreme Court's decision in ***Vidya Drolia (supra)*** wherein the scope of intervention in a Section 11 application was defined and made permissible in certain circumstances only. The same has been enumerated herein below **–**

> *92. (iv) Most jurisdictions accept and require prima facie review by the court on non-arbitrability aspects at the referral stage.*
>
> *
>
> *(vi) Exercise of power of prima facie judicial review of existence as including validity is justified as a court is the first forum that examines and decides the request for the referral. Absolute "hands off" approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective*

<u>intervention is acceptable as it does not obstruct but effectuates arbitration</u>.

(vii) <u>Exercise of the limited prima facie review does not in any way interfere with the principle of competence–competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage.</u>

(viii) Exercise of prima facie power of judicial review as to the validity of the arbitration agreement would save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability……

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(xi) The interpretation appropriately balances the allocation of the decision-making authority between the court at the referral stage and the arbitrators' primary jurisdiction to decide disputes on merits. The court as the judicial forum of the first instance can exercise prima facie test jurisdiction to screen and knockdown ex facie meritless, frivolous and dishonest litigation. Limited

jurisdiction of the courts ensures expeditious, alacritous and efficient disposal when required at the referral stage."

The Court further went on to hold that-

93. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time barred and dead, or there is no subsisting dispute. All other cases should be referred to the arbitral tribunal for decision on merits. Similar would be the position in case of disputed 'no claim certificate' or defence on the plea of novation and 'accord and satisfaction'. As observed in Premium Nafta Products Ltd., it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract

should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.

14. A bare reading of the aforementioned paragraphs will nullify the arguments raised by Mr. Mitra that there is no scope for judicial intervention in Section 11 applications except to determine the existence and validity of the arbitration agreement. Within a certain category of cases which satisfy the principles as laid down in ***Vidya Drolia (supra)*** and expanded in subsequent decisions (cited later in this judgment), the courts as opposed to a completely *hands-off approach* can put their hands back on and decline the appointment of the arbitrator provided the facts fall within the ambit of those certain category of cases.

15. It is not a universal principle that every case calls for the appointment of an arbitrator and that any and all disputes should be decided by the arbitrator. The courts act as a doorkeeper where entry is permitted for all the disputes but the doorkeeper can restrict the entry if certain specific criteria as laid down in the aforementioned judgments are not met. Reliance can be placed upon the decision of the Supreme Court in ***DLF Home Developers Limited -v- Rajapura Homes Pvt. Ltd. & Anr.*** in ***Arbitration Petition (Civil) No. 16 of 2020*** wherein it was clarified that –

"18. The jurisdiction of this Court under Section 11 is primarily to find out whether there exists a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party has made out a prima facie arbitrable case. The limited jurisdiction, however, does not denude this Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. A three-judge bench in Vidya Drolia (Supra), has eloquently clarified that this Court, with a view to prevent wastage of public and private resources, may conduct 'prima facie review' at the stage of reference to weed out any frivolous or vexatious claims.......

*

19. To say it differently, this Court or a High Court, as the case may be, are not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator. On the contrary, the Court(s) are obliged to apply their mind to the core preliminary issues, albeit, within the framework of Section 11(6-A) of the Act. Such a review, as already clarified by this Court, is not intended to usurp the jurisdiction of the Arbitral Tribunal but is aimed at streamlining the process of arbitration. Therefore, even when an arbitration

agreement exists, it would not prevent the Court to decline a prayer for reference if the dispute in question does not correlate to the said agreement."

16. Reference can also be made to the apex court's decision in ***Bharat Sanchar Nigam Ltd. & Anr. -v- M/s Nortel Networks India Pvt. Ltd.*** reported in ***[2021] 2 S.C.R. 644*** wherein the court held that adjudication of the limitation issue at the referral stage does not tantamount to stepping into the arbitrator's jurisdictional territory. The relevant paragraphs have been delineated below–

> *30. Issue of Limitation is normally a mixed question of fact and law, and would lie within the domain of the arbitral tribunal. There is, however, a distinction between jurisdictional and admissibility issues. An issue of 'jurisdiction' pertains to the power and authority of the arbitrators to hear and decide a case. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal.*

*

32. The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the arbitral tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some pre-condition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.

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36. In a recent judgment delivered by a three-judge bench in Vidya Drolia v. Durga Trading Corporation, on the scope of power under Sections 8 and 11, it has been 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 prima facie review at the reference stage is to cut the deadwood, where dismissal is bare faced and pellucid, and when on the facts and law, the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration agreement exists, or that the subject matter is not arbitrable, that reference may be refused.

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37. The upshot of the judgment in Vidya Drolia is affirmation of the position of law expounded in Duro Felguera and Mayavati Trading, which continue to hold the field. It must be understood clearly that Vidya Drolia has not re-surrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engineering (supra). It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.

17. I disagree with Mr. Mitra's argument that the principle in case of a Section 11 application is that of non – interference. In my view, the principle is rather of very limited and selective interference in certain category of cases. While party autonomy and independence of the arbitral tribunal are the cornerstones of creating an arbitration friendly atmosphere, but at the same time, the courts are not supposed to act as mere spectators in every Section 11 application.

18. Mr. Mitra relied upon ***Uttarakhand Purv Sainik (supra)*** to argue that the Court is '*only required to examine the existence of arbitration agreement*' and 'a*ll other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-kompetenz principle*'.

19. However, to my mind, this is an incomplete reading of the position of law on the aspect of judicial interference in a Section 11 application as the *kompetenz-kompetenz* principle upheld in ***Uttarakhand Purv Sainik (supra)*** emanated from the reasoning where the question of limitation is within the arbitrator's domain under Section 16 of the Act. Having said that, the apex court in ***BSNL –v- Nortel (supra)*** held that the question of limitation is not a challenge to the arbitrator's jurisdiction under Section 16 of the Act but rather it is a challenge to the admissibility of the claims itself. In the light of the same, the judgment adduced by Mr. Mitra is not concrete enough to seize the judicial hands of this Court in determining the question of limitation at the referral stage.

20. In addition to the above, in ***Vidya Drolia (supra),*** the Supreme Court has upheld in that –

> *"92.(vii) Exercise of the limited prima facie review does not in any way interfere with the principle of competence–*

competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage."

21. Now, the question before me is whether the claims here are *ex-facie time barred* and therefore, falls under the restrictive category of *deadwood*. To determine the starting point of cause of action and ascertain the expiry of the limitation period, this Court finds it pertinent to refer back to the judgment of the Supreme Court in ***BSNL –v- Nortel (supra)*** wherein it made explicitly clear that a notice invoking arbitration must be sent by the claimant party within three years from the date on which the escalation claim is rejected. The relevant paragraphs have been extracted -

"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. 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.

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39. The present case is a case of deadwood / no subsisting dispute since the cause of action arose on 04.08.2014, when the claims made by Nortel were rejected by BSNL. The Respondent has not stated any event which would extend the period of limitation, which commenced as per Article 55 of the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the Final Bill by making deductions. In the notice invoking arbitration dated 29.04.2020, it has been averred that: "Various communications have been

exchanged between the Petitioner and the Respondents ever since and a dispute has arisen between the Petitioner and the Respondents, regarding non payment of the amounts due under the Tender Document." The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that : "where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it." There must be a clear notice invoking arbitration setting out the "particular dispute" (including claims / amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail."

22. Now, the task before this Court is to apply the above-mentioned cases in the present issue at hand and to determine when the cause of action first arose. After perusing the facts of the present case and looking at the materials placed on record, this becomes quite evident that the final bill was prepared by the respondent IIMC on March 11, 2016, and was accepted by the petitioner on

March 15, 2016 and the acceptance iterated on March 17, 2016. Pursuant to receipt of such an acceptance, the respondent issued a final completion certificate to the respondent on May 5, 2016.

23. Therefore, the way I see it, the right to sue / cause of action first arose when the final bill was first issued on March 11, 2016. The limitation clock in the present case started ticking from March 11, 2016, and despite multiple opportunities to reject the final bill and invoke arbitration, the petitioner BKC opted not to do that and instead proceeded with acceptance of the final bill. In this context, the argument of Mr. Mitra that rejection of the price escalation for first time by the respondent on September 12, 2017 is when the cause of action first arose becomes meritless.

24. On top of that, the aforesaid argument of Mr. Mitra stands on a foundationless ground as well. A careful examination of the materials placed on record makes it evident that even before the preparation of the final bill, the escalation claims were raised multiple times by the petitioner. In my view, the very fact that the final bill was prepared by the respondent on March 11, 2016 without taking into account the said escalation claim would undoubtedly tantamount to being the first instance of rejection of the petitioner's price escalation claim which in turn would give rise to the cause of action for invoking arbitration. The acceptance of

the final bill by the petitioner would also mean the acceptance of such rejection by the respondent.

25. At this point, it would be apt to refer to the decision of the apex court in ***Secunderabad Cantonment Board –v- B. Ramachandraiah & Sons (supra)*** as cited by Mr. Chowdhury. On perusal of the paragraphs reproduced below, it becomes crystal clear that the factual situation in that case is akin to the one in the present matter. The relevant portion has been extracted below -

> "*19. Applying the aforesaid judgments to the facts of this case, so far as the applicability of Article 137 of the Limitation Act to the applications under Section 11 of the Arbitration Act is concerned, it is clear that the demand for arbitration in the present case was made by the letter dated 7-11-2006. This demand was reiterated by a letter dated 13-1-2007, which letter itself informed the appellant that appointment of an arbitrator would have to be made within 30 days. At the very latest, therefore, on the facts of this case, time began to run on and from 12-2-2007. The appellant's laconic letter dated 23-1-2007, which stated that the matter was under consideration, was within the 30-day period. On and from 12-2-2007, when no arbitrator was appointed, the cause of action for appointment of an arbitrator accrued to the respondent*

and time began running from that day. Obviously, once time has started running, any final rejection by the appellant by its letter dated 10-11-2010 would not give any fresh start to a limitation period which has already begun running, following the mandate of Section 9 of the Limitation Act. This being the case, the High Court was clearly in error in stating that since the applications under Section 11 of the Arbitration Act were filed on 6-11-2013, they were within the limitation period of three years starting from 10-11-2020. On this count, the applications under Section 11 of the Arbitration Act, themselves being hopelessly time-barred, no arbitrator could have been appointed by the High Court."

Likewise in the present matter, the limitation is set to have commenced on March 11, 2016 itself when the final bill was prepared by the respondent after due consideration of the petitioner's price escalation claims. This being the case, once the time has started running, any further rejection of the earlier claims will not give fresh start to the limitation period.

26. In addition to that, Mr. Mitra's contention that the acceptance of the final bill was revoked by the petitioner vide its letter dated May 16, 2016 is also ought to be rejected as a bare reading of the said acceptance letter reveals that it was mere repetition of its earlier

acceptance letters dated March 15, 2016, and March 17, 2016 and in fact, there was no mention of any sort of revocation of these earlier acceptance letters.

27. Moreover, I found it strange for the petitioner to seek respondent's permission to invoke arbitration in terms of clause 25 of the contract as the said clause contains no such requirement necessitating one party to seek another's permission to invoke arbitration.

28. There is a limited period within which an arbitration notice has to be sent, failing which a party's right to do so would extinguish. The Supreme Court in ***BSNL –v- Nortel (supra)*** held that by merely sending letter a party cannot claim an extension of the limitation period. Therefore, if Mr. Mitra's stance is accepted then it would be highly damaging wherein the period of limitation would expand by merely sending letters, thereby, putting the other party at a huge disadvantage. Logically, repetition of its earlier stance by the respondent would not amount to initiating a fresh cause of action or extend the limitation period.

29. Mr. Chowdhury, counsel appearing on behalf of the respondent cited the decision of the Supreme Court in ***Geo Miller & Company Private Ltd. -v- Rajasthan Vidyut Utpadan Nigam Ltd.,*** reported in ***2019 SCC OnLine SC 1137*** to argue that the

limitation period in the present case had already expired and that the petitioner cannot justify the unreasonable delay in invocation of arbitration by taking refuge in the purported settlement discussions. While this Court accepts the principle propounded in the aforesaid case as was also done by the apex court in ***BSNL –v- Nortel (supra)*** but the present case factually differs from the situation in ***Geo Miller (supra)***. In ***Geo Miller (supra)***, the final bill was still pending settlement whereas in the present case the final bill was not only settled but the retention money was also refunded to the petitioner. The petitioner clearly accepted the settlement by two letters, indicating no duress or coercion whatsoever, accepted the payments as per the final bill and the refund of the retention money.

30. Next, Mr. Mitra sought to challenge the acceptance of such final bill on the grounds that the same was done under duress from the respondent. This reminded me of the old saying of hitting arrows in the dark in the hope that one of them will hit the intended target. I firmly believe that one should not keep arguing for argument's sake. If a certain claim is made before the Court, the same needs to be backed up by some evidence. He failed to satisfy this Court regarding the existence of duress or any such extraneous factor which led the petitioner to accept the final bill. In my view, compelling financial circumstances and the

petitioner's eagerness to receive the payment cannot tantamount to duress from the respondent's side.

31. It is now well settled that the claims in the present petition are *ex-facie time barred.* However, as a last ditch effort Mr. Mitra contended that since the respondent in its letter dated April 10, 2021 had themselves appointed the arbitrator, the question regarding the existence of any dispute does not arise anymore. In my view, limitation is not something to be decided by the consent between the parties, but it is something which is statutorily mandated and judicially enforced. If there is a boundary drawn by the legislature and enforced by the judiciary, parties cannot act outside of it on the grounds that their consent should be the primary consideration in such cases. While this Court accepts that appointment of arbitrator by the respondent is impermissible but that would not permit the parties to venture beyond the boundaries of limitation.

32. The letter dated April 10, 2021 of the respondent is quite explicit with regards to non-admissibility of the claim and on the point of limitation. Even though the respondent appointed an arbitrator it clearly stated as follows:-

> "*In view of the above, our client states that there is no existing dispute referable to arbitration as alleged in your letter under*

reference. In any event the alleged claim sought to raised, is clearly barred by limitation.

Without prejudice to the above contentions, since your client has sought to invoke the arbitration clause, our client hereby nominates Shri. Basab Majumdar, Retd. DG, CPWD as its nominee arbitrator."

Ergo, the appointment per se cannot be treated as an acceptance of the claim resulting in extension of the limitation as the letter specifically denies the claim and states that the same is barred by limitation.

33. At this juncture, reference can be made to the Delhi High Court's decision in ***Extramarks Education India Pvt. Ltd -v- Shri Ram School and Anr.*** reported in ***2022 SCC OnLine Del 3123*** wherein Bhambani J. held that limitation cannot be extended by consent. The relevant portions have been extracted below –

> *14. To be abundantly clear as to the concept of 'limitation' barring a legal remedy, the following observations of the Hon'ble Supreme Court in N. Balakrishnan v. M. Krishnamurthy may be noticed:*
>
> > *"11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties*

do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finislitium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time."

(emphasis supplied)

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34. *For completeness, the two other objections raised on behalf of the petitioner may also be answered. The petitioner's objection that the schedule of payments, as set-out in Annexure 3 to Agreement dated 31.03.2015, ran up-to May 2018 is of no relevance of consequence, for the reason that admittedly the petitioner terminated the contract with the respondent by Notice dated 04.01.2017; and could not therefore have demanded payment up-to May 2018 in the same breath. The petitioner's other objection, that since in its reply dated 31.08.2021 the respondent themselves were willing to accept and had given their consent for appointment of an arbitrator "near to the locality" where the respondents were located, is neither here nor there, since if the court finds that the payments made are ex-facie time-barred, limitation for invoking a legal remedy cannot be extended even by consent. Conceptually, limitation bars a legal remedy and not a legal right, the legal policy being to ensure that legal remedies are not available endlessly but only up-to a certain point in time. Needless to add however, that if the respondents are conceding the petitioner's claim itself, and are ready and willing to pay-up, such payment would not be illegal and there could not be any legal impediment in doing so. A party may concede a claim at any time; but*

cannot concede availability of a legal remedy beyond the prescribed period of limitation."

35. This Court is in agreement with the principles laid down by the Delhi High Court in the aforesaid judgment. While time should never be a hindrance in dispensing justice, the same would not mean that the time for claiming recourse to a remedy never ends as this would defeat the very purpose for which such remedies exist. The goal is never just to ensure that justice is done but also to make sure it is done in a timely manner, and within certain boundaries of limitation as laid down by the law. In my view, limitation does not act as a barrier in the pathway of justice, but instead it acts as a means to ensure efficiency in the process of justice.

36. For ease of reference of the parties, I have attempted to encapsulate below the relevant juridical principles which emerge from the various judgments discussed above –

    a. The Supreme Court vide its decisions in ***Perkins Eastman Architects DPC & Another -v- HSCC (India) Ltd. (supra)*** and ***TRF Ltd. -v- Energo Engineering Projects Ltd. (supra)*** has univocally made it clear that unilateral appointment of an arbitrator by an interested party is not permissible.

b. The three judges' bench in ***Vidya Drolia –v- Durga Trading Corporation (supra)*** empowered the Courts adjudicating a Section 11 application to intervene in certain circumstances and held that such interventional exercise does not interfere with the principle of *competence-competence* and *separation* as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters gets weeded out at the initial stage. It is to be noted that the Supreme Court in this case observed that an absolute *hands off* approach would be counterproductive and harm arbitration, whereas limited yet effective intervention is acceptable as it does not obstruct but effectuates arbitration. Thus, the Courts at the Section 11 referral stage, with a view to prevent wastage of public and private resources, can interfere when it is manifest that the claims are *ex-facie time barred* and *dead*, or there is no *subsisting dispute*.

c. Similarly, in ***DLF Home Developers Limited –v- Rajapura Homes Pvt. Ltd., (supra)*** the apex court affirmed that the limited jurisdiction under Section 11 does not denude this Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. The Court went ahead to say it differently that this Court or a High Court, as the case may be, are not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the

doors of the chosen arbitrator. A limited review by the Court is not intended to usurp the jurisdiction of the Arbitral Tribunal but is aimed at streamlining the process of arbitration.

d. The Supreme Court further clarified in ***Bharat Sanchar Nigam Limited –v- Nortel Networks India Pvt. Ltd. (supra)*** that adjudication of the limitation issue at the Section 11 referral stage does not tantamount to stepping into the arbitrator's jurisdictional territory. In essence, it opined, that the issue of limitation is a challenge to the maintainability or admissibility of the claim itself and not a challenge to the jurisdiction of the arbitrator to decide the claim. Basis this reasoning, ***Uttrakhand Purv Sainik (supra)*** cited by Mr. Mitra stood distinguished.

e. Again in ***Bharat Sanchar Nigam Limited –v- Nortel Networks India Pvt. Ltd. (supra),*** the Supreme Court held that there must be a clear notice invoking arbitration setting out the particular dispute (including claims / amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail. It also concluded that the period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement discussions,

where a final bill is rejected by making deductions or otherwise.

Likewise in ***Geo Miller & Company Private Ltd. -v- Rajasthan Vidyut Utpadan Nigam Ltd. (supra),*** the apex court held that 'breaking point' is the date where any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This date 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.

f. In ***Secunderabad Cantonment Board –v- B. Ramachandraiah & Sons (supra)***, the apex court ruled that once the limitation period has started running, any final rejection by the respondent would not give any fresh start to the limitation period which has already begun running, following the mandate of Section 9 of the Limitation Act, 1963.

g. Lastly, in ***Extramarks Education India Pvt. Ltd -v- Shri Ram School (supra)***, the Delhi High Court remarked that limitation for invoking a legal remedy cannot be extended even by consent and that unending period for launching the remedy may lead to unending uncertainty and consequential anarchy.

37. For the convenience of the parties, I have summarized below the factual findings of this Court –

a. The final bill of March 11, 2016 was a result of reworking and enhancement of the initial costs from a figure of INR 39,03,20,185 to INR 80,23,73,260/-.

b. Therefore, the cause of action arose on March 11, 2016 itself, i.e., on the day when the final bill was issued by the respondent, and therefore, the limitation period started to run from that day itself;

c. Two letters were issued by the respondent accepting the final bill, and subsequently, they received payments for the same and also refund of the retention money. In fact, the petitioner's letter of acceptance only makes a 'request' for further enhancement and nothing more.

d. Subsequent demand letters by the petitioners do not utter a single word on coercion or duress, and in any case, no evidence was ever produced to show that their acceptance of the final bill dated March 11, 2016, was made under duress or coercion;

e. The letter by the respondent in 2017 rejecting the demands of the petitioner is only a reiteration of its earlier stand and cannot be accepted as the breaking point of negotiations to allow a fresh period of limitation. This argument of Mr. Mitra and his reliance on ***Geo Miller (supra)*** is misplaced as in that case, the final bill was never settled, and therefore, in that case, the rejection was taken as the starting point of limitation. The present case is clearly distinguishable on facts.

f. In light of the above, the limitation period started on March 11, 2016 itself and the notice of arbitration under Section 21 issued on March 8, 2021, is patently barred by limitation as per Article 137 of the Limitation Act, 1963.

g. In arguendo, if May 16, 2016, is assumed to be the 'breaking point,' i.e., the day when the petitioner raised their escalation claims for the first-time post receipt of payment, retention money, and the final completion certificate, and also sought

to invoke arbitration, even then the present application is barred by limitation.

h. Even though the respondent appointed an arbitrator in their letter dated April 10, 2021, the same would not be treated as an acknowledgement of the petitioner's claim as the letter not only denied such a claim but also stated that the same is barred by limitation.

38. I would like to put on record my appreciation of the lawyers appearing for both parties for their assiduous efforts in trying to convince the court on behalf of their clients. Arguments made during the course of the hearing were both invasive and thought-provoking and have resulted in substantial enhancement in the ken of knowledge of this Court on the subject.

39. In view of the above-mentioned findings by this Court, and humbly disagreeing with Mr. Mitra, I hold that it is patently clear that the claim giving rise to the present dispute is *ex-facie time barred* and falls within the limited category of *deadwood.* Resultingly, the reference to arbitration is hereby declined.

40. Accordingly, AP 237/2021 is dismissed. There shall be no order as to costs.

41. An urgent photostat-certified copy of this order, if applied for, should be made available to the parties upon compliance with requisite formalities.

(Shekhar B. Saraf, J.)