IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/PETN. UNDER ARBITRATION ACT NO. 173 of 2018

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DIPAKKUMAR NATHABHAI PATEL

Versus

NARMADABEN DHIRAJLAL RADADIA & 2 other(s)

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Appearance:
MR JIGAR G GADHAVI(5613) for the Petitioner(s) No. 1
MR DIPEN C SHAH(3374) for the Respondent(s) No. 1,2
MR. RADHESH Y VYAS(7060) for the Respondent(s) No. 3

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CORAM:**HONOURABLE THE CHIEF JUSTICE MR. JUSTICE ARAVIND KUMAR**

Date : 05/08/2022

CAV JUDGMENT

1. This petition is filed under section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act' for short) seeking appointment of Arbitrator contending *inter alia* that petitioner and respondents had entered into a partnership agreement on 02.03.1994 and one of the partner namely Rameshbhai Ishwarbhai Patel was relieved from the partnership and thereafter a new partnership agreement came to be executed on 01.07.1998 under which the petitioner – applicant and the respondent Nos. 1 to 3 became partners of the firm under which the applicant has been given 25% of the share. It is further contended that on account of

certain disputes having arisen between applicant and respondents, the applicant had filed a Regular Civil Suit No. 486 of 2005 before Civil Judge (Senior Division), Vadodara as well as Regular Civil Suit No. 409 of 2006 and Regular Civil Suit No. 746 of 2007 for various reliefs, which came to be disposed of on the ground that deed of partnership contained arbitration clause. Hence, it is stated that on disposal of suits, applicant had got issued notices to the respondents calling upon the respondents to give their consent for appointment of sole arbitrator, to which the respondent No. 1 objected. Respondent No. 3 did not object and no reply is issued by respondent No. 2. Hence, applicant has sought for appointment of an arbitrator.

2. On notice being issued, respondent No. 1 appeared and filed affidavit-in-reply denying the averments made in the petition except to the extent expressly admitted thereunder. It is stated that "Aadarsh Pharmacy and General" was an unregistered firm and was reconstituted by partnership deed dated 01.07.1998, whereunder it was

agreed that partnership was determinable at Will. It is also stated that said partnership was dissolved in the year 2005 after meeting came to be held on 09.05.2005, wherein it was agreed by the partners that petitioner would be removed from the firm and consequently dissolved the firm. It is contended that in furtherance of the meeting, minutes came to be drawn and respondent Nos. 2 and 3 executed a dissolution deed dated 16.05.2005 and even on request being made, petitioner did not affix his signature to the said dissolution deed and as such respondent No. 1 is said to have intimated the applicant on 16.05.2005 about his removal from the Firm and consequently dissolution of the firm. It is further contended that in the suits which came to be filed, the respondent No. 1 had filed an application under section 8 of the Act which came to be allowed and suit came to be disposed of vide order dated 08.03.2007. It is contended that thereafter petitioner filed third suit being Regular Civil Suit No. 764 of 2007, which came to be disposed of vide order dated 10.06.2013. Hence, contending that claim of the petitioner is hopelessly barred by limitation

and by attempting to revive the dead cause of action, the present application has been filed. Hence, 1st respondent has prayed for dismissal of this application.

3. Heard Shri Jigar Gadhvi, learned advocate appearing for petitioner and Shri Dipen Shah, learned advocate appearing for respondents. Perused the records.

4. Undisputedly, it emerges from the available records that partnership deed entered into between the parties on 01.07.1998 was an unregistered firm. The said partnership firm was not registered as required under section 59 of the Partnership Act. The said partnership deed provided for an arbitration clause. The dispute which arose between the petitioner / applicant on one hand and first respondent on the other hand namely the petitioner who claims to have been illegally removed from the partnership firm. Whereas respondent No. 1 has contended that a meeting was held on 09.05.2005 wherein all the partners of the firm participated and it was resolved to remove the petitioner as partner of the firm and it was also resolved

thereunder to dissolve the firm. The petitioner is said to have not affixed his signature to the minutes of said meeting. Respondent No. 1 also claims that respondent No. 2 and 3 executed a dissolution deed dated 16.05.2005 evidencing their removal as partners of the firm and consequently dissolution of the entire firm. On such removal, the respondent No. 1 has intimated the petitioner on 16.05.2005 which is also admitted by petitioner – applicant. Petitioner has also admitted that respondent no. 1 gave a public notice on 19.05.2005 in Gujarat Samachar daily newspaper that applicant and respondent no. 3 had been removed from the partnership firm and publication of such notice is also admitted by the petitioner in paragraph 2.4 of the application.

5. The applicant herein filed a suit being Regular Civil Suit No. 486 of 2005 to declare his removal as illegal. In the said suit, an application under Order VII Rule 11 of CPC came to be filed by first respondent herein, which came to be allowed vide order dated 04.09.2018. During the pendency of the said suit, applicant – petitioner filed Regular Civil Suit being No. 409 of 2006 for settlement of

accounts consequent upon dissolution of the firm, in which suit, first respondent filed an application under section 8 of the Act which came to be allowed vide order dated 08.03.2007 and directed the parties to proceed to resolve the disputes through arbitration.

6. These two orders namely order dated 08.03.2007 (allowing the application of respondent No. 1 filed under section 8 of the Act in Regular Civil Suit No. 409 of 2006) and order dated 04.09.2018 (passed in Regular Civil Suit No. 486 of 2005 allowing the application under Order VII Rule 11 of CPC) have undisputedly attained finality. The 3rd suit which came to be filed namely Regular Civil Suit No. 764 of 2007 for declaration and permanent injunction was also disposed of vide order dated 10.06.2013 in light of an application filed by respondent no. 1 herein under section 8 of the Act. This order also attained finality. Thus, the petitioner has accepted orders dated 08.03.2007, 04.09.2018 and 10.06.2013.

7. Petitioner is attempting to take umbrage under the order dated 04.09.2018 passed in Regular Civil Suit No.

486 of 2005 to contend that cause of action for seeking appointment of Arbitrator arose on disposal of the said suit. It also requires to be noted at this stage that aforesaid order dated 04.09.2018 which came to be passed on an application (Exh. 33) filed in Regular Civil Suit No. 409 of 2006 for rejection of plaint under Order VII Rule 11 contending *inter alia* that Court had already passed an order on 08.03.2007 on Exh. 29-A namely an application filed under section 8 had been allowed, by virtue of which the proceedings had come to an end and as such no purpose would be served by keeping the suit pending. This application as noticed hereinabove came to be allowed on 02.07.2018 and it had attained finality. Thus, nothing remained further to be done and as such a quietus came to be given to the said suit Regular Civil Suit No. 409 of 2006.

8. It would further emerge from the pleading of the parties that petitioner was purportedly or allegedly removed from the partnership firm constituted under deed of partnership dated 01.07.1998 on 16.05.2005. Respondent No. 1 even according to petitioner forwarded

the deed of dissolution to be signed by the petitioner, which was not admittedly signed by petitioner. By notice dated 19.05.2005, respondent no. 1 intimated the petitioner of his removal from the firm and had requested the petitioner to affix his signature to the deed of dissolution. This was followed by issuance of a notice by respondent No. 1 to petitioner on 25.05.2005 intimating the petitioner about dissolution of firm and removal of petitioner by majority of partners.

9. First respondent also gave a public notice on 09.06.2005 in Gujarat Samachar. All these facts were well within the knowledge of petitioner. This triggered the petitioner to file three suits namely Regular Civil Suit Nos. 486 of 2005, 409 of 2006 and 746 of 2007 above referred to. In Regular Civil Suit No. 409 of 2006, respondent No. 1 herein filed an application under section 8 of the Act contending *inter alia* that dispute is squarely covered by arbitration clause and as such parties are to be relegated to the arbitration and civil suits should not be proceeded with. As noticed hereinabove and at the cost of repetition,

it can be noticed that said application was allowed vide order dated 08.03.2007. In the Regular Civil Suit No. 486 of 2005, an application came to be filed by respondent no. 1 herein under Order VII Rule 11 for rejection of plaint and same was allowed and plaint came to be rejected vide order dated 04.09.2018 on the ground suit was not maintainable. Even, in the third suit viz. Regular Civil Suit No. 764 of 2007 filed by petitioner for declaration, the application filed by first respondent herein under section 8 of the Act by respondent No. 1 herein came to be allowed on 10.06.2013. The sum and substance of the claim of petitioner in these three suits was for declaring his removal as illegal; for rendition of accounts of the firm; and consequently relief of perpetual injunction. By virtue of order of proceedings of two suits having been stopped by trial court way back in 2007 i.e. on 08.03.2007 and 10.06.2013 respectively, the cause of action, if any, for the petitioner to file an application under section 11(6) of the Act to pursue his claim against 1st respondent on the ground it was alive was on disposal of these two applications. Infact, it can be gainsaid that on allowing of

application on 08.03.2007, the petitioner ought to have approached this Court seeking for appointment of an Arbitrator. He did not do so for reasons best known. However, after disposal of suit Regular Civil Suit No. 486 of 2005 on 04.09.2018, namely allowing of application filed on 12.07.2005 under Order VII Rule 11 by respondent No. 1 herein, the petitioner is now attempting to contend that present application filed under section 11(6) on 24.09.2018 is well within time or still he would be entitled to maintain his claim for payment from 1st respondent or rendition of accounts by respondent No. 1.

10. Section 43(1) of the Act indicate that the Limitation Act, 1963 shall apply to arbitration as it applies to the Court proceedings. A perusal of sub-section (2) of Section 43 would indicate that for the purposes of Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Normally the issue of limitation being question of fact/s and the Law governing the same would be procedural, it would always be open for the Arbitral Tribunal to decide based on the facts that may be unfolded

in a given case. However, this Court exercising the power of referring the dispute to arbitration, would refuse to do so when it is manifest that claims are ex-facie time barred and dead or there is no subsisting dispute. The Hon'ble Apex Court in the case of ***Vidya Drolia and Others versus Durga Trading Corporation*** reported in ***(2021) 2 SCC 1,*** has held : -

> ***"147.11*** *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."*

11. The Hon'ble Apex Court in a recent judgment in the case of ***Bharat Sanchar Nigam Limited and Another versus Nortel Networds India Private Limited*** reported in ***(2021) 5 SCC 738,*** has held : -

> ***"45.*** *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 barefaced 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.

45.1 *In paragraph 144, the Court observed that the judgment in Mayavati Trading had rightly held that the judgment in Patel Engineering had been legislatively overruled. Paragraph 144 reads as :*

> *"144. As observed earlier, Patel Engg. Ltd. explains and holds that Section 8 and 11 are complementary in nature as both relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Amendments to Section 8 vide Act 3 of 2016 have not been omitted. Section 11 covers the situation where the parties approach a court for appointment of an arbitrator. Mayavati Trading (P) Ltd., in our humble opinion, rightly holds that Patel Engg. Ltd. has been legislatively overruled and hence would not apply even post omission of sub-section (6-A) to Section 11 of the Arbitration Act. Mayavati Trading (P) Ltd. has elaborated upon the object and purposes and history of the amendment to Section 11, with reference to sub-section (6-A) to elucidate that the section, as originally enacted, was facsimile with Article 11 of the Uncitral Model of law of arbitration on which the Arbitration Act was drafted and enacted." (emphasis supplied)*

While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time barred and dead, or there is no subsisting dispute. Paragraph 148 of the judgment reads as follows :

> *"148. 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. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)], 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."

[emphasis supplied)

45.2 *In paragraph 154.4, it has been concluded that :*

"154.4*. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative*

dispute resolution mechanism." (emphasis supplied)

46. *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 Engg. Ltd. (supra).*

47. *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.*

48. *Applying the law to the facts of the present case, it is clear that this is a case where the claims are ex facie time barred by over 5½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 04.08.2014. The notice of arbitration was invoked on 29.04.2020. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable Section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation."*

12. Applying the aforesaid authoritative principles of law laid down by the Hon'ble Apex Court, when the facts on hand are looked into, at the cost of repetition, it would emerge therefrom that even according to the petitioner, he was removed from the firm on 09.05.2005

and deed of dissolution was forwarded to him by first respondent on 16.05.2005, followed by issuance of legal notice dated 19.05.2005 as well as publication of advertisement in Gujarat Samachar on 09.06.2005. This would evidence the fact that petitioner was well within the knowledge of he having been removed from the firm. Thus, cause of action having arisen on 16.05.2005, 19.05.2005 or on 09.06.2005 for invoking arbitration clause, for reasons best known, petitioner did not seek such recourse. On the other hand, petitioner filed a suit being R.C.S. No. 486 of 2005 for declaration of his removal as illegal and to grant injunction from preventing him from entering the shop premises, in which suit no interim order came to be passed in his favour. Be that as it may. Yet another suit being Regular Civil Application No. 409 of 2006 for settlement of accounts came to be filed in which an application under section 8 of the Act was filed by respondent No. 1 herein on 18.11.2006 which came to be allowed on 08.03.2007. As noticed herreinabove, third suit viz. Regular Civil Suit No. 764 of 2007 came to be filed for declaration and permanent

injunction and it came to be disposed of 10.06.2013. In Regular Civil Suit No. 486 of 2005, an application under Order VII Rule 11 for rejection of plaint came to be filed and learned trial Judge after taking note of the facts that in Regular Civil Suit No. 409 of 2006, the proceedings therein had been stopped and subsequent suit would not be maintainable, rejected the plaint by order dated 04.09.2018. It is thereafter petitioner has attempted to revive dead cause of action by filing this application. Even according to petitioner, cause of action arose on his alleged removal way back on 09.05.2005 and instead of taking recourse to invoke arbitration clause and seek for settlement of his claim immediately thereafter assuming he had a right to do so, he resorted to file Civil Suit and even after first order came to be passed in Regular Cisil Suit No. 409 of 2006 on 08.03.2007 if being construed as the date on which petitioner had cause of action for filing an application under section 11(6) for appointment of an Arbitrator, he did not choose to do so and said cause of action to sue had stood extinguished on expiry of three years period even if it had commenced on 07.03.2010 and

as such by the present application filed on 24.09.2018 under section 11(6) of the Act, petitioner cannot be allowed to urge his claim on the basis of a dead cause of action or revive the claim which is barred by Law of Limitation namely not raising it within three years from the date cause of action arose.

13. Hence, this Court is of the considered view that petition filed under section 11(6) is not maintainable and it is liable to be rejected.

For, reasons aforestated, I proceed to pass following :

O R D E R

(i) IAAP No. 173 of 2018 is **DISMISSED**.

(ii) No order as to costs.

(ARAVIND KUMAR,CJ)

AMAR SINGH