

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Arbitration Application No.14 of 2021

Jharia Petrol Supply, Durgapur, Jharia, P.O. & P.S. Jharia, District Dhanbad, through its proprietor Maina Devi, aged about 78 years, wife of Late Nand Kishore Aggarwal, Care of Mr. Lakshman Modi, resident of Flat No.400, Surya Apartment, Sector 21-D, Faridabad, Haryana, Near GBN School, P.O. & P.S. Faridabad District Faridabad (Haryana).

.... ... Petitioner

Versus

1. Indian Oil Corporation Limited, through its D.G.M. (R.S.), having its office at Indian Oil Bhawan, Dhanbad, P.O. & P.S. Dhanbad, District Dhanbad.

2. Managing Director, Indian Oil Corporation Limited, having its office at Indian Oil Bhawan, Dhanbad, P.O. & P.S. Dhanbad, District Dhanbad. Respondents

CORAM:HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD

For the Petitioner :Mr. Vipul Poddar, Advocate

For the Respondents :Mr. Rahul Lamba, Advocate

Order No. 04/Dated 2nd March, 2022

The matter has been taken up through video conferencing.

2. The instant application has been filed under Section 11(6)(C) of the Arbitration and Conciliation Act, 1996 for appointment of an independent Arbitrator and for reference of the dispute arising out of Clause 21 of the Agreement dated 29.09.1967 for Petrol HSD Dealer Agreement, between the parties for adjudication.

3. The brief facts of the case which led the petitioner/applicant to approach this Court by filing the instant application, are that an agreement was entered in between the petitioner/applicant and respondents, to be known as Petrol HSD Dealer Agreement, for the purpose of sale and disposal of Petrol / High Speed Diesel Oil and certain other petroleum products.

The aforesaid contract contains a provision as under Clause 21 for settlement of dispute through Arbitrator.

The petitioner/applicant was carrying out the business in terms of the aforesaid contract. However, an explanation was sought for on 15.09.1999 asking to reply as to why the penal action should not be initiated in line with Clause 14 of the said dealership agreement in violation of the terms and conditions of the aforesaid dealership agreement.

The petitioner/applicant replied. However, the aforesaid reply was not found to be satisfactory and in consequence thereof, the dealership agreement was cancelled.

The petitioner/applicant approached to this Court by filing writ petition being C.W.J.C. No.827 of 2000 (R). However, the aforesaid writ petition was dismissed against which intra-court appeal being L.P.A. No.696 of 2001 was

preferred but the same was also dismissed vide order dated 22.04.2002.

The petitioner/applicant, thereafter, made a request for appointment of Arbitrator vide application dated 28.04.2018. According to the petitioner/applicant, when the Arbitrator, in terms of the contract, has not been appointed, the instant application under Section 11(6)(C) of the Arbitration and Conciliation Act, 1996 has been filed.

The instant application was heard on 22.11.2021. Mr. Rahul Lamba, learned counsel, after waiving notice on behalf of respondents, had sought for four weeks' time to file counter affidavit. The matter was directed to be posted thereafter.

The matter has been listed today for hearing of the matter.

Mr. Lamba, learned counsel appearing for the respondents, has submitted that although no counter affidavit has been filed, but he is ready to argue the matter on merit.

The matter has been heard on merit with the consent of the learned counsel for the parties.

4. Mr. Vipul Poddar, learned counsel appearing for the petitioner/applicant, has submitted that it is a fit case where the sole Arbitrator is required to be appointed for

adjudication of the claim in terms of Arbitration Agreement as contained under Clause 21.

He further submits that the petitioner/applicant, in terms of the aforesaid condition stipulated in the contract, made request for appointment of Arbitrator vide application dated 28.04.2018 but the same was not responded. It is the laches on the part of the respondents in not appointing the Arbitrator, therefore, the instant application.

5. *Per contra*, Mr. Rahul Lamba, learned counsel appearing for the respondents, submits that the instant application is not maintainable on the ground of limitation.

According to him, the instant application has been filed after inordinate delay of about 20 years from the date of passing of the order by the Hon'ble Division Bench of this Court in L.P.A. No. 696 of 2001 whereby liberty was granted to the petitioner/applicant to approach before the authority for appointment of Arbitrator.

He further submits that the request for appointment of Arbitrator was also made after lapse of about 16 years from the date of order passed in L.P.A. No. 696 of 2001.

He, in order to strengthen his argument, has relied upon the judgment rendered by Hon'ble Apex Court in ***Bharat Sanchar Nigam Limited and Another v. Nortel Networks India Private Limited [(2021) 5 SCC 738]***, wherein the issue of limitation was the sole criteria for

consideration and while delving upon the issue, the Hon'ble Apex Court has held that the provision of Article 137 of the First Schedule of the Limitation Act, 1963, will be applicable, thereby the proceeding for appointment of Arbitrator, if filed beyond the period of three years as provided under Article 137 of the Limitation Act, 1963, will be barred by limitation and in view of the matter, such application is fit to be dismissed at the threshold.

6. Mr. Vipula Poddar, learned counsel appearing for the petitioner, in response to such submission, has submitted that the contention which has been raised by the learned counsel for the respondents to the effect that on the ground of expiry of the period of three years from date of occurrence of cause of action, the instant application is fit to be dismissed, is not worth to be considered in view of the judgment rendered by Hon'ble Apex Court in ***Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited [(2020) 2 SCC 455]*** and ***Zostel Hospitality Private Limited through its authorized representative v. Oravel Stays Private Limited through its Director and Others [(2021) 9 SCC 765]***.

7. We have heard the learned counsel for the parties and perused the documents available on record.

8. The undisputed fact in this case is that the petitioner/applicant had entered into a dealership

agreement on 29.09.1967 for the purpose of sale and disposal of Petrol / High Speed Diesel Oil and certain other petroleum products. The aforesaid agreement contains a clause of resolution of dispute as under Clause 21 thereof. The petitioner/applicant, while carrying out its business, on the ground of commission of certain irregularities, an explanation was sought for vide notice dated 15.09.1999 as to why the penal action be not taken. The aforesaid notice was replied by the petitioner/applicant denying the allegation of commission of alleged irregularities. The aforesaid reply was not found satisfactory and in consequence thereof, the agreement was terminated vide order of termination dated 12.03.2001.

The petitioner/applicant, being aggrieved with the aforesaid action of the respondents, preferred a writ petition being C.W.J.C. No.827 of 2000(R) but was dismissed on the ground of availability of alternative remedy.

The petitioner/applicant then preferred intra-court appeal being L.P.A. No. 696 of 2001 which was also dismissed vide order dated 22.04.2002 on the ground of availability of alternative remedy of arbitration clause in the agreement.

The petitioner/applicant has not acted immediately after passing of the order by the Hon'ble Division Bench of

this Court in L.P.A. No. 696 of 2001, rather, the petitioner/applicant made request vide letter dated 28.04.2018 for appointment of Arbitrator, as would appear from Annexure-5 to the paper book.

The grievance of the petitioner/applicant that even though request for appointment of Arbitrator was made vide request letter dated 28.04.2018 but no response thereof was received, therefore, the instant application under Section 11(6)(C) of the Act, 1996 has been filed.

Learned counsel for the respondents raised objection about non-maintainability of the instant application on the ground of filing of this application after inordinate delay. He, in support of his argument has relied upon the judgment rendered by Hon'ble Apex Court in ***Bharat Sanchar Nigam Limited and Another*** (Supra).

While on the other hand, learned counsel appearing for the petitioner/applicant has relied upon the judgment rendered by Hon'ble Apex Court in ***Uttarakhand Purv Sainik Kalyan Nigam Limited*** (Supra) and ***Zostel Hospitality Private Limited*** (Supra).

9. This Court, having appreciated the argument advanced on behalf of learned counsel for the parties, is required to answer the issue about the maintainability of the instant application on the ground of applicability of the provision of Article 137 of the Limitation Act, 1963.

This Court, before answering the aforesaid issue, is also required to consider as to whether the provision of Article 137 of the Limitation Act, 1963 will be held applicable in a petition filed under Section 11(6)(C) of the Arbitration and Conciliation Act, 1996.

This Court, to answer the issue of applicability of the provision of Article 137 of the Limitation Act, 1963, has gone across the judgment rendered by Hon'ble Apex Court in ***Bharat Sanchar Nigam Limited and Another*** (Supra), wherein the provision of Article 137 of the Limitation Act, 1963 has been held applicable in a proceeding while considering the application filed under Section 11(6)(C) of the Act, 1996, as would appear from paragraph Nos. 45.1, 50, 51 and 53.1 thereof, which reads hereunder as:-

“**45.1.** In para 144, the Court observed that the judgment in *Mayavati Trading* [(2019) 8 SCC 714] had rightly held that the judgment in *Patel Engg.* [(2005) 8 SCC 618] had been legislatively overruled. Para 144 reads as :

“144. As observed earlier, *Patel Engg. Ltd.* explains and holds that Sections 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. Para 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 the 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.* [2007 UKHL 40] , 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)

50. In the notice invoking arbitration dated 29-4-2020, 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.”

51. 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” [Section 21 of the Arbitration and Conciliation Act, 1996.] (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.

53.1. The period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. The period of limitation will begin to run from the date when there is failure to appoint the arbitrator. It has been suggested that Parliament may consider amending Section 11 of the 1996 Act to provide a period of limitation for filing an application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings.”

Thus, after the law having been laid down by the Hon'ble Apex Court in ***Bharat Sanchar Nigam Limited and Another*** (Supra) wherein the provision of Article 137 of the Limitation Act, 1963 has been held applicable, therefore, this Court is required to see as to whether the instant application filed under Section 11(6)(C) of the Act, 1996 can be said to be maintainable, request for which has been made after lapse of about 16 years from the date of

order passed by Hon'ble Division Bench of this Court in L.P.A. No.696 of 2001.

10. This Court, before considering the aforesaid issue, has also gone across the pleading made by the learned counsel for the petitioner in order to scrutinize as to whether any reason has been explained to show the delay in filing the said application after inordinate delay but no such explanation has been furnished except the age of the petitioner/applicant who is now 78 years.

There is no dispute about the fact that the limitation can be condoned if the party will show sufficient cause for its condonation but, no such reason is there. Further, the question of applicability of Section 5 of the Limitation Act, 1963 will also be required to be considered but no such issue has been raised, therefore, no such finding is being given.

Therefore, in the given facts of the case, admittedly the order of termination of the dealership agreement which was passed on 12.03.2001 against which writ petition/intra court appeal was preferred, which was dismissed by the Division Bench of this Court. The order passed by the Hon'ble Division Bench of this Court in L.P.A. No. 696 of 2001 was not questioned by the petitioner/applicant, as has been informed in course of argument, as such, the order passed by the Hon'ble

Division Bench of this Court in L.P.A. No.696 of 2001 has remained conclusive. As such, according to the considered view of this Court, the date of filing of the request for the purpose of counting the period of limitation of three years will be required to be counted from the date of order passed by the Hon'ble Division Bench of this Court in L.P.A. No.696 of 2001 i.e., on 22.04.2002.

Admittedly herein, after the disposal of the aforesaid intra-court appeal, which was dismissed on 22.04.2002 granting liberty to the petitioner/applicant for availing the alternative remedy for resolution of dispute as per the stipulation made in the dealership agreement and by taking recourse thereof, for the first time the petitioner/applicant has made request for appointment of sole Arbitrator in view of arbitration clause, as provided under Clause 21 of the aforesaid dealership agreement, on 28.04.2018, after lapse of about 16 years.

11. Mr. Poddar, learned counsel for the petitioner/applicant, has relied upon the judgment rendered by Hon'ble Apex Court in ***Uttarakhand Purv Sainik Kalyan Nigam Limited*** (Supra) in order to fortify his case about the issue of non-considering the limitation at this stage, rather, it may be left open to be adjudicated by the Arbitrator.

12. This Court has considered the judgment rendered by Hon'ble Apex Court in ***Uttarakhand Purv Sainik Kalyan Nigam Limited*** (Supra) of which the reliance has been placed about the observation made at paragraph 7.5 to 7.14 and paragraph 8 thereof. Paragraphs 7.5 to 7.14 and paragraph 8 of the aforesaid judgment are quoted hereunder as :-

“7.5. Further, the Chief Justice was required to decide all threshold issues with respect to jurisdiction, the existence of the agreement, whether the claim was a dead one; or a time-barred claim sought to be resurrected; or whether the parties had concluded the transaction by recording satisfaction of their mutual rights and obligations, and received the final payment without objection, under Section 11, at the pre-reference stage. The decision in *Patel Engg.* [(2005) 8 SCC 618] was followed by this Court in *Boghara Polyfab* [(2009) 1 SCC 267], *Master Construction* [(2011) 12 SCC 349], and other decisions.

7.6. The Law Commission in the 246th Report [Amendments to the Arbitration and Conciliation Act, 1996, Report No. 246, Law Commission of India (August 2014), p. 20.] recommended that:

“33. ... the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. *The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void.* Insofar as the [**Ed.** : The matter between two asterisks has been emphasised in original.] *nature* [**Ed.** : The matter between two asterisks has been emphasised in original.] of intervention is concerned, it is recommended that *in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be.* The amendment envisages that the judicial authority shall not refer

the parties to arbitration *only if it finds that there does not exist an arbitration agreement or that it is null and void*. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal.”

(emphasis supplied)

7.7. Based on the recommendations of the Law Commission, Section 11 was substantially amended by the 2015 Amendment Act, to overcome the effect of all previous judgments rendered on the scope of power by a non obstante clause, and to reinforce the kompetenz-kompetenz principle enshrined in Section 16 of the 1996 Act. The 2015 Amendment Act inserted sub-section (6-A) to Section 11 which provides that:

“(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, *notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.*”

(emphasis supplied)

7.8. By virtue of the non obstante clause incorporated in Section 11(6-A), previous judgments rendered in *Patel Engg.* [(2005) 8 SCC 618] and *Boghara Polyfab* [(2009) 1 SCC 267], were legislatively overruled. The scope of examination is now confined only to the existence of the arbitration agreement at the Section 11 stage, and nothing more.

7.9. Reliance is placed on the judgment in *Duro Felguera S.A. v. Gangavaram Port Ltd.* [(2017) 9 SCC 729], wherein this Court held that :

“48. ... From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. *the court should and need only look into one aspect—the existence of an arbitration agreement*. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple — it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.”

(emphasis supplied)

7.10. In view of the legislative mandate contained in Section 11(6-A), 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.

7.11. The doctrine of “kompetenz-kompetenz”, also referred to as “compétence-compétence”, or “compétence de la reconnized”, 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 minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified. If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”.

7.12. The legislative intent underlying the 1996 Act is party autonomy and minimal judicial intervention in the arbitral process. Under this regime, once the arbitrator is appointed, or the tribunal is constituted,

all issues and objections are to be decided by the Arbitral Tribunal.

7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, “*including any objections*” with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.

7.14. In the present case, the issue of limitation was raised by the respondent Company to oppose the appointment of the arbitrator under Section 11 before the High Court. Limitation is a mixed question of fact and law. In *ITW Signode (India) Ltd. v. CCE* [(2004) 3 SCC 48] 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. Reliance is also placed on the judgment of this Court in *NTPC Ltd. v. Siemens Atkeingesellschaft* [(2007) 4 SCC 451], wherein it was held that the Arbitral Tribunal would deal with limitation under Section 16 of the 1996 Act. If the tribunal finds that the claim is a dead one, or that the claim was barred by limitation, the adjudication of these issues would be on the merits of the claim. Under sub-section (5) of Section 16, the tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral proceedings would continue, and the tribunal would make the award. Under sub-section (6) a party aggrieved by such an arbitral award may challenge the award under Section 34. In *IFFCO Ltd. v. Bhadra Products* [(2018) 2 SCC 534] this Court held that the issue of limitation being a

jurisdictional issue, the same has to be decided by the tribunal under Section 16, which is based on Article 16 of the UNCITRAL Model Law which enshrines the kompetenz principle.

8. In view of the aforesaid discussion, we set aside the impugned judgment and order dated 11-1-2018 passed by the High Court, and direct that the issue of limitation be decided by the Arbitral Tribunal.”

13. This Court has considered the observations made at paragraph 7.5 onwards as also paragraph 8 and found therefrom, more particularly, paragraph 7.14 and paragraph 8, to the effect that the issue of limitation was raised by the company to oppose the appointment of Arbitrator under Section 11 before the High Court. It has been observed therein that the limitation is a mixed question of fact and law and, as such, finding on the issue of limitation would be jurisdictional issue. Such jurisdictional issue would be determined having regard to the fact and the law to be decided by the Arbitral Tribunal.

14. It requires to refer herein that the judgment rendered by the Hon’ble Apex Court in ***Uttarakhand Purv Sainik Kalyan Nigam Limited*** (Supra) was rendered on 27.11.2019 while the judgment in ***Bharat Sanchar Nigam Limited and Another*** (Supra) was rendered on 10.03.2021. It is settled that recent judgment of Hon’ble Apex Court, having answered the issue, will have binding precedence over the former judgment.

It further appears from the judgment rendered by the Hon'ble Apex Court in ***Bharat Sanchar Nigam Limited and Another*** (Supra) that ***Uttarakhand Purv Sainik Kalyan Nigam Limited*** (Supra) has been considered, as would appear from paragraph 33 thereof and after taking into consideration the ratio laid down therein, the Hon'ble Apex has observed which has been quoted and referred hereinabove.

15. Further, learned counsel appearing for the petitioner has relied upon the judgment rendered in ***Zostel Hospitality Private Limited*** (Supra) which was pronounced on 19th September, 2018. From its perusal, it appears that the issue about applicability of Article 137 of the Limitation Act, 1963 was not the subject matter, rather, the Hon'ble Apex Court, in the aforesaid judgment, has opined that the respondent can raise the issue of arbitrability of disputes before the Arbitrator with a further observation to the effect that needless to say, our expression of the view that an arbitration clause exists and the arbitrator should be appointed, would not affect the suit filed by the respondents. The observation made at paragraph 9 of the aforesaid judgment is quoted hereunder as :-

“9. In view of the aforesaid, we are of the opinion that the respondents can raise the issue of arbitrability of the disputes before the arbitrator. Needless to say, our

expression of the view that an arbitration clause exists and the arbitrator should be appointed, would not affect the suit filed by the respondents.”

16. Thus, it is evident that the judgment rendered by Hon'ble Apex Court in ***Uttarakhand Purv Sainik Kalyan Nigam Limited*** (Supra) since has been considered in the judgment rendered in the case of ***Bharat Sanchar Nigam Limited and Another*** (Supra), wherein the applicability of Article 137 of the Limitation Act has been decided holding about its applicability in an application filed under Section 11(6)(C) of the Act, 1996 which is after the judgment passed in the case of ***Uttarakhand Purv Sainik Kalyan Nigam Limited*** (Supra). Therefore, according to the considered view of this Court, after taking into consideration the position of law that where the ratio is being decided answering the issue, will have the binding precedence, as has been settled by Hon'ble Apex Court in ***ICICI Bank and Another v. Municipal Corpn. Of Greater Bombay and Others [(2005) 6 SCC 404]***, wherein at paragraph 8 it has been held –

“**8.** ... The ratio and effect of the judgment is required to be ascertained with reference to the question of law as decided by the Court. The ratio of the judgment or the principle upon which the question before the Court is decided is alone binding as a precedent. The decision of the Supreme Court upon a question of law is considered to be a binding precedent, and this must be ascertained and determined by analysing all the material facts and issues involved in the case.”

17. So far as the applicability of the judgment rendered in the case of **Zostel Hospitality Private Limited** (Supra), this Court is of the considered view that no particular issue about applicability of the provision of Article 137 of the Limitation Act, 1963 fell for consideration before the Hon'ble Apex Court, therefore, the aforesaid judgment since is on different aspect, is not applicable in the facts and circumstances of the case.

So far as the argument made on behalf of the learned counsel for the petitioner that the issue of limitation be left open to be decided by the Arbitrator is concerned, this Court is not in agreement with such submission after taking into consideration the judgment rendered in the case of **Bharat Sanchar Nigam Limited and Another** (Supra) wherein if the application itself is not maintainable on the ground of inordinate delay in filing application under Section 11(6)(C) of the Act, 1996, instead of referring it before the sole Arbitrator, is required to be answered at the threshold i.e., at the stage of delving upon the application filed under Section 11(6)(C) of the Act, 1996.

18. This Court, therefore, on the basis of the discussion made hereinabove and considering the binding of the judgment rendered by Hon'ble Apex Court in **Bharat Sanchar Nigam Limited and Another** (Supra), is of the view that the instant application filed by the

petitioner/applicant under Section 11(6)(C) of the Act, 1996, having been filed after lapse of a period of more than 16 years from the date of order passed by the Hon'ble Division Bench of this Court in L.P.A. No. 696 of 2001, is barred by limitation since filed after delay of more than the period of three years, as has been provided under Article 137 of the First Schedule of the Limitation Act, 1963.

19. Accordingly, the instant application fails and is dismissed.

(Sujit Narayan Prasad, J.)

Birendra/**A.F.R.**