

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

Arb P No.15/2023

**Reserved on :29.11.2024.
Pronounced on: 06.12.2024.**

M/s Mir Sons Constructions Pvt. Ltd., Registered Office 215 Karanagar, Medical College Road, Srinagar, through its Managing Director, Mohammad Farooq Mir, Aged about 63 years S/o Late Abdul Rehman Mir R/o Gole Market, Karanagar, Srinagar. **...Petitioner(s).**

Through: Mr. B. A. Malla, Advocate.

Vs.

1. Union Territory of J&K, through Commr/ Secy. To Government, Public Works Department, Civil Sectt., Srinagar Kashmir.
2. Chief Engineer, R&B Department Kashmir, Raj Bagh, Srinagar.
3. Executive Engineer, Truck Terminal Division Srinagar, Raj Bagh, Srinagar. **....Respondent(s)**

Through: Mr. Faheem Nissar Shah, GA.

**CORAM:
HON'BLE THE CHIEF JUSTICE**

O R D E R

01. The instant petition has been filed by the petitioner seeking appointment of an arbitrator by invoking Section 11(6) of the *Arbitration and Conciliation Act, 1996* (for short the 'Act').

02. It is averred in the petition that the petitioner being a Private Ltd. Company duly incorporated under the Indian Companies Act of 1956, after having competed in the tendering process initiated by the respondents, was allotted a contract, *Construction of Additional Office Accommodation at*

Old Secretariat Srinagar, vide allotment order No.15612-16 dated 26.11.1992. After allotment of the contract in favour of the petitioner, it is stated that the petitioner complied with the terms and conditions of the allotment order, submitted the bank guarantee and also dumped material and machinery on spot for execution of the work. It is stated that the respondents failed to provide the drawings required by them to be provided for completion of the work within three years and they also failed to release the amount of Rs.20.00 lacs as Mobilization Advance in favour of the petitioner. It is further averred that after a period of four years, on 08.05.1996, the respondents provided the drawing of construction of Layout and Raft of Bock "C" and the said work was executed on spot by the petitioner. However, the approved drawings of the balance works, despite repeated requests, were not provided, resulting into huge losses to the petitioner.

03. It is further pleaded in the petition that despite failure on the part of the respondents to provide the approved drawings, they sought encashment of the Bank Guarantee and, thus, the petitioner was constrained to approach the Court of Principal District Judge, Srinagar, under Section 9 of the Act seeking interim protection and the said application is stated to have been dismissed vide order dated 31.03.2004. Against the order dated 31.03.2004, the petitioner filed a Statutory Appeal before this Court being CIA No.48/2004 and the said appeal was also dismissed vide order dated 13.08.2018. Against the order of dismissal dated 13.08.2018 passed in CIA No.48/2004, the petitioner has filed a review petition being RPC No.09/2018 and the same is stated to be pending before this Court.

04. It is further claimed by the petitioner that he has executed the part of the work allotted to him to the extent approved drawings were provided to him and in so far as the rest of the work is concerned, the same could not be executed because of non-furnishing of the approved drawings. It is also stated that the respondents have also failed to release the Mobilization Advance of Rs.20.00 lacs as also the bills submitted with regard to the execution of the part of the work and, as such, dispute is claimed to have arisen between the parties which is required to be resolved through arbitration. It is further stated that in view of the aforesaid given facts, the

petitioner invoked clause 54 of the Agreement containing the Arbitration Clause and served a notice upon the respondents seeking appointment of an arbitrator in the matter. The petitioner has further stated that despite service of notice, the respondents have not acted in the matter and they failed to appoint an arbitrator in the matter, as such, the indulgence of this Court is sought in terms of Section 11(6) of the Act seeking appointment of an arbitrator.

05. The present petition came to be filed before this Court on 12.05.2023 and on coming up before the Court, notices were directed to be issued in the matter vide order dated 19.05.2023. The respondents through their counsel caused their appearance in the matter, however, despite granting several opportunities for filing objections, the respondents have failed to do so and accordingly, the matter was heard in absence of the objections.

06. Heard learned counsel for the parties and perused the records available on record.

07. Learned counsel for the petitioner submits that the petition requires to be allowed as there is a valid agreement between the parties and dispute has arisen between the parties on account of non-fulfillment of the legal obligation on the part of the respondents. It is further submitted that notice under Section 21 of the Act seeking appointment of an arbitrator was served upon the respondents but they failed to do so and hence the petitioner is before this court through the medium of present petition.

08. In opposition to the submissions made by the petitioner, learned counsel for the respondents submitted that the petition is not maintainable being barred by limitation.

09. In rebuttal, the learned counsel for the petitioner submits that the petition is within time and in support of his submission, the learned counsel relied upon the decision of the Hon'ble Supreme Court rendered in *M/s Arif Azim Co. Ltd. v. M/s APTECH Ltd.* reported as **AIR 2024 SC 1347**

10. Since the petitioner has made a mention in the petition that he had approached the court of Principal District Judge, Srinagar, in terms of Section 9 of the Act, in the year 2003, this court thought it necessary to go through the records of the appeal being CIA No.48/2004 arising out of the

order dated 31.03.2004 passed in the said application under Section 9 of the Act. Perusal of the said appeal reveals that the petitioner has specifically averred in paragraph 7 of the appeal, that he invoked the arbitration clause 54 of the contract and served a communication dated 05.10.2001 upon the Executive Engineer, respondent no.3 herein, seeking appointment of an Arbitrator. Perusal of the said file also reveals that the Court of Principal District Judge, Srinagar, while entertaining the application filed under Section 9 of the Act by the petitioner, has passed an interim order dated 22.09.2003, operative portion whereof reads as under:

“Subject to the objections of other side, the non-applicants shall not take any step to invoke the bank guarantee furnished by the applicants. This order shall remain in force till the opposite party files its objections and same are considered by the court.”

After passing of the aforesaid order, the application filed under Section 9 of the Act came to be dismissed by the Court of Principal District Judge, Srinagar, vide its order dated 31.04.2004 against which an appeal was filed before this Court which too was dismissed vide order dated 13.08.2018. Against the dismissal order dated 13.08.2018 a review petition has been filed by the petitioner which is pending adjudication.

11. While going through the aforesaid pleadings, it becomes crystal clear that the notice in terms of Section 21 of the Act was served upon the respondents on 05.10.2001 and protection sought in terms of Section 9 of the Act by the petitioner was granted to him by the court of Principal District Judge, Srinagar, on 22.09.2003.

12. Keeping in view the above facts and the material on record, the question which arises for consideration before this Court is whether the petition at hand is ex-facie barred by limitation or otherwise?

13. In order to appreciate the issue, it is apt to go through the relevant provisions of law.

14. Sections 21 and 43 of the Act, provides as under:

“21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on

which a request for that dispute to be referred to arbitration is received by the respondent.

43. Limitations.—(1) *The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.*

(2) *For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in Section 21.*

(3) *Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.*

(4).....”

15. From perusal of the aforesaid provisions of law, it is manifestly clear that limitation period starts to run from the date a request for referring the disputes to arbitration is made and for purposes of limitation, The Limitation Act, 1963 shall be applicable to arbitrations as it applies to proceedings in court.

16. In the present case while going through the records, it is manifestly clear that notice in terms of Section 21 of the Act was served by the petitioner upon the respondents on 05.10.2001 as is pleaded by the petitioner himself in the appeal filed against the order dated 31.03.2004 passed in the application filed under Section 9 of the Act. It is apt to mention here that petitioner in the petition at hand has pleaded that notice upon the respondents was served in terms of annexure-VI (wrongly marked as annexure-VII in the annexures). The petitioner has not pleaded in the petition as to when the notice was issued and served upon the respondents.

However, the notice purportedly to be the notice under Section 21 of the Act is dated 27th July, 2022. While going through the said communication it transpires that the crux of the said communication is with regard to shifting of the machinery and other materials from the site of the work and lastly a passing reference has been made therein that, as already requested, an arbitrator may be appointed in the matter. It has been specifically mentioned in the said communication that petitioner has long before requested for appointment of the arbitrator.

17. As referred to above, Section 21 of the Act, provides that arbitral proceedings commences from the date a request for referring the disputes, so arisen between the parties, is made. In the present case the request for arbitration has been made by the petitioner on 05.10.2001 seeking reference of the dispute so arisen between the parties to the arbitrator. The petitioner thereafter slept over its alleged rights for over twenty two years and woke up from the deep slumber in the year 2023 and filed the present petition by contending that notice in terms of Annexure-VI has been served upon the respondents.

18. In terms of Article 137 of the Limitation Act, 1963, the period of limitation to file an application under Section 11(6) is three years from the date of refusal to appoint the arbitrator or on expiry of thirty days from the date of notice/letter of request for appointment of an arbitrator. In the present case, the cause of action to file the petition under Section 11 of the Act, seeking appointment of arbitrator, has accrued to the petitioner after expiry of one month from the date the communication/ letter of request for appointment of arbitrator which was served upon respondents on 05.10.2001. The petitioner himself has pleaded in the appeal filed against the dismissal order passed in application under Section 9 of the Act, that notice was served upon the respondent-Executive Engineer on 05.10.2001, but still the petitioner slept over the matter for a long period of more than twenty two years and filed the petition at hand on 12.05.2023. Making a passing reference in the subsequent communications with regard to appointment of arbitrator does not prolong the period of limitation. In the circumstances, there is not an iota of doubt that the present petition is ex-facie barred by limitation as has been held by the Hon'ble Supreme Court

in case *Geo Miller & Co. Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.* : AIR 2019 SC 4244. Relevant portion of para-8 of the said judgment reads thus:

“8.Applying the aforementioned principles to the present case, we find ourselves in agreement with the finding of the High Court that the appellant’s cause of action in respect of Arbitration Applications Nos. 25/2003 and 27/2003, relating to the work orders dated 7.10.1979 and 4.4.1980 arose on 8.2.1983, which is when the final bill handed over to the respondent became due. Mere correspondence of the appellant by way of writing letters/reminders to the respondent subsequent to this date would not extend the time of limitation. Hence the maximum period during which this Court could have allowed the appellant’s application for appointment of an arbitrator is 3 years from the date on which cause of action arose i.e. 8.2.1986.....”

19. The Hon’ble Supreme Court while considering the similar issues, as are involved in the present petition, in case *B and T AG v. Ministry of Defence* : (2024) 5 SCC 358, has held as under:

“53. This Court in *Nortel Networks [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738]* observed that the Act 1996 has been framed for expeditious resolution of disputes and various provisions have been incorporated in the Act 1996 to ensure that the arbitral proceedings are conducted in a time bound manner. The Act 1996 does not prescribe any time period for filing an application under Section 11(6). Since there is no provision in the Act 1996 specifying the period of limitation for filing an application under Section 11, one would have to take recourse to the Act 1963, as per Section 43 of the Act 1996 which provides that the Limitation Act shall apply to arbitrators, as it applies to proceedings in Court. Since none of the articles in Schedule to the Limitation Act provide a time period for filing an application for appointment of arbitrator under Section 11, it would be covered by the residual provision under Article 137 of the Limitation Act which provides that the period of limitation is three years for any other application for which no period of limitation is provided elsewhere in the division. The time limit starts from the period when the right to apply accrues.

54. This Court in *Nortel Networks (supra)* relied on its various other decisions including few High Court decisions. This Court held that an application under Section 11 is to be filed in a Court of Law, and since no specific Article of the Act 1963 applies, the residual Article would become applicable. The

effect being that the period of limitation to file an application under Section 11 is three years from the date of refusal to appoint the arbitrator or on expiry of 30 days whichever is earlier. In the said case the respondent had issued the notice of arbitration on 29.04.2020 which was rejected by the appellant on 09.06.2020. The respondent filed an application under Section 11 before the High Court on 24.07.2020, i.e., within the period of three years of rejection of the request for appointment of arbitrator.

55. This Court allowed the appeals filed by the BSNL holding as under:

“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 4-8-2014. The notice of arbitration was invoked on 29-4-2020. 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.

49. The present case is a case of deadwood/no subsisting dispute since the cause of action arose on 4-8-2014, 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.

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 nonpayment 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, [S.S. Rathore v. State of M.P., (1989) 4 SCC 582 : 1990 SCC (L&S) 50; Union of India v. Har Dayal, (2010) 1 SCC 394; CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., (2020) 5 SCC 185] 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.

52. In the present case, the notice invoking arbitration was issued 5½ years after rejection of the claims on 4-8-2014. Consequently, the notice invoking arbitration is ex facie time-barred, and the disputes between the parties cannot be referred to arbitration in the facts of this case.”

73. Negotiations may continue even for a period of ten years or twenty years after the cause of action had arisen. Mere negotiations will not postpone the “cause of action” for the purpose of limitation. The Legislature has prescribed a limit of three years for the enforcement of a claim and this statutory time period cannot be defeated on the ground that the parties were negotiating.

76. The case on hand is clearly and undoubtedly, one of a hopelessly barred claim, as the petitioner by its conduct slept over its right for more than five years. Statutory arbitrations stand apart.”

20. The Hon’ble Supreme Court in ***M/s Arif Azim Co. Ltd. v. M/s Aptech Ltd. : AIR 2024 SC 1347***, the judgment relied upon by the petitioner, while considering the issues as are involved in the present petition has been pleased to held as under:

“50. Having traversed the statutory frame-work and case law, we are of the clear view that there is no doubt as to the applicability of the Limitation Act, 1963 to arbitration proceedings in general and that of Article 137 of the Limitation Act, 1963 in particular. Having held thus, the next question that falls for our determination is whether the present petition seeking appointment of an arbitrator is barred by limitation.

51. The determination of the aforesaid question is an exercise involving both law and facts. As is evident from Article 137 of the Limitation Act, 1963, the limitation period for making an application under Section 11(6) of the Act, 1996 is three years from the date when the right to apply accrues.”

(Emphasis supplied)

21. Thus keeping in view the ratio laid down by the Hon'ble Supreme Court in the aforesaid decisions, it is emphatically clear that the period of limitation to file an application under Section 11(6) seeking appointment of arbitrator is three years from the date of refusal to appoint the arbitrator or on expiry of thirty days from the date of service of notice. However, in the present case, as discussed above, the petitioner after serving the letter of request invoking arbitration clause on 05.10.2001 filed the present petition on 12.05.2023 after a lapse of more than twenty two years.

22. Besides, the petition being ex-facie barred by limitation in the aforesaid backdroup, the same is also time barred in terms of Section 9(2) of the Act. Section 9(2) of the Act provides that ***“Where, before the commencement of the arbitral proceedings a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.”***

23. While going through the aforesaid provision of law it is crystal clear that Section 9(2) of the Act requires that where a Court passes an order for any interim measure or protection, the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such time as the Court may determine. In the present case the petitioner had asked for the interim measure in terms of Section 9 of the Act before the learned Principal District Judge, Srinagar, which was granted by the said court on 22.09.2003 and the same remained in operation till dismissal of the said application vide order dated 31.03.2004, for a period of more than six months. However, during the said period of more than six months, no steps have been taken by the petitioner to seek appointment of an arbitrator in terms of Section 11(6) of the Act and the petitioner has chosen to file the present petition in the year 2023 after a lapse of more than twenty two years.

24. Thus, keeping in view the facts of the present case as also the ratio laid down by the Hon'ble Supreme Court, this petition is held to be ex-facie barred by time and merits dismissal.

25. Accordingly the petition is dismissed being time barred.

(TASHI RABSTAN)
Chief Justice

Srinagar
06.12.2024
Abdul Qayoom, Secy.

Whether approved for reporting: Yes.

