IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: July 05, 2022

\+ ARB.P. 74/2022

NATIONAL RESEARCH DEVELOPMENT CORPORATION AND ANR.

.... Petitioners

Through: Mr. Joydeep Sarma, Adv.

versus

MAK CONTROLS AND SYSTEMS PRIVATE LIMITED

.... Respondent

Through: Mr. M. Yogesh Kanna, Mr. Raja Rajeshwaran and Mr. Gangadarsana P.G., Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This is a petition filed under Section 11 (6) of the Arbitration & Conciliation Act, 1996 ('Act of 1996', for short) with the following prayers:

> *"IN THE PREMISES STATED ABOVE, IT IS, THEREFORE, RESPECTFULLY PRAYED THAT THIS HON'BLE COURT MAY BE PLEASED TO: -*
>
> *a). allow the present petition and appoint a Sole Arbitrator to adjudicate upon the disputes-between the parties;*
>
> *b). pass such further orders or directions as this Hon'ble Court may deem fit, appropriate and proper in the facts and circumstances of the present case."*

2. The Petitioner No.1 is a Government of India Enterprise working in the field of Research & Development of indigenous technology and processes. It grants licenses upon payment of royalty for using such technology/processes by entrepreneurs. It is an admitted position that an agreement dated March 06, 2002 was executed between the petitioners and the respondent (which is an incorporated entity under the Companies Act, 1956) for a period of twelve years. Vide the agreement the respondent was given financial assistance to the tune of ₹ 92 Lacs under the 'Programme Aimed at Technological Self Reliance' Scheme ('PATSER Agreement', hereinafter) for the development of Mak World Tracker ('Project', hereinafter). According to the PATSER Agreement the respondent had to enter into an agreement with the petitioner No.1 for payment of royalty on behalf of petitioner No. 2 for an annual lump sum amount of ₹24 Lacs for the products sold and manufactured for its own use by the respondent during the preceding year ending March 31st. In terms of the PATSER Agreement another agreement was signed between the petitioner No. 1 and the respondent on March 06, 2002 which provided for details regarding the payment obligations ('Royalty Agreement', hereinafter).

3. It is the case of the petitioners and so contended by Mr. Joydeep Sarma, Advocate appearing on behalf of the petitioners that on April 19, 2004 the officials of petitioner No.1 wrote a letter No. NRDC(R)//M-317/4320/2003-2004 to the respondent for the payment of the royalty for the year ending on March 31, 2004 to which the respondent had replied that since the Project is yet to be completed, *"Nil"* royalty return was filed for the year ending on March 31, 2004. On April 8, 2005 the officials of petitioner No.1 again wrote a letter No. NRDC(R)//M-317/4320/2004-2005

to the respondent for payment of royalty for the year ending March 31, 2005; again a similar reply was sent by the respondent stating that since the project is yet to be completed a "*Nil*" royalty return was filed for the year ending March 31, 2005. Letters seeking royalty payments were issued every year by the petitioner No.1 which were replied to in similar manner by the respondent, that is, no royalty return could be filed since the Project is yet to start. This process of sending letters and not receiving royalty continued up to the year 2014, as the last intimation sent by the respondent was on July 19, 2014. Even after the year 2014 the petitioner No.1 continued to follow up with the respondent for filing royalty returns and seeking the amount due. Mr. Sarma stated that the respondent replied on few occasions but did not file any royalty return. It is the case of Mr. Sarma that the respondent has made a conscious attempt to conceal the actual position of their production status.

4. Mr. Sarma has argued that the liability to pay the royalty was to continue for a period of five years from the date of commercial production which may include the period after the expiry of twelve years. As the period of five years from the last verified "royalty return" (which was filed by the respondent on July 19, 2014) was coming to a close, the petitioners, on June 24, 2019, invoked the Arbitration Clause in the PATSER Agreement. The respondent replied to the said legal notice on July 2, 2019 wherein, it reiterated its previous stand that there is no liability to pay any royalty since there was no commercial production. The PATSER Agreement mandates that on dispute, a reference be made to the Secretary of Department of Legal Affairs, Government of India or his nominee for adjudication. He argued that since the petitioners are government entities and the designated

arbitrator is also a government functionary, to avoid any future complication / objection, in view of the position of law, the present petition has been filed to seek an appointment of a sole arbitrator for adjudication of the disputes between the parties.

5. On the other hand, Mr. M. Yogesh Kanna learned Counsel appearing on behalf of the respondent submitted that the petitioners gave financial assistance of ₹ 92 Lacs which was followed up by the respondent investing another ₹161.89 Lacs in the Project which comes to a total of ₹253.89 Lacs. The Royalty Agreement was also entered into between the parties and there was an obligation upon the respondent and/or its subsidiaries to pay on behalf of petitioner No.2 an annual royalty of ₹24 Lacs. He contended that the respondent has to make payment of royalties for minimum period of five years with the underlying condition that there has to be a commercial sale of products manufactured under the aegis of the Project. As per the respondent the Research and Development of the Project was completed in the year 2007 and since then the respondent was trying to commercialise the Project but was unsuccessful. He stated that the respondent communicated to the petitioners on May 23, 2008 that all the proposed technical milestones, evaluations and field-testing related to the Project has been achieved and the respondent was hoping for a commercial break-through by marketing the product and in furtherance of this cause the respondent decided to participate in the Truck Exhibition to be held at Dallas, Texas, United States of America during the month of August 2008. According to Mr. Kanna, despite the repeated efforts put in by the respondent, the Project was not commercialised. It is for the reason of non-commercialisation of the Project

that the rights and the liabilities as per the PATSER Agreement stood discharged on the expiry of the said Agreement as on March 06, 2014.

6. Mr. Kanna has stated that the respondent operated a separate 'no-lien' bank account by the name of "PATSER Project Account" which was operated by the respondent. He submitted that the petitioner No.2 released the funds of the Project in accordance with the financial requirements of the Project whereby only ₹69.50 lacs were released until the completion of the Project in the year 2007. He argued that according to the PATSER Agreement the petitioners are vested with the right to recover all the unspent monies released for the Project, if the respondent unilaterally abandons the Project or if the Project is abandoned for Techno-economic reasons. As per his submission the Project was finished by the respondent, but for want of necessary clearances, licenses and sanctions from the authorities in the United States of America the commercial production of the Project could not be initiated. Mr. Kanna has taken a stand that the grants released by the petitioner No.2 to the respondent to the tune of ₹69.50 lacs until the completion of the Project were utilised for designing, developing, testing, etc., and that these funds were completely exhausted. Moreover, there is no unutilised grant left for the respondent to pay-back to the petitioners and thereby the respondent has not violated the said clause under the PATSER Agreement. As per the respondent the Product which was to be developed under the PATSER Agreement was for the exclusive usage of the US Trucking Industry, however despite best efforts, the respondent could neither secure the necessary clearance and approvals from the US Department of Transport in compliance of the Federal Motor Carrier Safety Regulations nor interface with the US Telecom Operators. Since the

approvals were not sanctioned the Project became inefficacious. As the Project under the PATSER Agreement never reached commercialisation, consequently the claim of the petitioners regarding the dispute does not arise.

7. As per Mr. Kanna, upon completion of the R&D related to the Project in the year 2007 and due to the non-commencement of the commercial production of the Project, the respondent approached the petitioner to transfer the technology to the third parties as per clause 11(e) of the PATSER Agreement. The exclusive right to license the technology developed through the Project to third parties' vests with the petitioner No.1. He argued that even after the respondent had intimated the petitioners communicating its willingness to transfer the technology along with all the associated rights pertaining to design, development and technical assets; the petitioner No.1 failed to consider the request of the respondent. This failure to transfer the project to the third parties also contributed to the non-commercialisation of the Project and made the commercialisation unviable and hence the petitioners were in violation of clause 4.3 of the PATSER Agreement.

8. Mr. Kanna has submitted that the respondent had done all the aforementioned acts in good faith and had acted as per the PATSER Agreement. Conversely, it was the petitioners who had not held up their end of the bargain and had waited for the PATSER Agreement to expire and to file an Arbitration Petition at a belated stage; in order to seek arbitration in a non-subsisting arbitration dispute. The petitioners have not acted as per the PATSER Agreement and at this point in time the claims of the petitioners stand vitiated due to the efflux of time, the claims were repudiated and the

PATSER Agreement stands discharged. He prayed that this Court ought not to appoint an arbitrator and should dismiss this petition.

9. He also sought the dismissal of the present petition on the ground that the claim for payment of royalty as stipulated under the agreement ended in the year 2014 with the expiry of the Agreement. It was the consistent stand of the respondent through various letters that due to the fact that there was no commercial production and /or sale, there is no obligation on the part of the respondent to pay any royalty. He stated that the petitioners cannot take undue advantage of an expired agreement after eight long years in 2022 and seek a reference to arbitration. In other words, there is no dispute which is arbitrable.

10. It is his contention that the petitioners suddenly after a period of five years of the expiry of the agreement through the legal notice dated June 24, 2019 sought to initiate arbitration proceedings for recovery of financial assistance provided by the petitioners and to appoint an arbitrator, this he stated is clearly a time-barred claim. The reply sent by the respondent dated July 02, 2019 clearly states that the respondent complied with the PATSER Agreement and the claims of the petitioners are time-barred. He argued that the petitioners have approached this Court with unclean hands as they knew that the Project had not been commercialised and chose to wait as long as eight years to make a claim towards the financial assistance.

11. It is also the case of Mr. Kanna that as per the Royalty Agreement which clearly states that all the provisions related to definitions, duration, arbitration, project completion, intellectual property rights etc. as contained in the PATSER Agreement shall be read as part of the Royalty Agreement. Therefore, the issue of payment of royalty stands expired along with the

PATSER Agreement as on March 06, 2014. Furthermore, the condition for payment of royalty clearly states that *"the liability of MAK to pay royalty under this clause shall accrue upon the start of commercial sale of the product by MAK and shall continue for a minimum period of five years from the date of start of commercial sale of the PRODUCT by MAK".* He stated that the payment of royalty is conditional on the commercial sale of the product. He has also argued that as per the PATSER Agreement "*Commercial Production*" of the product never took place. The "*Start Of Commercial Sale Of The Product(s)*" by the respondent never commenced as that can be, by way of first invoiced sale of the product(s) by the respondent.

12. The contention of Mr. Kanna is also that Section 11 of the Act of 1996 deals with the appointment of Arbitrators, however, there is no provision in the said act specifying a period of limitation for filing an application under Section 11 of the Act of 1996. Once, no period of limitation is prescribed, the provisions of the Limitation Act, 1963, more specifically, Section 43 would apply. The present petition is clearly barred by limitation as the petitioners have been sleeping since 2014 and have only decided to issue a legal demand notice on June 24, 2019 for Recovery of Financial Assistance provided by DSIR under TDDP Project for Development of Mak World Tracker. He has relied on the judgment of the Supreme Court in ***Bharat Sanchar Nigam Ltd. & Anr. v. Nortel Networks India Pvt. Ltd., (2021) 5 SCC 738***, to argue that when the Court is exercising jurisdiction under Section 11 of the Act of 1996, it may apply the *prima facie* test to screen and knock out the meritless and frivolous litigation and this would include the issues of admissibility including a

challenge to a claim or part of the claim as being time barred or prohibited. The claim of the petitioners being a stale claim does not require any reference to arbitration. The mere exchange of communications between the parties between the years from the expiry of the PATSER Agreement till the issuance of the legal notice in 2019 would not sustain the claim as being not stale.

13. He argued that Sections 5 to 20 of the Limitation Act, 1963 does not take into account the settlement discussion or the mere exchange of letters between the parties to extend the limitation. Whereas Section 9 of the Limitation Act, 1963 is clear while stating that once time has begun to run, no subsequent disability or inability to institute a suit or file an application stops the limitation. In the present case the time to raise the claim began from the time of expiration of the PATSER Agreement and the repudiation of the claim by the respondent in the year 2014. The stand taken by the petitioners that the period of limitation began on June 24, 2019 i.e., the date of issuance of demand notice, is untenable in law.

14. Mr. Kanna in that regard has relied upon the judgment of the Supreme Court in the case of ***Vidya Drolia v. Durga Trading Corpn. (2021) 2 SCC 1***, to argue that the exercise of power under Sections 8 and 11, has been held to be primarily to review and weed out the non-existent and invalid arbitration agreements. He also relied on the judgment in the case of ***DLF Home Developers Limited v. Rajapura Homes Private Limited and DLF Home Developers Limited v. Begur OMR Homes Private Limited, 2021 SCC Online SC 781***, to argue that the extent of judicial inquiry under Section 11 of the Act of 1996 is not to merely mechanically apply the provisions but for the Court to apply its mind to the core preliminary issues

within the framework of Section 11(6A) of the Act of 1996. He has also referred to a judgement of the Allahabad High Court in the case of ***Union of India v. Jagdish Kaur, AIR 2002 All 67***, to argue that if the principal agreement is non-existent; consequently, the arbitration clause contained therein would also not apply. The judgement of the Supreme Court in the case of ***Union of India v. Kishori Lal Gupta & Brothers, (1960) 1 SCR 493,*** has also been relied upon in this regard. While relying on ***Panchu Gopal Bose v. Port of Calcutta (1993) 4 SCC 338,*** he argued that in ***Bharat Sanchar Nigam Ltd. & Anr. v. Nortel Networks India Pvt. Ltd. (2021) 5 SCC 738*** the Supreme Court held that an application for appointment of an arbitrator under Section 11(6) is to be filed within three years from the date on which such right to apply accrues. Thus based on the various judgments of the Supreme Court the present petition as filed by the petitioners is barred by law.

15. In rejoinder submission, Mr. Sarma has argued that the present petition is not only within limitation but the dispute is also arbitrable. He has drawn my attention to a judgment of a Coordinate Bench of this Court in the case of ***National Research Development Corporation v. Pulver Ash Project Ltd., MANU/DE/9007/2007*** in support of his submissions. He argued that the Coordinate Bench while hearing a petition on similar facts, set aside the arbitral award and allowed the parties to again approach the arbitrator for adjudication of a claim for payment of royalty which was earlier held by the arbitrator to be barred by limitation. Mr. Sarma sought the prayers as made in the petition.

16. Having heard the learned counsel parties and perused the record, it would be apposite before delving into the merits of the controversy to

examine the Arbitration Clause as per the PATSER Agreement as included the Royalty Agreement. The same reads as under:

> *"15. ARBITRATION AND JURISDICTION*
>
> *If any dispute or difference arises between the parties hereto as to the construction, interpretation, effect and implication of any provision of this Agreement including the rights or liabilities or any claim or demand of any Party (or its extent) against other party or its sub-contractor or in regard to any matter under these presents but excluding any matters, decisions or determination of which is expressly provided for in this Agreement such disputes or differences shall be referred to the sole arbitration of the Secretary of Department of Legal Affairs, Govt. of India or his nominee·. A reference to the arbitration under this clause shall be deemed to be submission within the meaning of the Arbitration and Conciliation Act 1996 and any modification or re-enactment thereof and the rules framed thereunder for the time being in force.*
>
> *a) i) The venue of the Arbitration shall be at Delhi.*
>
> *ii) Each Party shall bear and pay its own cost of the arbitration proceedings unless the arbitrator otherwise decides in the award.*
>
> *iii) The provision of this clause shall not be frustrated, abrogated or become inoperative, notwithstanding this Agreement expires or ceases to exist or is terminated or revoked or declared unlawful.*
>
> *b) The Courts at Delhi shall have exclusive jurisdiction in all matters concerning this Agreement, including any matter related to or arising out of the arbitration proceedings or any award made therein."*

17. Having noted the clause, it is the conceded case of the parties that they have entered into the PATSER Agreement on March 6, 2002 for the development of Mak World Tracker, which is a Global Positioning System, along with data-logging and communication module and related sub-systems. Pursuant thereto, petitioner No.2 had provided ₹ 92 Lacs through petitioner No.1 to the respondent. In terms of the PATSER Agreement, a

Royalty Agreement was also executed between the parties on the same date whereby the respondent was to pay an amount of ₹ 24 Lacs to the petitioner No.1 on behalf of DSIR (petitioner No.2) every year in respect of the product manufactured and sold for its own use by the respondent during the preceding year ending March 31. This liability of the respondent to pay royalty under the Royalty Agreement was to accrue upon start of commercial sale of the product by the respondent and which was to continue for a minimum period of 5 years from the date of start of commercial sale of the product by the respondent.

18. The Royalty Agreement executed between the parties also contemplates that the terms stipulated in the PATSER Agreement shall be read as part of the Royalty Agreement. If that be so, the claim of the petitioners with regard to the royalty shall also be covered under the provisions of the arbitration clause as found mentioned in the PATSER Agreement and reproduced above. The petitioners had invoked the arbitration clause on June 24, 2019 by getting a legal notice issued to the respondent. The respondent had replied to the legal notice on July 2, 2019 wherein it denied the liability to pay royalty since there was no commercial production.

19. The substantive arguments of the learned counsel for the respondent are the following:

i. That the claim for payment of royalty as stipulated under the agreement ended in the year 2014 along with the expiry of PATSER Agreement.

ii. There was no commercial production and / or sale and as such there is no obligation on the part of the respondent to pay any royalty.

iii. The agreement related to the expenditure for development of the project was entered into between the parties on March 6, 2002 and the same has expired on March 6, 2014 and as such the PATSER Agreement stands expired and accordingly, there is no subsisting dispute between the parties which requires arbitration.

iv. That the total duration of the PATSER Agreement being for 12 years which had expired in the year 2014 and the respondent as far back in the year 2014 had furnished a 'nil' royalty form till 2014, the petitioners cannot take undue advantage of an expired agreement after 8 long years in the year 2014 and seek a reference to the arbitration.

20. The aforesaid submissions of the learned counsel for the respondent have been contested by Mr. Joydeep Sarma, learned counsel for the petitioners by stating that the stipulation in the agreement that the right of the petitioners to seek royalty still subsist inasmuch as per clause 3 of the Royalty Agreement the obligation on the part of the respondent to pay the petitioner No.1 on behalf of petitioner No.2 an annual lumpsum royalty of ₹24 Lacs every year in respect of the products manufactured and sold for own use by the respondent during the preceding year ending March 31 and the said obligation of the respondent to pay under the said clause shall

accrue upon start of commercial sale of the product by the respondent and shall continue to be paid for a minimum period of 5 years from the date of start of commercial sale of the product. In other words, it is his submission that even if the life of the PATSER Agreement has come to an end, the obligation of the respondent to pay royalty in the manner depicted in the Royalty Agreement shall continue and would not come to an end by efflux of time.

21. Having noted the submission made by the learned counsel for the parties, at the outset, I shall deal with the submission made by Mr. Kanna by relying upon the judgment of the Allahabad High Court in the case of ***Union of India v. Jagdish Kaur, (supra)*** in support of his submission that if the principal agreement is non-existent, the arbitration clause contained therein would also not apply. The said submission is not appealing in view of the settled position of law of the Supreme Court in the case of ***Everest Holding Limited v. Shyam Kumar Shrivastava and Ors., 2008 (16) SCC 774*** wherein the Court has clearly held that if there is any dispute between the parties to the agreement arising out of or in relation to the subject matter of the joint venture agreement, all such disputes and differences have to be adjudicated upon and decided through the process of arbitration and the Court has rejected the plea that joint venture agreement, which contained an arbitration agreement, having been terminated and cancelled, the disputes cannot be adjudicated upon and decided through the process of arbitration.

22. Similarly, in the case of ***Reva Electric Car Company P. Ltd. v. Green Mobil, MANU/SC/1396/2011,*** the Supreme Court has in paragraphs 31, 32 and 33 on identical issues held as under:

"31. I also find merit in the submission of Mr. Narasimha that irrespective of whether the MOU is now in existence or not, the arbitration clause would survive. The observations made by this Court in the case of Everest Holding Ltd. (supra) would clearly support the submission made by the learned senior counsel. In the aforesaid case, the parties had entered into a Joint Venture Agreement (for short 'JVA') dated 25th September, 2003 for the purpose of mining, processing and export of Iron Ore. On 26th March, 2004, another JVA was executed between the parties, particularly to iron out certain controversy in respect of JVA dated 25th September, 2003. Article 14.3 of the said JVA contained an arbitration clause providing that if the parties failed to resolve the matter through mutual agreement, the dispute shall be referred to an Arbitrator appointed by mutual agreement of the two parties. The stand of the petitioner in the aforesaid case was that on 20th September, 2004, it was shocked and surprised to receive unwarranted notices for cancellation of JVA. The aforesaid notice was replied on 6th October, 2004. Since the disputes between the parties were not resolved, the petitioner invoked the arbitration clause. Respondent No. 1 in reply to the notice refuted the claim of the petitioner and also refused to refer the matter to arbitration on the ground that the JVA between the petitioner and the respondent No.1 is not in existence as the same had been terminated by

respondent No.2. It was stated that in view of the aforesaid position, there could be no invocation of Clause 14.3 of JVA.

32. Considering the aforesaid fact situation, this Court observed that under Clause 14.2, the parties had agreed that they would use all reasonable efforts to resolve the disputes, controversy or claim arising out of or relating to these agreements. Since the parties have failed to resolve their differences, the same had to be referred to Arbitration under Clause 14.3. It was held that there is a valid Arbitration Agreement between the parties as contained in the JVA, which the parties are required to adhere to and are bound by the same. In other words, if there is any dispute between the parties to the agreement arising out of or in relation to the subject matter of the said JVA, all such disputes and differences have to be adjudicated upon and decided through the process of Arbitration by appointing a mutually agreed Arbitrator. This Court observed as follows:-

> *"Though the JVA may have been terminated and cancelled as stated but it was a valid JVA containing a valid arbitration agreement for settlement of disputes arising out of or in relation to the subject-matter of the JVA. The argument of the respondent that the disputes*

cannot be referred to the arbitration as the agreement is not in existence as of today is therefore devoid of merit."

In my opinion, the aforesaid observations are squarely applicable to the facts in the present case. The disputes that have arisen between the parties clearly pertain to the subject matter of the MOU.

33. Even if, I accept the submission of Ms.Ahamadi that MOU was not extended beyond 31st of December, 2007, it would make little difference. Section 16(1)(a) of the Arbitration and Conciliation Act, 1996 provides that an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. The plain meaning of the aforesaid clause would tend to show that even on the termination of the agreement/contract, the arbitration agreement would still survive. It also seems to be the view taken by this Court in Everest Holdings Ltd. (supra). Accepting the submission of Ms.Ahamadi that the arbitration clause came to an end as the MOU came to an end by efflux of time on 31st December, 2007 would lead to a very uncertain state of affairs, destroying the very efficacy of Section 16(1). The aforesaid section provides as under:

"16. Competence of arbitral tribunal to rule on its jurisdiction – (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with

respect to the existence or validity of the arbitration agreement, and for that purpose –

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

23. From the above, it is clear that a similar argument as advanced by Mr. Kanna was rejected by the Supreme Court. Hence, this plea of Mr. Kanna is rejected.

24. Mr. Kanna in support of his submissions has relied upon the judgment of the Supreme Court in the case of ***Vidya Drolia (supra)*** to argue that the objective of power under Sections 8 and 11 has been held to be primarily to review and weed out the non-existent and invalid arbitration agreements. The Supreme Court has held as under:

"134. Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases 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 the disputes/subject-matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary

and summary and not a mini trial. This necessarily reflects on the nature of the jurisdiction exercised by the court and in this context, the observations of B.N. Srikrishna, J. of "plainly arguable" case in Shin-Etsu Chemical Co. Ltd. [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234] are of importance and relevance. Similar views are expressed by this Court in Vimal Kishor Shah [Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788: (2016) 4 SCC (Civ) 303] wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement."

25. He has also relied upon the judgment in the case of ***DLF Home Developers Limited (supra)*** to argue that the extent of judicial inquiry under Section 11 of the Act of 1996 is not to mechanically apply the provisions, but rather the Court has to apply its mind to the core preliminary issues within the framework of the provisions of the Act. He also relied upon the judgment of the Supreme Court in the case of ***Bharat Sanchar Nigam Ltd. & Anr. (supra)*** wherein the Supreme Court has held that an application for appointment of an Arbitrator under Section 11 (6) is to be filed within three years from the date of which such a right to apply accrues. The relevant paragraphs of the judgment are reproduced as under:

"53. Accordingly, we hold that:

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.
53.2. In rare and exceptional cases, where the claims are ex facie time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference."

26. On a similar proposition, he relied upon ***Panchu Gopal Bose (supra) v. Port of Calcutta (1993) 4 SCC 338*** and ***National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267***. I am afraid the judgments relied upon by Mr. Kanna would have no applicability in the facts of this case, as it is the case of the petitioners that the right to receive the royalty continues even after expiry of the PATSER agreement. That is, the royalty is payable for minimum five years, after the product is manufactured and commercially sold in the market. No doubt, it is the case of the respondent that it has not commercially sold the product in the market, so as to pay the royalty. But this aspect need to be ascertained, which is only possible before the Arbitrator; where the parties shall produce evidence. So, the issue of limitation/arbitrability is not conclusive against the petitioners herein. Even the interpretation sought to be given by Mr. Sarma to the provisions of PATSER Agreement need to be looked into, considered and decided which can be through the process of arbitration. I find, in a petition filed by petitioner No.1 being ARB. P. 88/2022 decided on April 26, 2022, a similar plea was raised inasmuch as the agreement has expired and also the claim, if any, is barred by limitation. This Court has in paragraph 5 held as under and referred the parties to the arbitration under the aegis of Delhi International Arbitration Centre:

> *"5. I am of the view that the dispute with regard to lack of cause of action as also limitation are disputes which are amenable to the jurisdiction of Arbitral Tribunal, specially in view of the fact that this Court does not find that the objections with regard to the limitation is ex-facie made out from the records of the case. In the facts and circumstances of the case, the questions raised are mixed questions of fact and law, which would be required to be gone into by the Arbitral Tribunal, if such an objection is raised before the Tribunal."*

27. Accordingly, the present petition is allowed and the parties are referred to arbitration. The disputes shall be adjudicated in terms of claims and counter-claims, if any.

28. This Court appoints Justice R.K. Gauba, (Mobile No. 9650411919), Former Judge of this Court as the Arbitrator. The fee of the learned Arbitrator shall be regulated by the provisions of Fourth Schedule of the Arbitration and Conciliation Act, 1996. He shall also give disclosure under Section 12 of the Act.

29. The petition stands disposed of.

30. Let a copy of this order be sent to Mr. Justice R.K. Gauba (Retd.)

V. KAMESWAR RAO, J

JULY 05, 2022*/jg*