

Dispute Resolution Hotline

March 22, 2021

SUPREME COURT CLARIFIES LIMITATION PERIOD AND THRESHOLD FOR APPOINTMENT OF ARBITRATORS

- Application for appointment of arbitrator to be filed within three years from the date when there is failure to appoint the arbitrator;
- Rule is to refer to arbitration;
- Courts may refuse to refer to arbitration where claims are *ex facie* time-barred;

INTRODUCTION

The Supreme Court of India ("**Supreme Court**") in its latest decision, *Bharat Sanchar Nigam Limited v. Nortel Networks India Private Limited*,¹ clarified the limitation period for an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").

The Supreme Court held that (a) limitation period for filing an application under Section 11 ("**Section 11 application**") would be three years from the date when there is failure to appoint the arbitrator; and (b) a court may refuse to make the reference to arbitration where claims are *ex facie* time-barred.

FACTUAL BACKGROUND

Bharat Sanchar Nigam Limited ("**BSNL**") invited bids for planning, engineering, supply, insulation, testing and commissioning of GSM based cellular mobile network. In the tender process, Nortel Networks India Pvt. Ltd. ("**Nortel**") was awarded the purchase order. On completion of the works under the purchase order, BSNL deducted / withheld an amount of Rs. 997,093,031/- towards liquidated damages and other levies. The relevant timelines are set out hereunder:

- Nortel raised a claim on May 13, 2014.
- BSNL rejected the claim on August 04, 2014;
- On April 29, 2020, after a period of over 5 years, Nortel invoked the arbitration clause, and requested for appointment of an arbitrator ("**Notice of Arbitration**").
- BSNL rejected the claims as the claims were time-barred.
- Nortel filed a Section 11 application before the Kerala High Court ("**High Court**"). The High Court referred the disputes to arbitration; the said order was taken up in review, which was dismissed. This led to the present appeal before the Supreme Court.

ISSUES

1. Limitation period for filing an application under Section 11;
2. Refusal of court to make reference under Section 11, if the claims are *ex facie* time-barred;

JUDGMENT

A. What is the period of limitation for filing an application under Section 11?

The Supreme Court noted that in the absence of a provision prescribing a limitation period to file a Section 11 application for appointment of Arbitrator/s, the Limitation Act, 1963 ("**Limitation Act**") would be applicable.² Referring to a number of earlier high court decisions, the Supreme Court upheld that Article 137 (residual provision which stipulates a three-year limitation period) would be applicable for computing the limitation period for a Section 11 application.³

The Supreme Court clarified that the limitation period for filing a Section 11 application must not be confused with the limitation period applicable to substantive claims made in the underlying contract as both are distinct.

Separately, the Supreme Court noted that a period of three years for a Section 11 application is unduly long and defeats the very objective of providing expeditious resolution of commercial disputes. The Supreme Court stated that Parliament would have to amend the Act to prescribe a specific limitation period for a Section 11 application.

B. Whether a court may refuse to make the reference under Section 11 where the claims are *ex facie* time-barred?

The Supreme Court discussed the scope of "examination of an arbitration agreement" in a Section 11 application relying on judicial precedents and provisions of the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment Act**"). The amendments introduced in the 2015 Amendment Act was done based on the legislative

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intention, to minimize judicial intervention at appointment stage. The courts were to examine only the 'existence' of the arbitration agreement, and all other preliminary and threshold issues should be left to the arbitral tribunal, in line with the *kompetenz-kompetenz* principle.

Limitation period being a mixed question of fact and law and would lie within the domain of the arbitral tribunal and not for courts, to determine. The Supreme Court discussed the distinction between issues of '*jurisdictional*' and '*admissibility*'.

- '*Jurisdictional issues*' include objections to the competence of the arbitral tribunal to hear a dispute, (i) lack of consent to arbitrate, (ii) dispute falling outside the scope of the arbitration agreement, (iii) existence, scope and validity of the arbitration agreement, etc.
- '*Admissibility issues*' relate to the nature of the claim and are not a challenge to the jurisdiction of the tribunal to decide a claim, such as, breach of a mandate to indulge in mediation before arbitration, etc.

Relying on decisions from the Singapore Court of Appeal,⁴ the Supreme Court noted that the 'tribunal versus claim' test asks whether an issue refers to the power of the arbitral tribunal to hear the claim or the issue refers to the propriety of the claim to be heard by the tribunal. Applying the 'tribunal versus claim' test in the present case, the Supreme Court held that an *issue of limitation is an admissibility issue which must be decided by the arbitral tribunal* as a preliminary issue or at the final stage after evidence is led by the parties.

Referring to the ruling of the three-judge bench of the Supreme Court in *Vidya Drolia v. Durga Trading Corporation*,⁵ the Supreme Court concluded that a court may interfere '*only*' when it is '*manifest*' that the claims are *ex facie* time barred and dead, or there is no subsisting dispute. Courts should refuse to refer a dispute to arbitration under Section 11 only in 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.

Nortel in its Notice of Arbitration clarified that the limitation period would be extended considering the communications exchanged between the parties on the dispute. The Supreme Court disregarded Nortel's contention on extended limitation period in light of exchange of correspondence or even settlement discussions. Further, no pleadings were set out on any intervening facts which would extend the limitation period under the Limitation Act. The Supreme Court noted that Nortel's claims are *ex facie* barred as Nortel raised the notice of arbitration on April 29, 2020 i.e., over 5 years after Nortel's claims were rejected by BSNL on August 04, 2014.

ANALYSIS

The Court has clearly distinguished between the limitation of the period within which an application for appointment of an arbitrator needs to be filed and the limitation period of the claims in the underlying dispute. The time period within which an application for appointment of an arbitrator needs to be filed is 3 years from the date there is a failure to appoint an arbitrator.

The Supreme Court has reiterated a high threshold for refusing the appointment of arbitrators in a Section 11 application. It is only in a limited category of cases that a court will refuse to make such a reference. If there is even the slightest doubt, the rule is to refer disputes to arbitration otherwise it would encroach on a matter which is to be determined by the arbitral tribunal.

This is, no doubt, aimed at honouring the arbitration agreement and the principle of *Kompetenz-Kompetenz*, whilst protecting the counterparties from being compelled to undergo arbitration proceedings in cases where the claims are hopelessly time barred. In prescribing a high threshold, the Supreme Court has also shown that it is mindful of the legislative intent to minimize judicial intervention at appointment stage.

— Adimesh Lochan, Payel Chatterjee & Sahil Kanuga
You can direct your queries or comments to the authors

¹ Civil Appeal No. 833-844 of 2021 (Judgment of the Supreme Court dated March 10, 2021).

² The Supreme Court relied on Section 43 of the Arbitration Act which states that the Limitation Act applies to arbitrations as it applies to courts.

³ Leaf Biotech v. Municipal Corporation Nashik, 2010 (6) MhLJ 316; Deepdharshan Builders Pvt. Ltd. v. Saroj, (2019) 1 AIR Bom R 249; Prasar Bharti v. Maa Communication, 2010 (115) DRJ 438 (DB); Golden Chariot v. Mukesh Panika, 2018 SCC OnLine Del 10050.

⁴ Swisbrough Diamond Mines (Pty) Ltd. & Ors.v. Kingdom of Lesotho, [2019] 1 SLR 263; BBA & Ors. v. BAZ & Anr., [2020] SGCA 53.

⁵ (2021) 2 SCC 1.

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