

**THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE**

**ARBITRATION APPLICATION No.162 of 2023**

**ORDER:**

Mr. P.Pratap, learned counsel for the applicant.

Mr. Dinesh K. Gilda, learned counsel representing  
Mr. Damodar Mundra, learned counsel for the respondent.

2. This application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, "the Act") has been filed for appointment of an arbitrator.

3. Facts giving rise to filing of this application briefly stated are that the parties had entered into an agreement on 03.09.2016. The agreement admittedly contains an arbitration clause. A dispute between the parties under the agreement had arisen. Therefore, the applicant had issued a notice on 24.11.2018 to which the respondent submitted response on 05.12.2018. However, the applicant did not take any further steps.

4. In the meanwhile, the respondent filed a civil suit, namely Civil Case No.39 of 2020, for recovery of an amount of Rs.63,75,356/- along with interest. In the aforesaid civil suit, the applicant filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC). The aforesaid application was rejected by an order dated 06.04.2022 by the Upper District Judge, No.2, Jhunjhnu (Rajasthan) (hereinafter referred to as, the “Commercial Court”). Against the aforesaid order, the applicant filed an appeal, which is pending before the appellate court. Thereafter, the applicant has filed this application seeking appointment of an arbitrator on 21.08.2023.

5. Learned counsel for the applicant submits that the application filed by the applicant is within limitation as the applicant is entitled to seek exclusion of the period of limitation from 15.03.2020 to 28.02.2022 in view of the law laid down by the Supreme Court in **Cognizance for Extension of Limitation, In Re**<sup>1</sup>. It is contended that the requirement of making an application under Section 8(1) of

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<sup>1</sup> (2022) 3 SCC 117

the Act has been satisfied, as the applicant had brought to the notice of the Court that an agreement containing the arbitration clause is existing between the parties. It is urged that the applicant has not submitted itself to the jurisdiction of the Commercial Court in the civil suit. In support of the aforesaid submissions, reliance has been placed on the decisions in **Booz Allen and Hamilton Inc. v. SBI Home Finance Limited**<sup>2</sup>, **Sundaram Finance Limited v. T.Thankam**<sup>3</sup>, **Vidya Drolia v. Durga Trading Corporation**<sup>4</sup> and **Madhu Sudan Sharma v. Omaxe Limited**<sup>5</sup>.

6. On the other hand, learned counsel for the respondent has submitted that it had filed a civil suit in the month of February, 2020, in which the applicant, after rejection of the application under Order VII Rule 11 of CPC, has filed the written statement on 16.05.2022. It is further submitted that the applicant has failed to take action as envisaged under Section 8(1) of the Act and therefore, has

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<sup>2</sup> (2011) 5 SCC 532

<sup>3</sup> (2015) 14 SCC 444

<sup>4</sup> (2021) 2 SCC 1

<sup>5</sup> 2023 SCC OnLine Del 7136

forfeited the right to file the application under Section 11(6) of the Act.

7. I have considered the submissions made on both sides and have perused the record.

8. The applicant had sent a notice on 24.11.2018. In view of the law laid down by the Supreme Court in **Cognizance for Extension of Limitation, In Re** (supra), the applicant is entitled to exclusion of time between the period from 15.03.2020 to 28.02.2022. Therefore, the application filed by the applicant under Section 11(6) of the Act is held to be within limitation.

9. Section 8(1) of the Act requires a party to bring to the notice of the Court that an arbitration agreement between the parties exists. The object of Section 8(1) of the Act is to bring the matter in relation to existence of an arbitration agreement to the notice of the Court. The Supreme Court in **Sundaram Finance Limited** (supra) dealt with the issue as to the approach of the trial Court once an application

before it under Section 8 of the Act is filed. In paragraph 13, it was held as under:

**13.** Once an application in due compliance with Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance with the procedure under the special statute. The general law should yield to the special law—*generalia specialibus non derogant*. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court.

10. The requirement contained in Section 8(1) of the Act is satisfied in the facts of the case by filing an application, namely the application under Order VII Rule 11 of CPC, and it was brought to the notice of the Court that the arbitration agreement exists between the parties. The applicant has not submitted itself to the jurisdiction of the

Court. Therefore, in the peculiar facts of the case, it cannot be held that the applicant has not complied with the mandate contained in Section 8(1) of the Act. Therefore, the contention that the applicant is not entitled to invoke Section 11(6) of the Act is misconceived and the same does not deserve acceptance.

11. The dispute between the parties has admittedly arisen which requires resolution in the manner agreed to by the parties under the agreement.

12. In view of the aforesaid, Mr. Justice P.Naveen Rao, former Acting Chief Justice of this Court, (#3001, My Home Bhooja, Block-A, Plot Nos.22-24 & 31-33, Rayadurgam, Ranga Reddy District, Mobile No.8374012311), is appointed as sole arbitrator to adjudicate the dispute between the parties.

13. The parties undertake to appear before the sole arbitrator on 24.02.2024 at 11:00 a.m. along with a copy of this order.

14. Thereupon, the sole arbitrator shall proceed with the arbitral proceedings in accordance with law.

15. Accordingly, the arbitration application is allowed.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

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**ALOK ARADHE, CJ**

02.02.2024

vs