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Arb O.P.(Com. Div.) No.299 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 01.08.2022

CORAM

THE HONOURABLE Mr.JUSTICE **M.SUNDAR**

Arb O.P.(Com. Div.) No.299 of 2021

M/s.Radha Meditech
Represented by the Sole Proprietor
Mr.Sudhir Sanugale, aged 9 years
Having its registered office at :
Shri Sadguru Darshan CHS
410, 4th Floor, Fitwala Road
Prabhadevi Station
Mumbai – 400 013.

... Petitioner

Vs

M/s.Cook India Medical Devices Pvt. Ltd.,
A Company registered under the provisions
of Companies Act 1956,
Having its registered office at :
Plot No.22, (SP) 3rd and 4th Floor
Kochar Jade, Thiru.Vi.Ka.Industrial Estate
Guindy, Chennai – 600 032.

... Respondent

Arbitration Original Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 praying to (a) the Arbitration Agreement being Clause 11.7 contained in the Domestic Dealer Agreement dated 11th June, 2014 and Domestic Dealer Agreement dated 15th June, 2015 (Exhibit 'A' and 'A-1' hereto) be taken on file of this Court and that the Hon'ble Chief Justice



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may pleased to appoint a sole Arbitrator and the disputes between the parties arising out of and/or in relation to any matters under the agreement be referred to Arbitration as per the provisions of the Arbitration and Conciliation Act, 1996, as amended from time to time; (b) for such further and other orders and directions as this Court may deem fit and proper and (c) for costs.

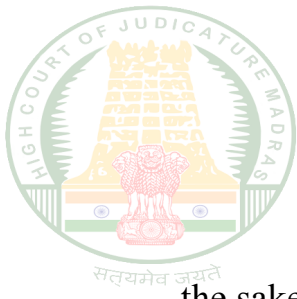
For Petitioner : Mr.Arjun Suresh
along with Mr.Laksh Singhvi
for Mr.Ramaswamy Meyyappan

For Respondent : Ms.Shruti Raina
along with Ms.Janani Shankar

ORDER

Captioned 'Arbitration OP (Com.Div) No.299 of 2021' [hereinafter 'Arb.OP' for the sake of brevity] has been presented in this Court on 14.12.2021 under Section 11 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter referred to as 'A and C Act' for the sake of brevity, convenience and clarity]. Captioned Arb.OP has been filed invoking Section 11 of A and C Act but it does not mention sub-section/s under Section 11 with specificity.

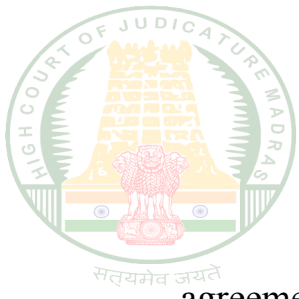
2. Short facts shorn of granular particulars are that the respondent i.e., 'COOK INDIA MEDICAL DEVICES PVT. LTD.' [hereinafter 'COOK' for



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the sake of brevity] is a manufacturer of medical devices; that COOK entered into three agreements with one Mr.Sudhir Sanugale, who is carrying on business in the name and style 'RADHA MEDITECH' [hereinafter 'RADHA' for the sake of brevity] as sole proprietor; that these three agreements are dated 11.06.2014, 15.06.2015 and 26.08.2019; that these three agreements shall be referred to as '2014 Agreement', '2015 Agreement' and '2019 Agreement' and/or 'first', 'second' and 'third' agreements respectively for the sake of convenience; that the first and second agreements are captioned 'DOMESTIC (INDIA) DEALER AGREEMENTS' and the third agreement is captioned 'DISTRIBUTION AGREEMENT'; that all three agreements are for appointing RADHA as dealer/distributor for medical devices manufactured by COOK; that the first agreement was effective till 30.12.2014, the second agreement was effective till 30.12.2015 and the third agreement was effective till 30.08.2020; that these three agreements are the 'primary contracts' between the parties and all three agreements contain 'arbitration clauses' i.e., Clause 11.7 of first and second agreements and Clause 8 of Article XVI of third agreement; that when primary contracts i.e., first, second and third agreements were operating, arbitrable disputes erupted between COOK and RADHA *inter alia* pertaining to termination of second



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agreement, loss alleged to have been caused to RADHA by COOK by allowing other distributors to sell products to hospitals allotted to RADHA, losses said to have been suffered by RADHA owing to stocks retained by COOK in the guise of investigation into corrupt practises, insisting on procurement of stocks disproportionate to the hospitals allocated to RADHA, loss said to have been caused to RADHA during 2016 and 2019 when COOK refused to renew the agreement [obviously the second agreement] and breaches said to have been committed by representatives of COOK; that it is to be noted that this is not an exhaustive adumbration of arbitrable disputes that have arisen between the parties and it is only a thumbnail sketch of arbitrable disputes that can be culled out from the case file that has been placed before this Court; that RADHA owing to eruption of arbitrable disputes invoked the three arbitration clauses qua first, second and third agreements [three primary contracts] by one common notice dated 06.10.2021; that this invocation notice was issued by RADHA through its solicitor's firm; that COOK responded by reply dated 21.10.2021 through its solicitor's firm representing that in and by this 21.10.2021 communication COOK denied the arbitral disputes on merits and called upon withdrawal of the invocation / trigger notice; that it is to be noted that prior to the trigger



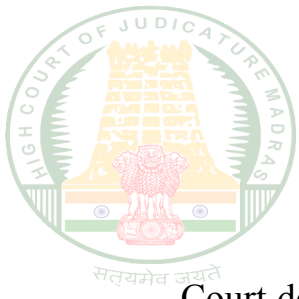
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notice, second agreement was terminated by COOK on 07.06.2016; that post termination notice RADHA returned unsold products to COOK on 27.10.2017; that post exchange of trigger notice and reply, there was a deadlock regarding appointment of Arbitrator though some correspondence was exchanged between COOK and RADHA; that such deadlock necessitated presentation of captioned Arb.OP in this Court on 14.12.2021 as already alluded to supra and notice was issued in captioned Arb.OP vide order dated 05.01.2022; that COOK entered appearance, resisted the prayer for appointment of Arbitrator *inter alia* by filing a counter affidavit and contending that *lis* is *ex facie* barred by limitation; that the captioned Arb.OP was heard out.

3. In the hearing today, Mr.Arjun Suresh along with Mr.Laksh Singhvi for the petitioner [RADHA] and Ms.Shruti Raina along with Ms.Janani Shankar for respondent [COOK] are before this Court. Both learned counsel made submissions in support of their respective stated positions.

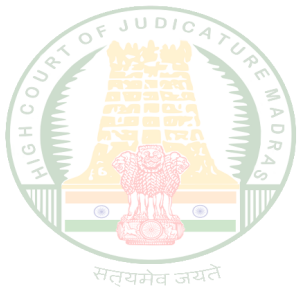
4. Before adverting to the submissions that were made before this Court and embarking upon the exercise of discussing the same and giving dispositive reasoning to arrive at a conclusion in the captioned Arb.OP., this



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Court deems it appropriate to mention/set out two aspects of the matter. The first is, this Court notices that the petitioner has been described as 'RADHA MEDITECH, represented by sole proprietor Mr.Sudhir Sanugale' in the short and long cause titles. Further 'RADHA MEDITECH' has been prefixed with 'M/S' which is used to describe a compendious name like that of a partnership firm. The long cause title goes a step further and says that the petitioner is a 'sole Proprietorship Company'. Company is a juristic person. Therefore, this is obviously an error. The petitioner should have described himself as 'Mr.Sudhir Sanugale, carrying on business in the name of 'RADHA MEDITECH' as sole proprietor'. When this was pointed out, a fervent plea was made to consider and read the short and long cause titles as 'Mr.Sudhir Sanugale, carrying on business in the name and style 'RADHA MEDITECH' as its sole proprietor'. This request is acceded to as learned counsel for COOK submitted that in the light of primary contracts this can be treated as a non-issue. The second aspect of the matter is, captioned Arb.OP is predicated on aforementioned three arbitration clauses in three primary contracts. In the cause title, there is a mention about all three primary contracts and a scanned reproduction of Page No.1 of captioned petition is as follows :



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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Ordinary ORIGINAL CIVIL JURISDICTION

Arb O.P (Comm. Div.) NO 299 OF 2021

In the matter of:

The Arbitration and Conciliation Act,
1996;

AND

In the matter of the Domestic Dealer
Agreement dated 11th June, 2014
along with Domestic Dealer
Agreement dated 15th June, 2015 and
third distribution agreement dated
26.08.2019 between M/s. Radha
Meditech and M/s. Cook India
Medical Devices Pvt. Ltd.

M/S. RADHA MEDITECH

Represented by the Sole Proprietor,
Mr. Sudhir Sanugale, aged – 49 years
Having its registered office at:

Shri Sadguru Darshan CHS,
410, 4th Floor, Fitwala Road,
Prabhadevi Station, Mumbai – 400013

...PETITIONER

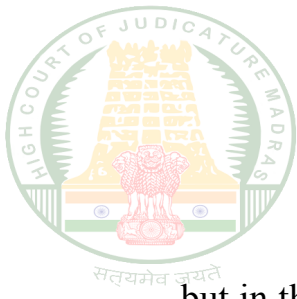
VERSUS

**M/S COOK INDIA MEDICAL
DEVICES PVT. LTD.**

A Company registered under the
provisions of Companies Act 1956,
having its registered office,
At Plot No. 22 (SP), 3rd and 4th Floor,
Kochar Jade, Thiru. Vi. Ka Industrial
Estate, Guindy, Chennai – 600032

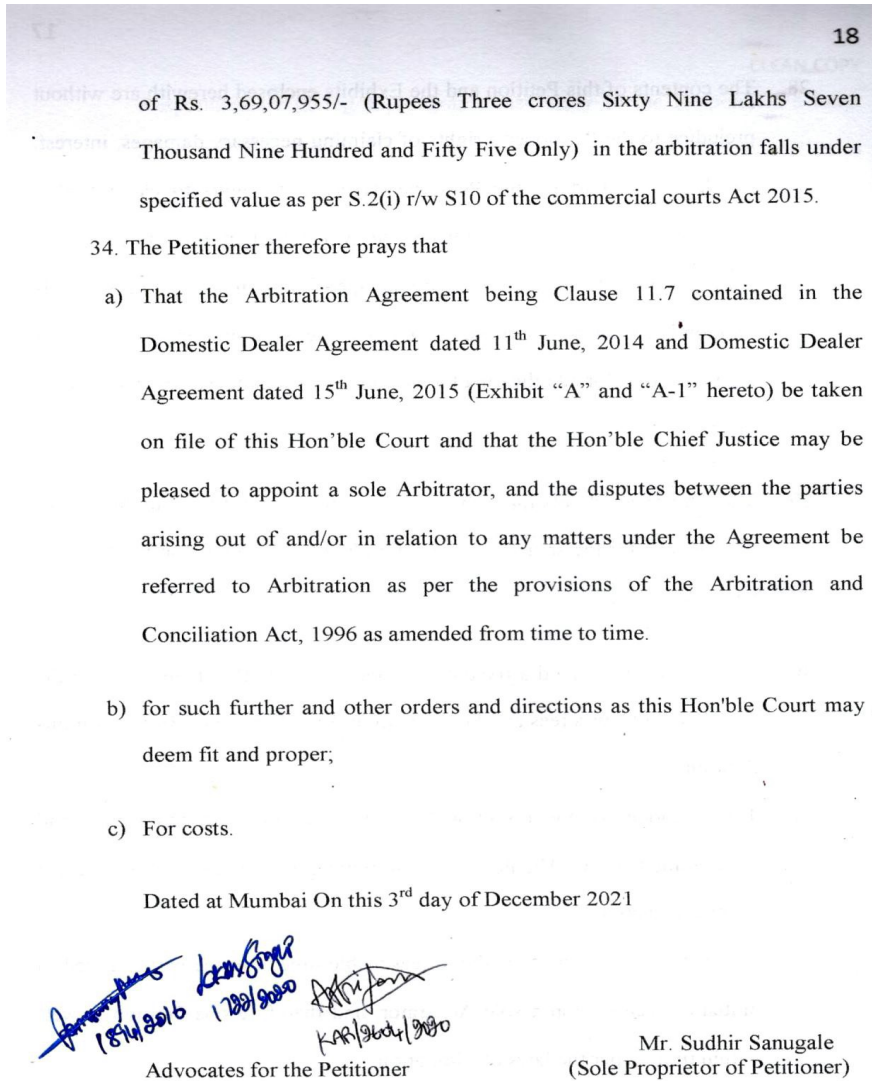
...RESPONDENT

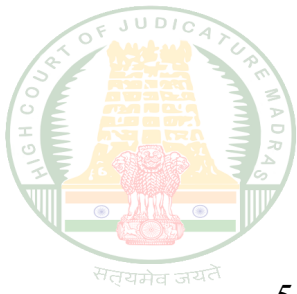
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but in the prayer, there is reference only to two contracts namely the first and second contracts, to be more particular, in paragraph No.34(a) of the petition, which is the prayer paragraph. A scanned reproduction of the same is as follows :

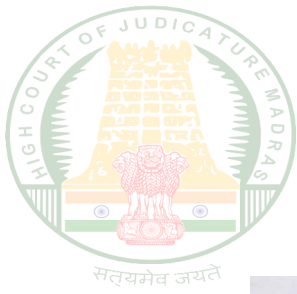




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5. When the case progressed, it was pointed out by learned counsel for COOK that the arbitration clause in the third agreement provides for institutional arbitration i.e., Arbitration by 'ICC' ('International Chamber of Commerce'). Therefore, learned counsel for RADHA filed an additional affidavit. In the additional affidavit, there was a mention that it was pursuant to the direction of this Court and when pointed out, learned counsel fairly submitted that this is an error and it has been filed by the petitioner-RADHA on its own volition albeit on permission being granted by this Court on a request from learned counsel for RADHA. A scanned reproduction of the affidavit and the endorsement made in the docket is as follows :



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IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Ordinary Original Civil Jurisdiction)

Arb O.P (Comm. Div) No. 299 of 2021

In the matter of:

The Arbitration & Conciliation Act, 1996;

And

In the matter of the Agreement dated 11.06.2014, 15.06.2015 between M/s. Radha Meditech And M/s. Cook India Medical Devices Pvt. Ltd.

M/S. RADHA MEDITECH

Represented by the Sole Proprietor,
Mr. Sudhir Sanugale, aged – 49 years
Having its registered office at:
Shri Sadguru Darshan CHS,
410, 4th Floor, Fitwala Road,
Prabhadevi Station, Mumbai – 400013

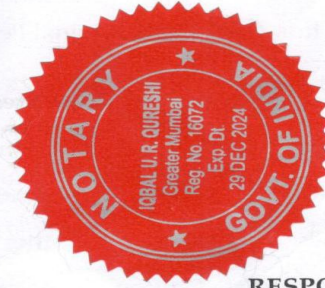
...PETITIONER

Versus

M/s. Cook India Medical Devices Pvt. Ltd.

A Company registered under the
Provisions of Companies Act 1956,
Having its registered office,
At Plot No. 22 (SP), 3rd and 4th Floor,
Kochar Jade, Thiru. Vi. Ka Industrial
Estate, Guindy, Chennai – 600032

...RESPONDENT



ADDITIONAL AFFIDAVIT ON BEHALF OF THE PETITIONER

I, Mr. Sudhir Sanugale, an adult, Indian Inhabitant, Sole Proprietor of the Petitioner above named having my registered office at Shri Sadguru Darshan CHS, 410, 4th Floor, Fitwala Road, Prabhadevi Station, Mumbai – 400013, do hereby solemnly affirm and state as follows:



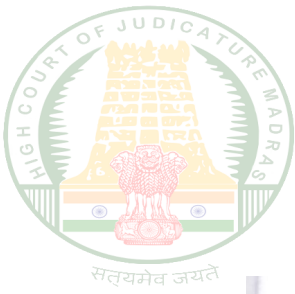


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1. I am the Sole Proprietor of the Petitioner above named and am authorised to file the present Affidavit for and on behalf of the Petitioner.
2. I state that the captioned Petition is filed under section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator under the Agreements dated 11.06.2014 and 15.06.2015 entered and executed between both the parties.
3. In furtherance to the directions of this Hon'ble Court, I am filing the present affidavit. I undertake to this Hon'ble Court that I am restricting the prayer in this Arbitration Original Petition only to the appointment of an Arbitrator in respect of the Agreement dated 15.06.2015.
4. I further state that I seek liberty of this Hon'ble Court to give up on appointment of an Arbitrator in respect of the agreement dated 11.06.2014 in this Arbitration Original Petition.
5. I further state that I reserve my right to file a separate Petition for appointment under the Agreement dated 11.06.2014. The present affidavit may not be construed as a waiver of my right to seek arbitration under the Agreement dated 11.06.2014 through an appropriate Petition. Consequently, I seek liberty of this Hon'ble Court to record that the present affidavit may not impede me from exercising my right to arbitrate in respect of any other agreement entered into between the parties.





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6. In view of the aforesaid I humbly pray that the reliefs sought in the captioned Petition may be restricted to the appointment of a Learned Arbitrator under Agreement dated 15.06.2015.

Dated this 24th day of June, 2022

Dated 24th JUN 2022 day of June, 2022)

Solemnly affirmed at Mumbai)

Ramkumar
Moghe
Advocates for the Petitioner

Mr. Sudhir Sanugale
(Sole Proprietor of Petitioner)

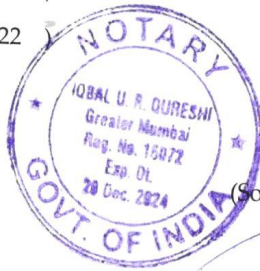
VERIFICATION

I, Sudhir Sanugale, Indian inhabitant, aged 49 years, the Sole Proprietor of the Petitioner above named, having its registered office at Shri Sadguru Darshan CHS, 410, 4th floor, Fitwala Road, Prabhadevi Station, Mumbai – 400 013, do hereby declare that whatever is stated hereinabove is true to the best of my knowledge and I believe the same to be true.

Solemnly affirmed at Mumbai)

This 24th JUN 2022 day of June, 2022)

Ramkumar
Moghe
Advocates for the Petitioner

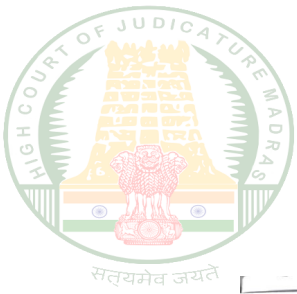


Mr. Sudhir Sanugale
(Sole Proprietor of Petitioner)



NOTED & REGISTERED

BEFORE ME
IQBAL U. R. QURESHI
NOTARY
Government Of India



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Paragraph 3 of the Additional Affidavit erroneously mentions that it was filed pursuant to the Direction of this Honble Court. This Statement is ERRONEOUS and wrong. The petitioner Regrets and Apologues for the misleading Statement.

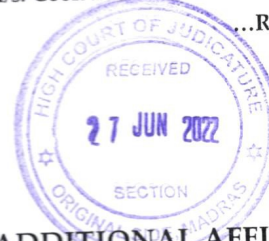
Laksh Singhvi
17/6/2020
1/8/2022

IN THE HIGH COURT OF JUDICATURE
AT MADRAS
(Ordinary Original Civil Jurisdiction)
Arb O.P (Comm. Div) No. 299 of 2021

M/S. RADHA MEDITECH
Represented by the Sole Proprietor,
...PETITIONER

Versus

M/s. Cook India Medical Devices Pvt. Ltd.
...RESPONDENT



**ADDITIONAL AFFIDAVIT ON
BEHALF OF THE PETITIONER**

*Recd copy on 27/06/22
Jaini
counsel for Respondent.*

Ramaswamy Meyyappan (MS 1894/2016)
Arthi Fernandes (KAR 2604/2018)
Laksh Singhvi (MS 1722/2020)
Arjun Suresh (MS 1682/2020)

Counsel for Petitioner
+ 91 99430 24639





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6. The above affidavit refers only to first and second agreements. It does not refer to the third agreement. Learned counsel for petitioner submitted that the prayer may be taken into account and the cause title portion in Page No.1 of the petition which talks about all three agreements may please be ignored. This request is also acceded to as this is a Section 11 legal drill.

7. This Section 11 Court having set out the factual matrix in a nutshell i.e., short facts shorn of granular particulars and two essential aspects of the trajectory this matter has taken, deems it appropriate to extract and reproduce the proceedings made by this Court in earlier listings on 19.04.2022, 08.06.2022, 21.06.2022 and 29.06.2022, which read as follows :

'Proceedings dated 19.04.2022 :

Read this in conjunction with and in continuation of earlier proceedings made in the previous listing on 06.04.2022.

2. Mr.Ramasamy Meyyappan, learned counsel on record for sole petitioner and Mr.Samudra Sarangi, learned counsel on record for lone respondent are before this Court.

3. This Court is informed that the respondent has filed counter affidavit and pleadings are complete.



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4. This Court is informed that there is serious disputation about existence of Arbitration Agreement and therefore, the captioned Arb OP has to be heard out and that the same can be heard out in the next listing.

5. List immediately after summer vacation. List on 08.06.2022.

Proceedings dated 08.06.2022 :

Mr.Arjun Suresh and Ms.Shruti Raina, learned counsel for petitioner and respondent company respectively are before this Court.

2. A counter affidavit has been filed and pleadings are complete. Learned counsel for respondent submits that there is contest in the matter, the contest is broadly on three points and they are as follows:

(i) The lis is stale i.e., barred by limitation and therefore, there cannot be constitution of 'Arbitral Tribunal' ['AT' for the sake of brevity]. **Bharat Sanchar Nigam Limited and another Vs. Nortel Networks India Pvt. Ltd., [SLP (C) No.1531-32/2021]** is pressed into service in support of this argument;

(ii) There are three contracts and a composite petition has been filed. This runs contrary to **Duro Felguera** principle [**Duro Felguera, S.A. versus Gangavaram Port Limited** reported in (2017) 9 SCC 729];

(iii) The third contract provides for institutional arbitration by ICC, but captioned Section 11 petition has been filed bypassing the same;



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3. As regards the second point, learned counsel for petitioner submitted that he restricts his prayer in the captioned OP to one of the three contracts, namely contract dated 15.06.2015.

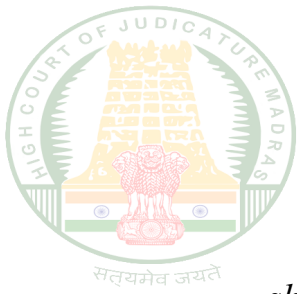
4. This proceedings is to broadly capture the submissions that have been made with the intention of narrowing down the points qua contest on which the petition is now pivoted.

For continuation of arguments, list on 21.06.2022.

Proceedings dated 21.06.2022 :

Read this in conjunction with and in continuation of earlier proceedings made in the previous listing on 08.06.2022.

2. Mr.Arjun Suresh, learned counsel for petitioner and Ms.Shruti Raina, learned counsel along with Ms.Janani Shankar for respondent are before this Court. After some arguments, learned counsel for petitioner submitted that the petitioner intends to restrict the prayer for appointment of Arbitrator to one of the three agreements namely agreement dated 15.06.2015. This in effect inter alia means that the captioned Arb.OP would not pertain to the third agreement dated 26.08.2019 also besides agreement dated 11.06.2014.. It is submitted that the captioned Arb.OP does not seek appointment of Arbitrator qua third agreement i.e., agreement dated 26.08.2019. Learned counsel for petitioner requests for a



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short accommodation to file an affidavit duly signed by the same individual, who has verified the captioned Arb.OP. to this effect and bring it before Court.

List on 29.06.2022.

Proceedings dated 29.06.2022 :

Read this in conjunction with and in continuation of earlier proceedings made in the previous listing on 21.06.2022.

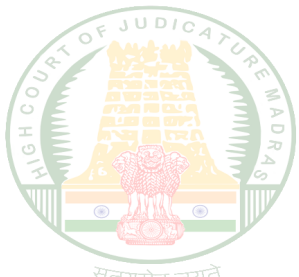
2. Adverting to earlier proceedings, Mr.Arjun Suresh, learned counsel for petitioner submits that an affidavit has since been filed. Ms.Shruti Raina, learned counsel along with Ms.Janani Shankar, for respondent confirms that she has been favoured with a copy of affidavit filed by the petitioner.

3. In the light of the affidavit, captioned matter now has to be heard out is learned petitioner's counsel say.

4. List the matter Monday a week. List on 11.07.2022.

8. The above also explains the circumstances under which the aforementioned affidavit came to be filed [to be noted, proceedings made in 21.06.2022 listing]. Be that as it may, the reason for extracting the aforementioned proceedings i.e., 08.06.2022 proceedings is, in the aforementioned proceedings the issues have been narrowed down.

9. Now that petitioner-RADHA has restricted the prayer to one primary

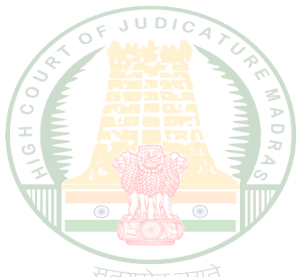


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contract (2015 Agreement/second agreement) the composite petition argument predicated on *Duro Felguera* does not fall for consideration. That leaves us with the first point i.e., *lis* being *ex facie* barred by limitation.

10. The narrative thus far makes it clear that the entire Section 11 legal drill turns on *ex facie* barred by limitation plea i.e., *Nortel* principle. To examine this aspect of the matter, it is necessary to set out some crucial / critical undisputed dates and events. The second agreement dated 15.06.2015 on which the captioned Arb.OP is pivoted and predicated was terminated by COOK on 07.06.2016. RADHA returned unsold medical devices as per inventory to COOK on 27.10.2017 post such termination. Notice invoking arbitration clause was issued by RADHA on 06.10.2021 and that met with a reply from COOK on 21.10.2021. This 06.10.2021 notice is admittedly a notice invoking arbitration within the meaning of Section 21 of A and C Act. Both counsel agreed qua commencement of arbitration proceedings when this 06.10.2021 notice was received by COOK but the exact date is not available. Therefore, as it cannot be prior to 06.10.2021 and not later than 21.10.2021, this Court takes 06.10.2021 as the date of commencement of arbitral proceedings within the meaning of Section 21

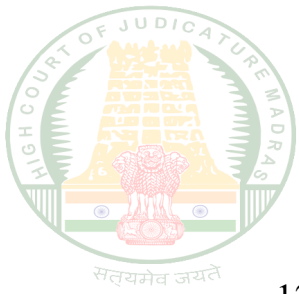


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though the language in which Section 21 is couched makes it clear that the reckoning date is not the date of notice but it is the date of receipt of notice by the noticee. To be noted, noticee / addressee in this case is COOK. There is no dispute or disagreement between learned counsel that from 15.03.2020 to 28.02.2021, the enlargement of limitation for all purposes across the Board by Hon'ble Supreme Court vide *suo motu* proceedings in *Suo Motu* Writ Petition (C) No.3 of 2020 i.e., ***Cognizance for Extension of Limitation, IN RE*** reported in (2022) 3 SCC 117 owing to CORONA virus pandemic and consequent lock down which none could portend or presage operated. This narrows down the bone of contention about which there will be discussion infra. To be noted, as already alluded to supra, these are undisputed dates and events.

11. On limitation, learned counsel on both sides while opening their submissions, submitted that the applicable Article would be Article 137 qua Schedule of 'The Limitation Act, 1963' (36 of 1963) [hereinafter 'Limitation Act' for the sake of convenience and clarity] and subsequently both counsel changed their stands (as the hearing progressed) and submitted that they would rely on Article 55 of the Schedule of the Limitation Act.



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12. Either way, the issue is narrowed down to whether the question of reckoning date is 07.06.2016 i.e., the date of termination notice qua the second agreement or 27.10.2017 i.e., the date on which RADHA returned the unsold medical devices to COOK. This is all too critical as, if it is 07.06.2016, three years therefrom elapsed on 07.06.2019 and RADHA will not have the benefit of *suo motu* proceedings of Hon'ble Supreme Court and if it is on 27.10.2017, RADHA will have the benefit of *suo motu* proceedings of Hon'ble Supreme Court.

13. Before embarking upon the exercise of setting out discussion and giving dispositive reasoning qua aforementioned narrowed down bone of contention, this Court deems it appropriate to briefly mention the scope of a legal drill under Section 11 of A and C Act. The scope of a legal drill under Section 11 of A and C Act as of today has four facets. One is a statutory facet and other three facets have been put in place by judicial pronouncements. The statutory facet is sub-section (6A) of Section 11 of A and C Act which continues to be in the statute book notwithstanding Act 33 of 2019 i.e., Arbitration and Conciliation (Amendment) Act, 2019, which shall hereinafter be referred to as 'Second Amendment Act' for the sake of



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convenience and clarity. To be noted, the First Amendment is Arbitration and Conciliation (Amendment) Act, 2015, dated 23.10.2015. The Second Amendment Act came is dated 09.08.2019 and it contains 16 provisions / sections but only 11 of these sections/provisions i.e., Sections 1, 4 to 9 (both inclusive), Sections 11 to 13 (both inclusive) and Section 15 of the Second Amendment Act kicked in on and from 30.08.2019. This means that Section 3 of the Second Amendment Act amending Section 11 has not come into force as of today. To be noted, these 11 sections have come into force with effect from 30.08.2019 vide Notification of Government of India vide S.O.3154(E) and this is owing to the Second Amendment Act being a conditional legislation in the light of sub-section (2) of Section 1 of Second Amendment Act. This means that Section 3 of Second Amendment Act which amends Section 11 of A and C Act has not started operating and sub-section (6A) of Section 11 has not been deleted. Now that sub-section (6A) is in the statute book, a Section 11 legal drill should perambulate within the statutory perimeter sketched by sub-section (6A). This statutory perimeter confines a Section 11 legal drill to examination of existence of arbitration agreement between the parties.



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14. Aforementioned sub-section (6A) of Section 11 of A and C Act came up for consideration before Hon'ble Supreme Court in oft quoted ***Mayavati Trading Pvt. Ltd vs Pradyuat Deb Burman*** reported in (2019) 8 ***SCC 714***, relevant paragraph is paragraph No.10 and the same reads as follows:

'10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgement, as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgement in Duro Felguera'

This Paragraph No.10 of ***Mayavati Trading*** case law takes us to ***Duro Felguera*** principle being ratio laid down by Hon'ble Supreme Court in ***Duro Felguera S.A. Vs Gangavaram Port Limited*** reported in (2017) 9 ***SCC 729***, relevant paragraphs in ***Duro Felguera*** case are paragraph Nos.48 and 59 and the same read as follows:

'48. Section 11(6-A) added by the 2015 Amendment, reads as follows:



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“**11. (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.*”

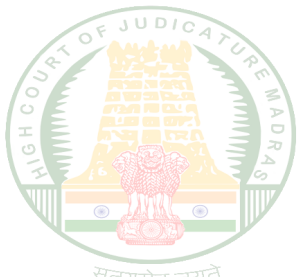
(emphasis supplied)

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.

.....

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. and Boghara Polyfab. This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists – nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Courts intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.'

15. In the case on hand, there is no disputation or disagreement amongst the parties about the existence of arbitration clause i.e., Clause 11.7

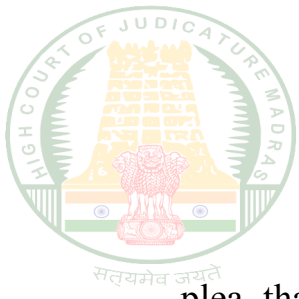


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of second agreement. To be noted, this Clause 11.7 of second agreement serves as arbitration agreement between the parties i.e., 'arbitration agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act. Therefore, the first facet of Section 11 legal drill does not fall for consideration in the case on hand. As already alluded to supra, the other three facets are by way of judicial pronouncements and they are ***N.N.Global*** and ***Nortel*** principles. ***N.N.Global*** principle is ratio laid down by Hon'ble Supreme Court vide ***N.N.Global Mercantile Pvt. Ltd., Vs. Indo Unique Flame Ltd., and others*** reported in ***2021 SCC Online SC 13***, ***Nortel*** principle is ratio laid down by Hon'ble Supreme Court vide ***Bharat Sanchar Nigam Limited and another Vs. Nortel Networks India Private Limited*** reported in ***(2021) 5 SCC 738*** and ***NCC*** principle i.e., an order made by Hon'ble Supreme Court less than a fortnight ago i.e., on 20.07.2022 in ***Indian Oil Corporation Limited vs NCC Limited*** in Civil Appeal Nos.342 to 345 of 2022 [SLP(C) Nos.13408/2019, 13815/2019, 13813/2019 and 13816/2019].

16. ***N.N.Global*** principle turns on issues of arbitration agreement between the parties being in the form of a clause/covenant in a contract and a



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plea that the agreement is unstamped/ insufficiently stamped and/or not registered though compulsorily registrable. This plea does not arise in the case on hand and therefore, the second facet of Section 11 also does not fall for consideration in the case on hand. **Nortel** principle is a plea that *lis* is *ex facie* barred by limitation which is referred to as 'deadwood' for convenience. This falls for consideration in the case on hand. This in fact is the sole bone of contention in the case on hand as already delineated supra. **NCC** principle is one where Hon'ble Supreme Court has made it clear that in cases where issues pertaining to *lis* are very 'clear and glaring' as opposed to issues which are 'debatable, disputable and reasonably arguable', can be looked into in a Section 11 legal drill. This is contained in paragraph No.13 of **NCC** case law. This **NCC** case law may really not come into play in the case on hand but it is of relevance qua on the case on hand. To be noted, this facet may not come into play in the case on hand as it turns on *ex facie* barred by limitation plea.

17. Reverting to the plea on hand, while learned counsel for petitioner contends that there are post contract obligations vide Clause 9.5 of second agreement and therefore 27.10.2017 being the date on which unsold



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equipments were returned is the reckoning date, learned counsel for COOK would contend that it is a clause which has aided the sale of assets to COOK without obligation and therefore it cannot alter the reckoning date. In other words, learned counsel for COOK submitted that the termination of the second contract on 07.06.2016 is the reckoning date, it was pointed out that the termination itself is assailed and this constitute a major chunk of arbitrable disputes.

18. Before proceeding further, this Court would like to set out its understanding of the expression '*ex facie barred by limitation*'. This expression would necessarily mean a plea where no investigation is required. '*Ex facie*' necessarily means no investigation is required. *Ex facie* as per Black's Law Dictionary (Tenth Edition) is 'On the face of it; evidently; apparently. [The phrase typically referred to a defect appearing from the document itself, without further enquiry].' This takes this Court to Clause 9.5 of the second agreement and the same reads as follows :

'9.5 COOK may, at its sole option, but without obligation, repurchase (or cause DEALER to sell to COOK's designee in the Territory) any or all Products



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- (a) *owned by, or in the possession or control of, DEALER as of the date of expiration or termination; and/or*
- (b) *acquired by DEALER after termination or expiration*
- (c) *for the invoice price paid by DEALER, less twenty-five percent (25%) for inspection and restocking expenses. DEALER shall pay all shipping fees, insurance costs and expenses related to transporting the Products to the destination specified by COOK; and'*

The argument that repurchase of sold items by COOK without obligation is at the option of COOK and therefore cannot be the reckoning date becomes debatable and reasonably arguable i.e., as COOK in its counter affidavit, more particularly in paragraph No.3.6 has averred that RADHA instead of returning the unsold products immediately (inspite of continuous requests) continued to hold the unsold inventory and ultimately has gone on to say that the returned inventory was assessed in accordance with COOK's policy and were found to be in unsaleable condition as it was dirty, damaged and/or expired. Paragraph No.3.6 of the counter affidavit reads as follows :



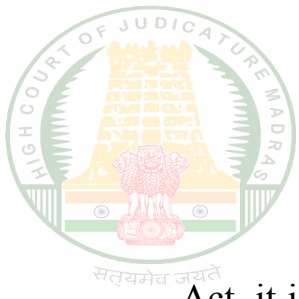
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'3.6. Upon termination of the 2015 Agreement, Petitioner was required to return Respondent's products immediately in exchange for credit for the outstanding balance due. Conversely, instead of returning the products, as also mandated by the 2015 Agreement, Petitioner continually requested the Respondent to reappoint it as a distributor. The Respondent did not reinstate the Petitioner as a distributor and demanded the Petitioner return the unsold inventory products as per the Clause 9.4(b) of the 2015 Agreement. To Respondent's discontent, Petitioner continued to hold Respondent's unsold inventory illegally for over a year and belatedly returned it on 27 October 2017. The returned inventory was assessed in accordance with Respondent's returns policy and was found in unsaleable condition as it was dirty, damaged and expired. Respondent informed the Petitioner about the poor condition of the inventory and Petitioner acknowledged the same via email on 20 November 2017. Per Respondent's return policy, the unsaleable stock was returned to the Petitioner, and it was concluded that no reimbursement could be issued to the Petitioner for the damaged inventory.'

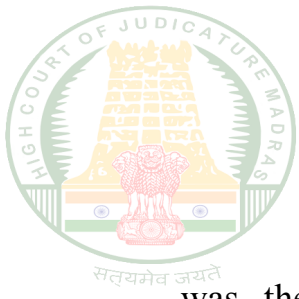
Therefore, in the above context, it appears that COOK has taken back the products, assessed the same and has come to the conclusion that the returned products were in poor condition. This is disputed by RADHA and this is also a dispute which turns on facts. As regards Articles 137 and 55 of Limitation



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Act, it is not a case of when right to apply first accrues or when the contract is first broken as it includes continuing breach too. The contention of learned counsel for RADHA that the aforementioned Clause 9.5 of the second agreement is a post termination obligation and that whether this post termination obligation was performed or breached is clearly a mixed question of fact and law. This question in turn will decide the reckoning date for limitation. In this regard Articles 137 and/or 55 of Limitation Act do not talk about 'first accrued' or 'first breached' as in some other Articles of Limitation Act. Therefore, this Court is unable to persuade itself to believe that this is a case where the dispute is '*ex facie barred by limitation*'. Some investigation is required to decide whether it is barred by limitation. In this regard, before moving on to *NCC* case law, this Court deems it appropriate to refer to *Nortel* principle. In *Nortel*, the facts were straight, neat and clean. This is captured in Paragraph No.4 of *Nortel* case law i.e., ***Bharat Sanchar Nigam Limited and another Vs. Nortel Networks India Private Limited*** reported in **(2021) 5 SCC 738**, wherein it is clear that cause of action for invoking arbitration arose on 04.08.2014 when the claim made by Nortel was rejected by making deductions from the final bill but Nortel slept over its alleged rights for 5½ years before issuing notice of arbitration on 29.04.2020. This

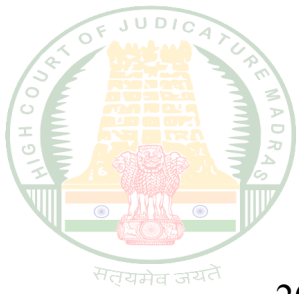


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was the case where Nortel did not take action from 04.08.2014 till 29.04.2020 and this factum is clear as daylight unlike the case on hand.

19. A careful reading of *Nortel* case law rendered by Hon'ble Supreme Court makes it clear that it is not only elucidative but it is exhaustive / comprehensive and is therefore instructive. It is comprehensive because every conceivable situation has been dealt with. In paragraph 47 of *Nortel*, Hon'ble Supreme Court has made it clear that it would apply only to cases where there is not even a vestige of doubt that the claim is *ex facie* time barred. It has been made clear that the Court may decline to make the reference only in such cases. Thereafter, Hon'ble Supreme Court in the same paragraph 47 has made it clear that even if there is '*slightest doubt*', the rule is to refer the dispute to arbitration and it has been further stated with surgical specificity and abundant clarity that doing anything otherwise, i.e., declining to refer to arbitration when there is even slight doubt about whether the matter is time barred would tantamount to encroaching upon the domain of what is essentially a matter to be determined by the Arbitral Tribunal.



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20. In the case on hand, as would be evident from the discussion elsewhere in this order, learned counsel have oscillated between Articles 137 and 55 of Schedule of Limitation Act. Both these articles do not talk about first accrual of right or when the contract is first broken respectively. To be noted, Article 55 even provides for continuing breach. In the case on hand, continuing breach has also been pleaded. Then, the date on which the breach in respect of which the claim is predicated has to be ascertained with specificity and exactitude. All these are questions of facts. Therefore, to decide the limitation in this backdrop, it clearly becomes a mixed question of facts and law, it is not just a case of '*slightest doubt*', i.e., a slight doubt but it is a case of considerable doubt. In this view of the matter, I respectfully follow *Nortel* principle, more particularly paragraphs 47 and 53.2 thereat. By doing this, it is clear that this is not a matter where one can decline to make a reference. On the contrary, it is a matter for reference. It does not fall under 'rare and exceptional cases' category either, i.e., paragraph 53.2 of *Nortel*. Paragraphs 47 and 53.2 of *Nortel* read as follows:

Paragraph 47 :

47.It is only in the 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, that the court



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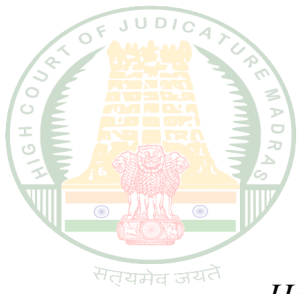
may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.

Paragraph 53.2:

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.

21. In this regard, this Court reminds itself about the celebrated ***Padma Sundara Rao*** case rendered by a Constitution Bench of Hon'ble Supreme Court i.e., ***Padma Sundara Rao Vs. State of Tamil Nadu*** reported in ***(2002) 3 SCC 533***. In ***Padma Sundara Rao*** case, the question of how a decision or a precedent should be placed reliance on was elucidatively explained by the Hon'ble Supreme Court, relevant paragraph is Paragraph No.9 and the same reads as follows :

'9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in



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Herrington v. British Railways Board [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom British Railways Board v. Herrington, (1972) 1 All ER 749 (HL)]] . Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.'

22. Aforementioned paragraph No.9 is not only elucidative, it is instructive. To be noted as ***Padma Sundara Rao*** has been rendered by a Hon'ble Constitution Bench, the ratio gets elevated to the status of declaration of law. If ***Nortel*** principle is read in the context of ***Padma Sundara Rao*** principle, it emerges without any doubt that the facts are distinguishable qua case on hand as the dates are telltale in ***Nortel***. In other words, the dates are so telltale that they are clear as daylight in ***Nortel***, whereas it is debatable or disputable in the case on hand. This Court deems it appropriate to extract Paragraph No.13 of ***NCC*** case :

'13. Having heard learned Counsel appearing for the respective parties and in the facts and circumstances of the case, the issue / aspect with regard to 'accord and satisfaction' of claims is seriously disputed and is debatable. Whether, in view of the acceptance of Rs.4,53,04.021/- by the respondent NCCL which was released by IOCL on the offer / letter made by the respondent NCCL dated 02.11.2016 there is an instance of 'accord and satisfaction' of the claims is a good and reasonably



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arguable case. It cannot be said to be an open and shut case. Therefore, even when it is observed and held that such an aspect with regard to 'accord and satisfaction' of the claims may/can be considered by the Court at the stage of deciding Section 11 application, it is always advisable and appropriate that in cases of debatable and disputable facts, good reasonably arguable case, the same should be left to the Arbitral Tribunal. Similar view is expressed by this Court in the case of Vidya Drolia (supra). Therefore, in the facts and circumstances of the case, though it is specifically observed and held that aspects with regard to 'accord and satisfaction' of the claims can be considered by the Court at the stage of deciding Section 11(6) application in the facts and circumstances of the case, the High Court has not committed any error in observing that aspects with regard to 'accord and satisfaction' of the claims or where there is a serious dispute will have to be left to the Arbitral Tribunal. However, at the same time, we do not agree with the conclusion arrived at by the High Court that after the insertion of Sub-Section (6-A) in Section 11 of the Arbitration Act, scope of inquiry by the Court in Section 11 petition is confined only to ascertain as to whether or not a binding arbitration agreement exists qua the parties before it, which is relatable to the disputes at hand. We are of the opinion that though the Arbitral Tribunal may have jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability, the same can also be considered by the Court at the stage of deciding Section 11 application if the facts are very clear and



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glaring and in view of the specific clauses in the agreement binding between the parties, whether the dispute is non-arbitrable and/or it falls within the excepted clause. Even at the stage of deciding Section 11 application, the Court may prima facie consider even the aspect with regard to 'accord and satisfaction' of the claims.'

Paragraph No.13 of *NCC* case law will make it clear that the exercise of going into merits will arise only in cases where the issues and facts are 'clear and glaring' i.e., beyond a speck of doubt. As regards to disputed, debatable and arguable cases, this Court also notices that Hon'ble Supreme Court in *Nortel case* itself vide paragraph No.53.2, has made it clear that it would apply in rare and exceptional cases where the claims are *ex facie* time barred and it is manifest that there is no substituting dispute.

23. This Court also reminds itself about *Vidya Drolia* case i.e., *Vidya Drolia & Ors. Vs. Durga Trading Corporation* reported in (2020) SCC *OnLine SC 1018*, for the limited purpose of saying that a three Member Bench of Hon'ble Supreme Court has made it clear that as regards reference qua arbitration when in doubt, a Section 11 Court would refer. Therefore, *Vidya Drolia* case also persuades this Court to make a reference.

24. Before concluding, it is necessary to set out that the arguments that



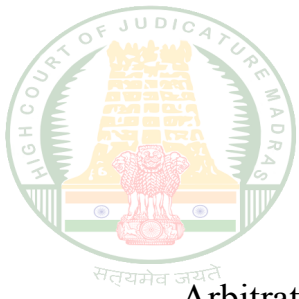
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a composite notice i.e., notice dated 06.10.2021, has been issued for invoking the arbitration clause does not come in the way of appointment of an Arbitrator as the arbitrable disputes have been set out in paragraph No.18 thereat, atleast six disputes vide sub-paragraphs (a) to (f) thereat and some of those disputes certainly and indisputably turn on second agreement on which the captioned Arb.OP is now predicated.

25. This Court therefore deems it fit and proper to come to the conclusion that this is a case where the question of limitation should also be left open to be raised and decided by Hon'ble Arbitral Tribunal to be appointed (infra) in the case on hand.

26. Before making the appointment, this Court reverts to the opening observations that the captioned petition has been filed under Section 11 of A and C Act without setting out the sub-section with specificity. This is an arbitration by a sole Arbitrator and absent procedure for appointment, it should necessarily be under sub-section (3) but considering the language in which Clause 11.7 is couched, it cannot be gainsaid that a procedure has not been agreed and one of the parties has failed to act as per the procedure i.e., 11(6)(a). Either way that does not come in the way of appointment of



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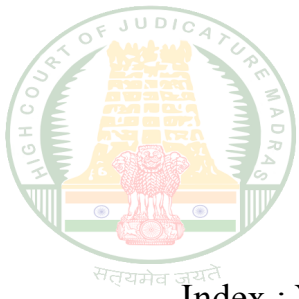
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Arbitrator, leaving open all the questions and therefore this Section 11 Court deems it appropriate to not to dilate further on this. In the days to come, it is desirable that a protagonist of a Section 11 petition sets out the sub-section with specificity.

27. In the light of narrative thus far, Hon'ble Mr.Justice K.Chandru (Retd.), a former Judge of this Court, residing at No.4-B, Kanchana, 78, St.Marys Road, Abiramapuram, Chennai-600 018, [Ph.Nos.29510162 Mobile: 94443-90962] is appointed as sole Arbitrator. All questions including limitation are left open and Hon'ble sole Arbitrator is requested to enter upon reference qua second agreement being agreement dated 15.06.2015 between the petitioner and the respondent, adjudicate upon the arbitrable disputes that have arisen between the parties including the limitation plea and render an award by holding sittings in Chennai, as there is no dispute that the seat / venue is Chennai. The fee of Hon'ble Arbitrator shall be governed by 'The Fourth Schedule' of A and C Act.

28. Captioned Arb.OP is disposed of in aforesaid manner. There shall be no order as to costs.

01.08.2022



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Index : Yes / No
Speaking order / Non-speaking orders

Note: Registry is directed to communicate a copy of this order forthwith to

- 1.The Hon'ble Mr.Justice K.Chandru (Retd.,)
Former Judge of Madras High Court
No.4-B, Kanchana, 78, St.Marys Road
Abiramapuram,
Chennai-600 018.
[Ph.Nos.29510162 Mobile: 94443-90962]
- 2.The Director
Tamil Nadu Mediation and Conciliation Centre
cum – Ex Officio Member
Madras High Court Arbitration Centre
Madras High Court, Chennai – 600 104.



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M.SUNDAR. J.,

ds

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01.08.2022