IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 10.10.2022

\+ **FAO(OS)(COMM) No.9/2019 & CM No.2239/2019**

M/S WELSPUN ENTERPRISES LTD. ..... Appellant

versus

M/S NCC LTD. ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Sandeep Sethi, Sr. Adv. with Mr. Sameer Parekh, Ms. Sonali Basu Parekh, Ms. Smita Bhargava, Ms. Tanya Chaudhary, Ms. Pavitra Singh & Mr. Manu Bajaj, Advs.

For the Respondent : Ms. Priya Kumar, Mr. Tejas Chhabra & Mr. Arpit Sharma, Advs.

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HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

INTRODUCTION

1. The appellant (hereafter '**Welspun**') has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an order dated 20.11.2018 (hereafter '**the impugned order**') passed by the learned Single Judge, whereby the appellant's application under Section 34 of the A&C Act,

seeking to set aside an arbitral award dated 23.07.2018 (hereafter '**the impugned award**'), was rejected.

2. The impugned award was rendered by majority of 2:1 by an Arbitral Tribunal comprising of three members. Whilst the majority was of the view that the claims of Welspun, as included in the Final Bill, were barred by limitation, one of the members of the Arbitral Tribunal (minority) expressed a contrary view.

3. The learned Single Judge concurred with the view that the claims, as contained in the Final Bill, were barred by limitation for the reason that the arbitration had not commenced within a period of three years from the due date for payment of the Final Bill, as claimed.

4. The Arbitration Clause contemplated a pre-arbitration dispute resolution mechanism by referring the disputes to the Chief Executives of the parties. The dispute resolution process failed on 21.12.2012 and the notice for arbitration was issued on 27.01.2014. According to Welspun, the right to seek reference to arbitration would arise on failure of the amicable dispute resolution procedure and thus, invocation of the arbitration was within the period of limitation. However, the learned Single Judge rejected the said contention, *inter alia*, on the ground that Welspun had failed to explain the delay in invoking the arbitration after the dispute resolution process had failed on 21.12.2012.

5. The principal controversy to be addressed in the present appeal is whether the claims of Welspun, as included in the Final Bill dated 30.10.2010, were barred by limitation.

FACTUAL CONTEXT

6. An Engineering, Procurement and Construction (EPC) contract in respect of "*Balance Offsite & Utilities and Interconnection with Panipat Refinery / Marketing Terminal (EPCC-9 Package)*" in the Panipat Naphtha Cracker Project was executed between Indian Oil Corporation Limited (hereafter '**IOCL**') and Nafto Gaz India Private Limited (hereafter '**Nafto Gaz'**). The scope of work under the said EPCC-9 Package included "*Design, Engineering, Procurement, Supply Transport, Fabrication, Construction, Painting, Insulation, Testing and Commissioning of Raw Water Storage and Treatment Plant, Fire water Storage & Pump House, Storm Water Storage & Pump House, Flare System, interconnecting Process Streams between Refinery and Panipath Naphtha Cracker Project (PNCP) including hook ups with the existing system, Naphtha unloading and transfer from Panipat Marketing Terminal to PNCP and construction of inter-connecting flyover between Panipat Refinery and PNCP*".

7. Subsequently, Nafto Gaz awarded the said EPC contract in favour of the respondent (hereafter '**NCC**'). Thereafter, NCC sub-contracted the work in respect of the inter-connecting flyover between the existing Panipat Refinery and Panipat Naphtha Cracker Project (PNCP) to Welspun.

8. By a Letter of Intent dated 24.10.2006 (hereafter '**the LoI**'), NCC subcontracted the works in respect of the interconnecting flyover

between Panipat Refinery and PNCP to MSK Projects (India) Ltd. (hereafter '**MSK**').

9. On 19.12.2006, a Memorandum of Agreement (hereafter '**the MoA'**) was executed between MSK and NCC. In terms of the said MoA, NCC had subcontracted the work concerning a flyover project (hereafter '**the Project**') on an item rate basis for a total value of ₹53.25 crores, in favour of MSK.

10. Subsequently, MSK was acquired by Welspun.

11. On 12.06.2010, the Mechanical Completion Certificate was issued to Welspun by IOCL.

12. Thereafter, on 03.08.2010, a meeting was held between the parties, wherein NCC had agreed to pay various amounts due to Welspun.

13. Thereafter, on 30.10.2010, Welspun submitted the Running Account Bill no. 33/Final Bill. A joint inspection was carried out thereafter and the said Final Bill was duly certified.

14. Accordingly, the Completion Certificate was issued by NCC on 30.11.2010. The said certificate recorded the actual date of completion of works as on 19.03.2010 and the executed contract value of the Project as "*Rs 5216.97 lakhs (excluding service tax) and final bill for Rs 2.64 crore for extra item under certification*"

15. Welspun claims that it had sent various emails to NCC seeking the payments due to it. Further, various meetings were also held between the parties, wherein NCC denied its liability to pay the due amounts at that stage.

16. In view of the disputes between the parties, Welspun issued a legal notice dated 21.08.2012 and called upon NCC to pay an amount of ₹16,68,89,114/- along with interest at the rate of 18% per annum from 19.03.2010 (the date of completion of the works), within a period of twenty-one days of the receipt of the notice, failing which it would invoke the dispute resolution mechanism.

17. NCC responded to the said notice by a letter dated 10.09.2012. It claimed that it had awarded the works relating to the contract to MSK on "back-to-back basis". It referred to the LoI and claimed that the MoA was executed on the basis of the LoI. According to NCC, the LoI had clarified that execution of the Project under the MoA was on a back-to-back basis. NCC acknowledged that in its record, a sum of ₹2.56 crores was payable to MSK/Welspun, however, it claimed that the payment would be due on receipt of corresponding payments from Nafto Gaz.

18. NCC had further mentioned that a huge amount of money for the work done by MSK as well as by NCC, was outstanding from Nafto Gaz. It stated that it had been continually appealing to MSK that "*the payments if any shall be cleared, if and only, upon the receipt of payments from the M/s Naftagoz*" and till Nafto Gaz releases payments

to NCC, it would not be liable to pay the amounts as claimed by Welspun.

19. Thereafter, on 26.11.2012, in accordance with the Dispute and Settlement Clause as contained in the MoA, Welspun referred the dispute to the Chief Executives of NCC and Welspun. However, on 21.12.2012, an attempt to resolve the disputes between the parties failed.

20. Thereafter, Welspun invoked the agreement to refer the disputes to arbitration by a notice dated 27.01.2014.

ARBITRATION

21. Welspun filed its Statement of Claims before the Arbitral Tribunal. It, essentially, raised five claims. Claim no. I was for the amount certified in the Final Bill for supply (₹19,88,16,796/-), erection (₹31,68,51,167/-) and extra items (₹3,33,63,921/-). These amounts were claimed without accounting for the amounts already received. Claim no. II was for a sum of ₹3,90,86,244/- on account of reimbursement of service tax. Claim no. III was for a sum of ₹78,87,305.85 on account of escalation in the cost of steel. Claim no. IV was for a sum of ₹7,31,84,544/- towards reimbursement of payments made to the suppliers on behalf of NCC. And, Claim no. V was for a sum of ₹4,21,41,692/- on account of retention money being the amount retained from various Running Account (RA) Bills. A tabular statement of the computation of the amounts claimed by Welspun, as set out in its Statement of Claims, is reproduced below:

"Welspun is entitled to the following admitted amounts				
S. No.	**Particulars**		**Amount**	**Total**
1.	Claim I Amounts payable towards certified amount in the Final Bill			
a.	Supply Bill:	(+)	Rs.19,88,16,796	
b.	Erection Bill:	(+)	Rs.31,68,51,167	
c.	Extra Items	(+)	Rs.3,33,63,921	
2.	Claim II: Reimbursement of Service Tax	(+)	Rs.3,90,86,244/-	
3.	Claim III: Claim towards escalation on steel	(+)	Rs.78,87,305.85/-	
4.	Claim IV: Reimbursement of payments made to the Suppliers on behalf of NCC.	(+)	Rs.7,31,84,544/-	
5.	Claim V: Claim towards payment of Retention	(+)	NIL	
	Total amount entitled to be received by Welspun			**Rs.66,91,89,978/-**
	Payments made by NCC			
6.	Amount paid by NCC	(-)	Rs.26,08,81,480/-	
7.	Debit Notes as accepted by Welspun	(-)	Rs.1,42,77,690/-	
8.	Material supplied	(-)	Rs.16,27,02,829/-	
	Adjustments made, as per the terms of the MOA by NCC are as follows:			
9.	TDS Deduction	(-)	Rs.49,91,948/-	
10.	Interest on Mobilisation Advance	(-)	Rs.73,94,381/-	
11.	Mobilisation Advance (net)	(-)	Rs.5,20,52,535/-"	

22. In addition to the above, Welspun also claimed interest at the rate of 18% per annum computed at ₹15,53,02,904/- till 31.12.2015. Welspun also claimed *pendente lite*, future interest and costs.

23. NCC filed a Statement of Defence contesting the aforesaid claims. It raised a preliminary objection that the claims raised by Welspun were premature as its contract with MSK/Welspun was on "*back-to-back basis*" with its contract with Nafto Gaz. It claimed that payments to Welspun could be considered only upon certification and release of the amounts from Nafto Gaz (IOCL to NCC). Since NCC

had neither received the certification nor payments, the claims to that extent were pre-mature and the cause of action for making such claims had not arisen. However, without prejudice to the said contention, NCC also claimed that Welspun's claims were barred by limitation and were liable to be rejected on the principle analogous to Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereafter '**the CPC**'). The relevant extract of the Statement of Defence articulating the said preliminary objection, is set out below:

> "9. The contention of NCC has always been that the contract with MSK now Welspun was on a back to back basis with the contract of NCC and NaftoGaz. Therefore, any claims or payments that Welspun may consider itself entitled to can be considered only upon certification and release of such amounts from NaftoGaz/IOCL to NCC. NCC has neither received the certification nor the payments. To that extent the claims as raised by Welspun are premature and the cause of action for the same has not arisen. NCC is in no position to admit accept or pay any part of the claim since that depends upon certification by NaftoGaz and the release of payments by NaftoGaz/IOCL. This is also a specific term of the LOI/MOA.
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> 10. Without prejudice to this contention of NCC, assuming without admitting that Welspun can raise its claims at this stage, the claims of Welspun as set out in the Statement of Claim are barred by limitation. Consequently, the claims as set up are liable to be rejected on principles analogus to Order VII Rule 11 of the Code of Civil Procedure 1908."

24. NCC also set out in detail its reasoning for claiming that the contract with MSK was on a back-to-back basis. It also relied upon the

LoI, in support of its defence. In addition to the above, NCC claimed that Welspun had failed to perform its obligation in a time-bound manner. It claimed that it also had counter-claims against MSK/Welspun arising as a result of various defaults on its part. However, at that stage, it was unable to quantify the claims. According to NCC, the same could be done only after certification and approvals from Nafto Gaz and EIL/IOCL.

25. The Arbitral Tribunal (majority) considered the aforesaid defence and did not find any merit in NCC's claim that its contract with MSK/Welspun was on a back-to-back basis. The Arbitral Tribunal concluded that "*back to back' payment was not contemplated by the parties in entering into the MoA dated 19.12.2006*".

26. Insofar as the question of limitation is concerned, the Arbitral Tribunal (majority) concluded that Welspun's claims as included in the Final Bill (Claim nos. I, II and III) were barred by limitation. Welspun had relied on the Minutes of the Meeting held on 03.08.2010 between the parties and asserted that NCC had acknowledged the payments due to Welspun and agreed to pay the same during the course of the said meeting. The Arbitral Tribunal (majority) held that the cause of action for invoking the arbitration had arisen on 03.08.2010, when the promise to pay was made as well as thereafter, when the Final Bill was certified (which was done on 30.10.2010). Thus, Welspun's notice under Section 21 of the A&C Act was beyond the period of three years from the said date and therefore, the said claims were barred by limitation.

27. Welspun's claim for reimbursement of payments made to suppliers on behalf of NCC (Claim no. IV) was also rejected as being barred by limitation. The Arbitral Tribunal held that Welspun had neither pleaded nor proved the date on which such payments were made to vendors and therefore, the dates of the invoices would be relevant for considering the question of limitation. The earliest of the invoices was dated 26.05.2007 and the last invoice was dated 30.06.2008. Since the invoices were dated more than three years prior to the date of invoking the arbitration, the claim for reimbursement of the said amount was also held to be barred by limitation.

28. However, insofar as the claim for refund of the retention money is concerned, the Arbitral Tribunal noted that NCC had promised to pay the same on receipt from Nafto Gaz and therefore, Welspun would be entitled to receive the same as and when the said amount was received from Nafto Gaz.

29. The majority award was signed by all the three Arbitrators. However, it was specifically mentioned that *"As there is a cleavage of opinion, the Majority Award shall prevail. The Award of Justice K. Ramamoorthy is appended separately*."

30. Although, there was no mention of a supplemental award, the record produced also includes a supplemental award signed by one of the Arbitrators [Justice (Retd.) Manmohan Sarin], which is undated and appears to have been penned down to contradict certain findings as recorded in the minority opinion, captioned 'Dissenting Award'. The

minority (Dissenting Award) found that Welspun was entitled to its claims (Claim nos. I, II and III) being the amounts due in terms of the certified Final Bill. However, Welspun's Claim no. IV was not accepted on the ground that Welspun had not satisfied the requirement of Section 70 of the Indian Contract Act, 1872. In terms of the Dissenting Award, Welspun's claim for interest was also liable to be allowed to the extent of 9% per annum from 27.01.2014 till the date of payment. Justice (Retd.) K. Ramamoorthy was of the opinion that Welspun was entitled to costs quantified at ₹1,14,15,169/- along with interest at the rate of 9% per annum.

SECTION 34 OF THE A&C ACT

31. Welspun challenged the impugned award by filing an application under Section 34 of the A&C Act [being OMP COMM 468/2018 captioned ***Welspun Enterprises Limited v. NCC Limited***]. Welspun assailed the impugned award on the ground that its claims were raised within the period of limitation and the Arbitral Tribunal had erroneously rejected its claims on the said ground. Welspun had also contended that the defence of NCC was intrinsically inconsistent inasmuch as on one hand, NCC had contended that the claim preferred by Welspun was pre-mature and on the other hand, it contended that the claim was barred by limitation.

32. The learned Single Judge examined the contentions advanced on behalf of Welspun and found the same to be unmerited. The learned Single Judge found that the claim preferred by Welspun was on the

basis of certification of the Final Bill on 29.11.2010 and, accordingly, held that the cause of action had accrued in favour of Welspun on the said date. The learned Single Judge further found that the letter dated 10.09.2012, as relied upon by Welspun, did not extend the period of limitation as mere exchange of correspondence between the parties could not extend the period of limitation or provide a fresh date of commencement of cause of action.

33. The learned Single Judge further referred to Section 21 of the A&C Act and the decision of the Supreme Court in ***State of Goa v. M/s Praveen Enterprises***[1], wherein it was held that that the date of invoking arbitration was a determinative factor for the purpose of limitation.

34. The learned Single Judge accepted that the parties were required to explore the possibility of settlement through reference of disputes to their respective Chief Executives, however, concluded that Welspun had not considered the reference to Chief Executive as a pre-condition to invocation of the arbitration but an attempt to amicably resolve the disputes. It is apparent that the learned Single Judge did not accept that the period of limitation would commence from the failure of the dispute resolution process on 21.12.2012. The learned Single Judge concurred with the Arbitral Tribunal that the letter dated 26.11.2012 invoking the dispute resolution mechanism did not stop the period of limitation. Paragraphs 11 and 12 of the impugned order are relevant and are set out below:

[1] ***(2012) 12 SCC 581***

> "11. It may be true that before invoking the Arbitration Agreement between the parties the petitioner was required to explore the possibility of a settlement through reference of the dispute to the Chief Executives of the parties, however, in the present case the same had also resulted in a failure on 21.12.2012. the petitioner thereafter invoked the arbitration proceedings only on 27.01.2014. The petitioner was, therefore, not considering this reference to the Chief Executives as a pre condition to the invocation of the arbitration, but as a step for making an attempt to amicably resolve the disputes. No reason has been given by the petitioner for not invoking arbitration between 21.12.2012 to 27.01.2014.
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> 12. The Arbitral Tribunal has also considered the issue of limitation in detail and has held that the letter dated 26.11.2012 by itself did not stop the period of limitation from running. It further held that mere exchange of correspondence between the parties would not extend the period of limitation and the petitioner was bound to take recourse to the legal remedy within the prescribed period of limitation, failing which it was to suffer the consequences thereof. it has held that all claims falling under the final bill are therefore, barred under the Law of Limitation."

35. The learned Single Judge also found no cause to interfere with the impugned award whilst accepting NCC's contention that the retention money was refundable once the same was received by NCC from Nafto Gaz. The learned Single Judge, accordingly, held that the Arbitral Tribunal was right in holding that the claim for refund of retention money was pre-mature in nature and therefore, within the period of limitation.

CONTENTIONS ADVANCED ON BEHALF OF THE PARTIES

36. Mr. Sethi, learned senior counsel appearing for Welspun, assailed the impugned award as well as the impugned order, essentially, on three grounds. First, he submitted that the Arbitral Tribunal had erred in not appreciating NCC's primary contention that the claims are pre-mature and therefore, it was not open for NCC to claim that they were barred by time. He referred to the decisions in the case of ***Vimal Chand Ghevar Chand Jain v. Ramakant Eknath Jadoo*** [2] and ***Gautam Sarup v. Leela Jetley & Ors.***[3], in support of his contention that alternate pleas are permissible but they cannot be mutually destructive.

37. Second, he submitted that Welspun had invoked the dispute resolution mechanism on 26.11.2012, which was within a period of two years from the date of the Completion Certificate and therefore, the invocation could not be held as barred by time. He relied on the decisions of the Supreme Court in ***State of Orissa & Anr. v. Damodar Das***[4], ***S. Rajan v. State of Kerala***[5] and ***Asia Resorts Ltd. v. Usha Berco Ltd.***[6].

38. Third, he submitted that the assumption that there was only a singular cause of action, was erroneous. He submitted that the cause of action could arise on multiple dates and could also continue. He submitted that the cause of action had also arisen on multiple occasions, when NCC had accepted its liability to pay. It had simply made it

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[2] ***(2009) 5 SCC 713***
[3] ***(2008) 7 SCC 85***
[4] ***(1996) 2 SCC 216***
[5] ***(1992) 3 SCC 608***
[6] ***2001 (8) SCC 710***

contingent upon its receipt from Nafto Gaz. It had also arisen on 10.09.2012, when NCC had accepted that the amount was payable, albeit, on a back-to-back basis. He contended that the jural relationship was acknowledged and the same was sufficient for the purpose of extending the period of limitation. He contended that the learned Single Judge erred in not accepting that the said letter dated 10.09.2012 was an acknowledgment of debt although a plain reading of the said letter clearly indicated the same. In support of his contention, Mr. Sethi also referred to the decisions in ***J.C. Budhraja v. Chairman, Orissa Mining Corpn. Ltd.***[7]***; Syndicate Bank v. R. Veeranna***[8]***; Food Corporation of India v. Assam State Coop. Marketing & Consumer Federation Ltd.***[9] and, ***Lakshmirattan Cotton Mills Co. Ltd. and Behari Lai Ram Charan v. The Aluminium Corporation of India Ltd.***[10].

39. Lastly, Mr. Sethi submitted that the period of limitation would commence only when the right to refer the matter to arbitration had arisen. He stated that a reference to arbitration could be made only once the parties had exhausted the remedy for resolving their disputes through intervention of their respective Chief Executives. The said settlement failed on 21.12.2012 and thus, the right to refer the dispute to arbitration arose on the said date. The arbitration was invoked within a period of three years from the said date and therefore, was within the period of limitation. He referred to the decisions in the case of ***Hari***

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[7] ***(2008) 2 SCC 444***
[8] ***(2003) 2 SCC 15***
[9] ***(2004) 12 SCC 360***
[10] ***AIR 1971 SC 1482***

Shankar Singhania & Ors. v. Gaur Hari Singhania & Ors.[11]***, P.D. Pillai v. Mrs. Kaliyanikutty Amma and Ors.***[12] and ***In Re: Deepika Housing Projects Ltd. & Ors.***[13], in support of his contention.

40. Ms. Priya Kumar, learned counsel appearing for NCC, countered the aforesaid submissions. She submitted that the time spent by the Chief Executive Officers of the respective parties in the conciliation proceedings could not be excluded for the purpose of limitation. She relied on the decision in the case of ***Ravinder Kumar Verma v. M/S. BPTP Ltd. & Anr.***[14], in support of her contention. She submitted that the Court had noticed that Section 77 of the A&C Act expressly permits a party to initiate proceedings to preserve its rights and therefore, it is open for any party to invoke the arbitration if any further delay would render the claims barred by limitation.

41. Next, she submitted that there was no scope for imputing any equitable considerations in applying the law of limitation. She also submitted that any party seeking benefit of exclusion under any law was required to plead and prove the same. In the present appeal, Welspun had not claimed exclusion of any period on account of reference of the disputes to the Chief Executive Officers and therefore, it was not open for Welspun to now claim that the said period ought to be excluded.

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11 ***(2006) 4 SCC 658***
12 ***AIR 1995 Ker 78***
13 ***AIR 2007 Cal 280***
14 ***2014 SCC OnLine Del 6602***

42. She referred to the decision of the Supreme Court in ***Geo Miller & Company Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.***[15] and contended that the observations made in the said decision would not be relevant as Welspun had not pleaded any case of extension of limitation on the ground of negotiations. Thus, there were no averments as to the "*breaking point*" of negotiations and therefore, Welspun is precluded from raising any such plea.

43. Finally, she submitted that Welspun was attempting to set up a new case, which was not pleaded and it was impermissible for it to do so. She referred to the decision of the Supreme Court in ***Union of India v. Ibrahim Uddin***[16], to support her contention.

REASONS & CONCLUSIONS

44. At the outset, it is relevant to note that the controversy involved in the present case is in a narrow compass. The limited question to be addressed is whether the claims raised by Welspun, in respect of the work done and as included in the Final Bill, are barred by limitation.

45. It is necessary to note that the facts whether the Completion Certificate had been issued on 30.11.2010 or the Final Bill had been certified as stated on 30.10.2010 were to some extent disputed by NCC. However, the Arbitral Tribunal found that the Final / RA Bill No.33 had been certified and the Completion Certificate dated 30.11.2010 was issued. The Arbitral Tribunal also proceeded on the basis that a meeting

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[15] ***(2020) 14 SCC 643***
[16] ***2012 (8) SC 148***

was held between the representatives of the parties on 03.08.2010. Thus, notwithstanding any controversy in regard to these facts, the same must be accepted to be true for the purpose of determining the question whether Welspun's claims were barred by limitation, as was done by the Arbitral Tribunal.

46. The first question to be addressed is whether the Arbitral Tribunal (majority) erred in not appreciating that NCC had taken contradictory stands. On one hand, it claimed that the claims preferred by Welspun were pre-mature as such claims could be made only after Nafto Gaz had certified the work and made the necessary payments. On the other hand, NCC claimed that they were belated. The contention that Welspun's claims were pre-mature was premised on the basis that the contract between the parties was on a back-to-back basis. As noticed above, NCC had also averred that the claims raised by Welspun were barred by limitation. According to NCC, such alternate pleas were permissible as they were premised on two alternative assumptions: one, that NCC was not liable to make any payments till it received further payments from Nafto Gaz and, second, that it was liable to make payments notwithstanding that it had not received the payments from Nafto Gaz. In the second scenario, Welspun's claims would be barred by limitation.

47. The Arbitral Tribunal had rejected NCC's contention that such alternative pleas were available. Welspun had relied on the decision of the Supreme Court in ***Vimal Chand Ghevar Chand Jain v. Ramakant***

Eknath Jadoo[17] and ***Gautam Sarup v. Leela Jelly and Otters***[18], whereby the Supreme Court had held that alternative pleas were permissible but the same could not be destructive of each other. It was contended on behalf of NCC that the said decisions were not applicable. However, the Arbitral Tribunal rejected the said contention. NCC has not challenged the decision of the Arbitral Tribunal to reject its contention that such alternative pleas – as taken in its preliminary objections – are impermissible.

48. Notwithstanding the above, the Arbitral Tribunal held that it was required to independently adjudicate the question as the controversy involved jurisdictional issues. The decision of the Arbitral Tribunal, in this regard, cannot be faulted. Section 3 of the Limitation Act, 1963 (hereafter '**the Limitation Act**') expressly requires the court to reject an action instituted beyond the prescribed period notwithstanding that no such defence has been set up. By virtue of Section 43 of the A&C Act, the Limitation Act is also applicable to arbitration.

49. In view of the above, we are unable to fault the Arbitral Tribunal's decision to determine the question of limitation on merits notwithstanding the inconsistent pleas raised by NCC.

50. The principal question to be addressed in the present case is the import of the provision of the pre-arbitration dispute resolution process

[17] ***(2009) 5 SCC 713***
[18] ***(2008) 7SCC 85***

on the question of limitation. The Dispute Resolution Clause, as contained in the MoA, reads as under:

> **"Disputes and Settlement**
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> In the event of any dispute, arising between the parties relating to the various terms and conditions set forth hereinabove, the parties undertake to resolve the differences by mutual negotiation. If such dispute or difference cannot be resolved within one month from the date it is arisen, the same shall be referred to the Chief Executives of NCC and MSK. If the Chief Executives also fail to agree then such differences/disputes shall be referred to a Sole Arbitrator to be appointed by NCC and MSK by mutual consent.
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> However, the parties fail to agree upon a Sole Arbitrator with mutual consent, as aforesaid, MCC and MSK will each nominate an Arbitrator of their choice, and the two arbitrators so nominated shall choose a Third Arbitrator. The award of the Arbitrator/s so appointed shall be final and conclusive and be binding on both the parties to this Memorandum of Agreement. The provisions of the Indian Arbitration Act of 1996 or any statutory modification or re-enactment thereof and the rules made there under for the time being in force shall apply to the arbitration proceedings under this clause. The venue of arbitration shall be Delhi"

51. It is clear from the above that the said Dispute Resolution Clause requires the parties to make an endeavour to resolve the differences by mutual negotiations. The parties had agreed that if such disputes could not be resolved within a period of one month from the date they had arisen, they would refer the same to their respective Chief Executives. It is only when the Chief Executives of the respective parties fail to resolve the same then such differences and disputes would be referred to arbitration.

52. The question to be addressed is whether, in the context of the aforesaid dispute resolution mechanism, the period of limitation would commence prior to the parties exhausting the agreed pre-reference procedure/remedies.

53. Several dispute resolution clauses provide for multi-tier or water fall dispute resolution mechanisms. These require the parties to undertake mediation or to first attempt to resolve the dispute in an alternative forum before resorting to arbitration. The entire purpose is to provide the parties an opportunity to resolve the disputes in an amicable manner before resorting to adversarial proceedings.

54. It is also relevant to bear in mind that the law of limitation does not extinguish the cause. It only precludes a party from availing the legal remedies for redressal of the said cause (See: ***Bombay Dying & Manufacturing Co. Ltd. v. State of Bombay & Ors.***[19]). Thus, the question whether a party forfeits its recourse to arbitration on account of time spent in otherwise trying to resolve the disputes, is required to be viewed in the aforesaid perspective.

55. In ***Panchu Gopal Bose v. Board of Trustee for Port of Calcutta***[20], the Supreme Court referred to the decision of the Queen's Bench in ***West Riding of Yorkshire Country Council v. Huddersfield Corporation***[21] and held that the rule of limitation would be applicable to arbitration proceedings in the same manner as it applies to litigation

[19] ***AIR 1958 SC 328***
[20] ***(1993) 4 SCC 338***
[21] ***(1957) 1 All ER 669***

before courts. In that case, the party had invoked the arbitration process under the Arbitration Act, 1940 after a period of ten years from the date it had first put forward its claims. In the facts of the said case, the Supreme Court found that recourse to arbitration was not available. The Supreme Court also referred to the text, ***Russel on Arbitration, 19th Edn***, to posit that the limitation period to commence arbitration, would start to run "*from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned*".

56. The Supreme Court also noted the following proposition as stated in the book **Law of Arbitration**[22] by Justice Bachawat:

> "The cause of arbitration, therefore, arises when the claimant becomes entitled to raise the question, i.e. when the claimant acquires the right to require arbitration. the limitation would run from the date when cause of arbitration would have accrued, but for the agreement".

57. In view of the above, the period of limitation would run when a party acquires a right to refer the disputes to arbitration. Clearly, if the arbitration agreement requires the parties to exhaust the dispute resolution process as a pre-condition for invoking arbitration, the right to refer the dispute to arbitration would arise only after the parties have exhausted the said procedure. The counterparty could raise a valid objection to any step taken to refer the disputes to arbitration in avoidance of the agreed pre-reference dispute resolution procedure. If the parties have agreed that they would first endeavour to resolve the

[22] ***Chapter 37 at Page 549***

disputes amicably in a particular manner, it is necessary for them to first exhaust that procedure before exercising any right to refer the disputes to arbitration.

58. In ***Hari Shankar Singhania & Ors. v. Gaur Hari Singhania & Ors.***[23], the Supreme Court categorically held that a reference to arbitration "*is required to be filed within a period of three years when the right to apply accrues*". It is, therefore, crucial to determine when such 'right to apply' accrues in a case. As per the Court, the right to apply would accrue when differences between the parties to the arbitration agreement were evident – when the parties reach a 'breaking point', that is, when a settlement with or without conciliation is no longer possible. Pertinently, the Court noted that the limitation period would not start so long as the parties were in dialogue even if differences surfaced during such period, as an interpretation to the contrary would inevitably "*compel the parties to resort to litigation / arbitration even where there is serious hope of the parties themselves resolving the issues*". Thus, the right to apply can be said to have accrued "*only on the date of the last correspondence between the parties and the period of limitation commences from the date of the last communication between the parties*."

59. In this regard, the Supreme Court also referred to the findings of the High Court of Delhi in ***Oriental Building and Furnishing Co. Ltd. v. Union of India***[24], wherein the High Court had, *inter alia*, held that

[23] ***(2006) 4 SCC 658***
[24] ***AIR 1981 Del 293***

"*[n]either party can move the Court without the existence of a difference between them [...] there can be negotiations between the parties and all sorts of correspondence. But it is only when they come to the conclusion that they cannot resolve the dispute between them, it can be said that a difference arises*."

60. It is also important to note that: (i) this judgment was rendered in the context of the Arbitration Act, 1940; (ii) the controversy in the case involved a family dispute; (iii) the correspondences exchanged between the parties were not merely in the nature of reminders but various letters to amicably negotiate and resolve the matter; and, (iv) the correspondences revealed an inclination to implementing the deed of dissolution in that case and amicably settling the family dispute.

61. Subsequently, in ***Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.***[25], the Supreme Court relied on the decision of ***Hari Shankar Singhania & Ors. v. Gaur Hari Singhania & Ors.***[26] to state that "*till such time as the settlement talks are going on directly or by way of correspondence no issue arises and with the result the clock of limitation does not start ticking*". Hence, there would be no question of stifling the right to arbitration where settlement talks were ongoing. This is because the issue between the parties would be live and therefore, the three-year limitation period stipulated under Article 137 of the Limitation Act cannot be said to have lapsed. In this regard, the

[25] ***(2007) 4 SCC 599***
[26] ***Supra Note 23***

Court also placed reliance on its earlier decision in ***Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corpn. Ltd.***[27]

62. In the year 2019, after considering the law thus far on the issue of limitation period in the context of accrual of the cause of action for arbitration proceedings to commence, the three-Judge Bench of the Supreme Court in ***Geo Miller & Company Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd***.[28] enunciated the following principles:

(i) Mere exchange of correspondence between the parties would not be sufficient to extend the time of limitation – specific pleadings and evidence qua the parties' *bona fide* negotiation history should be placed on record for the careful consideration of the Court and for the benefit of limitation (as discussed above) to enure in favour of such party. On this basis, the Court ascertains the 'breaking point', that is, the point when a reasonable party would abandon settlement efforts and contemplate referring the dispute to arbitration.

(ii) A party must not wait for an unreasonably long period to invoke the arbitration proceedings, if the counterparty does not settle and merely because written correspondences, including reminders, are being sent to the counterparty.

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[27] ***(2006) 5 SCC 275***
[28] ***Supra Note 15***

(iii) Commercial or mercantile disputes are inherently different in nature from family disputes. The Supreme Court in ***Hari Shankar Singhania & Ors. v. Gaur Hari Singhania & Ors.***[29] was concerned with a family dispute and the findings in that case were specifically rendered in that context. Thus, the threshold for determining the 'breaking point' in commercial disputes would differ – and would be lower – as parties in commercial settings are primarily interested in securing the amounts due to them.

(iv) Whilst the scheme evolved under the A&C Act was different from the erstwhile Arbitration Act, 1940, the principles applicable in relation to the law of limitation under both the statues would be the same. Therefore, the Supreme Court affirmed that the three-year limitation period stipulated under Article 137 of the Limitation Act, applicable to arbitration proceedings, commenced under the Arbitration Act, 1940 would equally be applicable under the A&C Act in the context of appointment of an arbitrator under Section 11 of the A&C Act.

63. As stated above, a party cannot be expected to commence arbitration without exhausting the pre-reference procedure. One of the principal questions that arises in this context is whether the time spent for complying with the pre-reference procedure is required to be excluded while calculating the period of limitation for referring the disputes to arbitration or whether the period of limitation would

[29] ***Supra Note 23***

commence after the said procedure has been exhausted. In this context, the decision of the Supreme Court in ***Geo Miller & Company Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd***.[30] is instructive. Paragraph 28 of the said decision is relevant and set out below:

> "28. Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. The Court upon careful consideration of such history must find out what was the "breaking point" at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This "breaking point" would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim."

64. Although the Court observed that the period spent by the parties in negotiating an amicable settlement is required to be excluded, however, in the latter part of the aforesaid passage, the Court, in unambiguous terms stated that the cause of action for the purpose of

[30] ***Supra Note 15***

limitation would commence from the 'breaking point' of the negotiations.

65. In ***Alstom Systems India Pvt. Ltd. v. Zillion Infraprojects Pvt. Ltd.***[31], a Single Bench of this Court had considered the question whether the period of limitation for referring the disputes to arbitration would commence from the date of failure of mediation. The Court referred to the decision of the Supreme Court in ***Geo Miller & Company Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd***.[32] and held as under:

> "21. No doubt, the opening sentence of para 28 in Geo Miller talks of exclusion of the period of negotiation, while computing the period of limitation for the purposes of 1996 Act. Mr. Sethi had, with some justification, sought to capitalize on this observation to contend that, at best, the learned Arbitral Tribunal could only have excluded the period during which the petitioner and the respondent were negotiating. The learned Arbitral Tribunal could not, submits Mr. Sethi, have postponed the cause of action to 27th September 2020, when the efforts at mediation failed.
>
> 22. If one were to read the first sentence in para 28 of Geo Miller divorced from the rest of the paragraph, perhaps this submission might have merited consideration. It is, however, trite that the judgments of Court are not to be read like statutes. Equally, words used by the Supreme Court, in its judgements, are all to be accorded due importance. A paragraph in a judgement is to be read as a whole, and not in a vivisected fashion, relying on one sentence and

[31] ***OMP(COMM) No.351/2021, decided on 31.01.2022***
[32] ***Supra Note 15***

> overlooking others. Para 28 of Geo Miller clearly goes on to hold that, once the 'breaking point', being the date on which any reasonable party would have abandoned the efforts at settlement, is determined, the cause of action would be deemed to arise from that date, for referring the dispute to arbitration. These words are clear, unambiguous and unequivocal. They entirely support the view, expressed by the learned Arbitral Tribunal, that the cause of action, in the present case, would be deemed to arise on 7th September 2020, being the date on which efforts at mediation between the parties ultimately failed. That once the 'breaking point', being the date on which any reasonable party would have abandoned the efforts at settlement, is determined, the cause of action would be deemed to arise from that date, for referring the dispute to arbitration. These words are clear, unambiguous and unequivocal."
>
> [emphasis added]

66. We concur with the aforesaid view. The period of limitation for referring the disputes to arbitration cannot commence till the parties have exhausted the necessary pre-reference procedure. If the arbitration clause requires the parties to engage in negotiations or to attempt to resolve the disputes in mediation/conciliation, the right to refer the disputes to arbitration would arise only after the negotiations for an amicable settlement have failed and the parties have exhausted their endeavors to resolve the disputes through mediation/conciliation.

67. Several courts in various decisions have consistently held that pre-reference arbitration mediation/settlement processes are required to run the full course. Even in cases where such processes have consumed a significant period of time, the courts have held that the cause of action

to invoke the arbitration would arise only after such process has irrevocably broken down.

68. In ***TVC India Pvt. Ltd. v. ABN Amro Bank N.V.***[33], a Single Bench of this Court had considered a situation where the contractually mandated pre-arbitration process had stretched far beyond the contemplated one-day mediation, that is, over a period of two years. In the aforesaid context, this Court held as under:

> "6…..In the present case Hon'ble Mr. Justice K. Ramamoorthy (a former Judge of this Court) was appointed as a mediator with the consent of both the parties. However, instead of one day mediation agreed by the parties in the agreement, the proceedings before the mediator went on for about two years when the respondent admittedly withdrew itself from the mediation proceedings on 30.6.2006. It shall be significant to mention that the respondent acquiesced itself in the mediation proceedings by continuing in the mediation proceedings till 30.6.2006. It was only after the mediation failed or could not work, the petitioner has to file the present petition for appointment of an Arbitrator for resolving the dispute that have arisen between the parties under the contract**.** In the opinion of this Court the cause of action for appointment of Arbitrator has arisen in favor of the petitioner when the mediation did not work out as a result of withdrawal by the respondent on 30.6.2006**.** In case the limitation for filing of the present petition is reckoned from the said date of 30.6.2006, the present petition filed by the petitioner on 13.11.2006 cannot be said to be beyond limitation prescribed in Article 137 of the Limitation Act."
>
> [emphasis added]

[33] ***2008 (1) Arb LR 579 Delhi***

69. In ***National Highways Authority v. Progressive Construction Ltd.***[34], a Single Bench of this Court considered a case whether the disputes had been pending resolution before a committee constituted by the petitioner (National Highways Authority). The reference of the disputes to a committee was not a part of the dispute resolution clause; the committee had been set up in an *ad hoc* fashion after the disputes had arisen during the performance of the contract in question. The process for amicable resolution of disputes continued for almost six years before it was explicitly rejected. Thereafter, the disputes were referred to arbitration. In the arbitral proceedings, an objection was raised that the claims were barred by limitation. It was contended that the period of limitation commenced from the original date when the disputes had first arisen prior to reference of the same to the committee. The Arbitral Tribunal rejected the said contention and found that the claims were within the period of limitation. The arbitral award was challenged before this Court. The learned Single Judge of this Court upheld the arbitral award and observed as under:

> "20. On reading of the findings of the Arbitral Tribunal it would disclose that the arguments of the petitioner on the issue of limitation are without any force, as there is a finding of fact by the Arbitral Tribunal that the Variation Orders for the entire increased quantity were not issued on 26th March, 2003, and yet further the issue as to the revision of the rates was under the active consideration of the respondent for a very long time from 29th May, 2003, to 27th April, 2009, as the respondent had formed a Committee for revising the rates and forwarding the revised rates to NHAI for

[34] ***2014 SCC OnLine Del 3104***

approval, and the respondent had also appeared before the Committee in an attempt to amicably resolve the issue. The respondent rejected the proposal for revised rates only on 27th April, 2009, and therefore the contention of the petitioner is that the cause of action began on 26th March, 2003, cannot be accepted. It is settled law that when the parties are actively trying to resolve the disputes, then the cause of action for resorting to arbitration cannot be said to have commenced."

70. The decision of the learned Single Judge in ***National Highways Authority v. Progressive Construction Ltd.***[35] was upheld by a Division Bench of this Court by an order dated 08.09.2014[36]. The relevant extract of the said decision reads as under:

"24. The third condition concerns limitation.

25. As per NHAI the cause of action arose when variation order for change in quantity of items were issued on March 26, 2003.

26. The learned Single Judge has noted that the learned Arbitral Tribunal has dealt with the factual aspect of this issue, which reasoning has been verbatim noted in paragraph 19 of the impugned decision.

27. Pithily stated that the learned Single Judge has brought out that after the variation order, notifying change of quantities, was issued on March 26, 2003, parties discussed the vexed question of in what manner the same had to translate into price payable to the contractor. The learned Single Judge has noted that the Arbitral Tribunal had succinctly brought out that the variation order issued on March 26, 2003 was not for an

[35] ***Supra Note 34***

[36] ***National Highways Authority v. Progressive Construction Ltd.: FAO(OS) No.401/2014***

entire increased quantity. The learned Single Judge has noted that the Arbitral Tribunal has brought out the impact of the issue of revision of rates being discussed. The learned Single Judge has noted that on April 27, 2009, NHAI itself had formed a committee to resolve the impasse. To put it pithily, the dispute was not on the increased quantity as per price variation; the dispute concerned the revision of rates. It is not the case of NHAI that on a particular date it unequivocally closed the chapter on the revision of the rates leaving no further scope for any discussion and further with respect to said date cause of action would accrue.

28. The objections filed by NHAI show a total confusion in the mind of NHAI between a cause of action and cause of action accruing. Whereas the former encompasses such facts, if traversed, required to be proved to sustain a claim, the latter would mean the date on which the right to sue accrues."

[emphasis added]

71. It is necessary to note that the Coordinate Bench of this Court had held that there was a clear distinction between "cause of action" for prosecuting a claim and the "cause of action accruing" for invoking arbitration.

72. In ***Delhi Jal Board v. Mohini Electricals Ltd.***[37], a Single Judge of this Court (one of us, Vibhu Bakhru, J.) upheld the decision of the dispute adjudicating board (DAB) holding that the limitation would not commence till the right to refer the disputes to arbitration had arisen. The relevant extract of the said decision reads as under:

[37] ***2022 SCC OnLine Del 1869***

"43. In the facts of the present case, the respondent had made its claims and invoked the dispute resolution mechanism. The period of limitation in respect of the claims had stopped running once the claims had been referred to the DAB**.** There was inordinate delay in constituting the DAB. As noted above, this was the subject matter of protracted correspondence. Finally, one of the consortium partners of the respondent was compelled to approach this Court and the DAB was constituted thereafter. The DAB did not render its decision, however, the parties agreed to close the said proceedings and refer the disputes to arbitration.

44. The Arbitral Tribunal had referred to the aforesaid facts and concluded that the parties were involved in the resolution of the disputes through dispute redressal mechanism as contemplated under Clause 20 of the Agreement. The Arbitral Tribunal held that the limitation would not commence till the right to refer the disputes to arbitration had arisen. The said right arose on 05.03.2018 when the parties agreed to close the DAB proceedings and refer the disputes to arbitration. The Arbitral Tribunal held that even if the date on which the respondent requested for appointment of the Arbitrator is considered (that is 17.07.2017), the claims would be within the period of limitation.

45. This Court finds no infirmity with the aforesaid decision. The period of limitation in respect of any dispute would stop running once the parties had invoked the dispute resolution mechanism. Undeniably, if there is an inordinate delay on the part of any party to implement the dispute resolution mechanism, the party seeking redressal of the disputes would require to take appropriate action within a period of three years. In the present case, the respondent (its JV partner) had taken pro-active steps for implementing the dispute resolution mechanism by approaching this Court by filing a writ petition."

[emphasis added]

73. Ms. Priya Kumar, who appeared on behalf of NCC, relied upon the decision of a learned Single Judge of this Court in ***Ravinder Kumar Verma v. M/S. BPTP Ltd. & Anr.***[38]. In that case, the Court had held that the pendency of the conciliation proceedings would not be a bar for enforcing rights to refer the disputes to arbitration by filing an application under Section 11 of the A&C Act or seeking dismissal of the suit under Section 8 of the A&C Act. The Court had reasoned that such proceedings would be necessary to preserve the rights and to ensure that the claims are not barred by limitation. The Court had held that since Section 77 of the A&C Act permits the parties to institute proceedings, which are necessary for preserving their rights, it is open for the parties to move applications under Sections 8 and 11 of the A&C Act to save their claims from being barred by limitation.

74. Ms. Priya Kumar had earnestly contended that the said decision amply clarifies that the period of limitation would neither be suspended nor its commencement deferred in the event of any mediation on account of the parties engaging in any pre-reference dispute resolution process.

75. We are unable to concur with the aforesaid reasoning of the learned Single Judge in ***Ravinder Kumar Verma v. M/S. BPTP Ltd. & Anr.***[39]. Section 77 of the A&C Act expressly proscribes the parties from initiating any judicial proceedings in respect of disputes that are subject matter of conciliation proceedings except where in the opinion of the

[38] ***Supra Note 14***
[39] ***Supra Note 14***

party *"such proceedings are necessary for preserving his rights"*. The period of limitation to refer the disputes to arbitration commences only upon the parties exhausting the necessary pre-reference procedure, hence, the question of taking recourse to Section 11 of the A&C Act for appointment of an arbitrator for preserving the right to arbitration does not arise.

76. The necessary question to be addressed is whether the period of limitation for referring the disputes to arbitration commences to run prior to the parties exhausting the agreed pre-reference procedures. In our view, the answer is in the negative. If the period of limitation does not commence running till the pre-arbitration processes have been exhausted – as has been held in various decisions– there is no need for protecting the remedy of arbitration against the bar of limitation prior to completion of the pre-reference procedure. We are unable to accept that if the arbitration agreement requires a party to refer the disputes to conciliation before referring the same to arbitration, the period of limitation would commence prior to the parties exhausting the remedy to resolve the disputes through conciliation.

77. The idea of mediation, even in cases of litigation, is encouraged in many countries. Austria, for example, provides methods of regulating limitation periods and permits suspension of such limitation period before initiating court proceedings. Poland requires for interruption of the limitation period in cases of pre-litigation mediation, that is, the limitation period ceases entirely upon commencement of the mediation process. The position in Hungary appears to be similar. In Singapore,

however, the mediation process does not generally postpone or pause the period expended in settlements efforts before invoking arbitration.

78. Article 8(1) of the European Directive of Mediation provides as under:

> "**Effect of mediation on limitation and prescription periods**
>
> 1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process."

79. In the United Kingdom, Section 27 of the Arbitration Act, 1950 as well as Section 12 of the Arbitration Act, 1996 empower the courts to extend the time for commencement of arbitration. Such power has been exercised by the courts to extend limitation where delay was caused due to parties attempting to settle the disputes amicably.

80. In the decision of ***Liberian Shipping Corporation v. A. King & Sons***[40], the Court of Appeal considered the question of extending the period of limitation for commencing arbitration where the delay was caused because the parties preferred to settle their disputes. In that case, the owners of the vessel had let out the vessel to charterers. There was delay in loading and discharge of goods on account of fire. In that context, cross claims were filed. The owners of the vessel claimed damages for the delay caused to the vessel by fire. The charterers, on

[40] ***[1967] 2 WLR 856***

the other hand, claimed damages for extra expenses incurred by them in arranging transport on account of the failure to discharge the vessel at the designated port. The parties engaged in negotiations for settlement of the disputes. The settlement efforts consumed the limitation period of three months provided for initiating arbitration in terms of the charterparty. The owners, nine days after the time limit had expired, applied to the Court (Master Lawrence) under Section 27 and their plea for extending the period of limitation was allowed.

81. Upon an appeal (before Donaldson J.) being preferred by the charterers, the same was reversed. Thereafter, when the matter was referred to the Court of Appeal, the issue essentially came down to whether the owners were time-barred from initiating arbitration because they were nine days out of time. The Court of Appeal rendered a 2:1 decision, in favour of the owners. The decision was based on the interpretation of the phrase 'undue hardship' provided in Section 27 of the Arbitration Act, 1950. Lord Denning, in his majority opinion, held that the owners would suffer undue hardship if they were barred. Lord Salmon, in his separate concurring decision, observed that although the parties were breathing fire against each other, it was obvious from the letters that they did express willingness to meet and see if the matter could be settled. Accordingly, he observed that "*I have no doubt at all that if two ordinary business men entering into this contract had been asked if it would cause undue hardship to refuse to extend the time should circumstances such as the present occur, they would both unhesitatingly have answered 'Yes'*." Lord Salmon also enumerated

certain factors to be considered: the degree of blameworthiness of the claimants in failing to appoint an arbitrator within time; the amount at stake; the length of the delay; whether the claimants had been misled; and whether, through circumstances beyond their control, it was impossible for them to appoint an arbitrator in time. The majority, therefore, observed that not allowing an extension of limitation would cause undue hardship to the owners. Therefore, the appeal was allowed.

82. The Canadian courts have also taken a view that the period of limitation would commence on break down of the pre-arbitral resolution process. In the recent decision of ***Jean Maisonneuve and 3721094 Canada Inc. v. Christopher Clark and Lanciter Consulting Inc.***[41], the parties had referred their business disputes to arbitration. In the year 2016, they settled all disputes except one (referred to as the 'Excluded Issue'). The mutual release signed by the parties, *inter alia*, contemplated for the reference of the Excluded Issue to arbitration in case the parties were unable to resolve the same amicably.

83. In the year 2017, the parties got involved in litigation over the validity of the said settlement agreement as a whole. In the year 2018, the appellant took the position that there would be no negotiation regarding the Excluded Issue. In 2019, the respondent wrote to the appellant seeking to initiate arbitration. The appellant refused this request on the ground that it was time-barred. When the respondent moved the superior court, the appellant took the same ground stating

[41] ***2022 ONCA 113***

that the ninety-day period or, in the alternative, the two-year limitation period provided in the limitation statute had already expired.

84. The court held that there was no agreement to conduct the arbitration within a ninety-day period and further held that the arbitration was not barred by the two-year limitation period under the limitation statute because "*[i]t was not evident that the arbitration was 'appropriate' until it was clear that the dispute could not be resolved through negotiations*", in terms of the relevant statutory provision. Accordingly, the court found that it was only in the year 2018 that the respondent could have known that a settlement *qua* the Excluded Issue was not possible. On that basis, the respondent's application was considered to have been made within the two-year limitation period.

85. The Court of Appeal for Ontario upheld the aforesaid decision.

86. In ***PQ Licensing S.A., Vincent Herbert and Jean-Marie Josi v. LPQ Central Canada Inc.***[42], the appellant and the respondent had executed a franchise agreement. In 2009, the respondent/franchisee served a rescission notice on the appellant/franchisor. This was disputed by the appellant/franchisor soon upon receipt.

87. In 2011, the respondent/franchisee commenced action before the superior court. The appellant/franchisor objected to these proceedings on the ground that the franchise agreement required that the parties mediate before commencement of arbitration. At that point, there was

[42] ***2018 ONCA 331***

disagreement between the parties as to whether the requirement to mediate was inapplicable owing to breaches on the part of the appellant/franchisor, effectively rendering the franchise agreement void. As the matter remained dormant for a while, it was administratively dismissed for delay in 2013.

88. When the respondent/franchisee attempted to revive the case, the appellant/franchisor contended that the respondent/franchisee had failed to timely commence the arbitration. Subsequently, a sole arbitrator was appointed to determine whether the arbitration was time-barred for not being commenced within a period of two years from 2009, that is, when the appellant/franchisor had disputed the respondent/franchisee rescission notice.

89. The sole arbitrator concluded that the dispute was not time-barred as the agreement contemplated mediation as a pre-condition to the arbitration and therefore, the arbitration was not 'appropriate' for commencement until after the mediation requirement was complied with.

90. The Appeal Judge agreed with the arbitrator and specifically observed that "*[i]f the claim is the kind of claim that can be remedied by another and more effective method provided for in the statute, then a civil action will not be appropriate until that other method has been used*." It was held that the interpretation of the word 'appropriate' to initiate arbitration depended on "*the parties' choice to have their disputes resolved by arbitration if mediation as a precondition [was]*

unsuccessful." The Court of Appeal for Ontario agreed with the findings of the Appeal Judge below and held that as per the interpretation of the word 'appropriate' and the given factual matrix, "*the parties would only know that arbitration was appropriate when the mediation requirement had been exhausted*." The Court of Appeal, therefore, dismissed the appeal.

91. It is also apposite to bear in mind that the legislative as well as judicial policy is to promote mediation and encourage the parties to make a serious endeavor for an amicable resolution of the disputes before commencing any adversarial proceedings. Section 12A of the Commercial Courts Act, 2015 makes it mandatory for the parties to exhaust the remedy of mediation prior to institution of the suit in such manner as may be prescribed. Sub-Section (3) of Section 12A of the Commercial Courts Act, 2015 expressly provides that the period during which the parties remained occupied with the pre-institution mediation would not be computed for the purpose of limitation under the Limitation Act.

92. In the facts of the present case, the Arbitration Clause expressly required the parties to attempt resolving the disputes and differences by mutual negotiations. If the efforts to resolve the disputes did not yield fruit within a period of one month from the date the same had arisen, the parties were bound to refer the disputes to their respective Chief Executives. The parties could refer the disputes to arbitration only if the Chief Executives failed to arrive at a consensus.

93. NCC had agreed to make the payments at the meeting held on 03.08.2010 and the Minutes of the Meeting record the same. The Final/RA Bill no.33 was certified on 30.10.2010 and the Completion Certificate was issued on 30.11.2010. According to Welspun, the amounts were due and payable in terms of the MoA. According to Welspun, the amounts were required to be paid within a period of one month from the date of certification of the bills, that is, on or before 30.11.2010.

94. Welspun sent a letter dated 17.05.2011 requesting for release of payments amounting to ₹13,17,12,365/-, which according to Welspun were due and payable. This was followed by other e-mails dated 20.07.2011 and 22.07.2011. It is apparent from the said communications that the parties had discussions in the meanwhile. The e-mail dated 22.07.2011 sent by Welspun also indicates that during the course of discussions, NCC had indicated that the payments would be linked on back-to-back basis with its client (Nafto Gaz/IOCL). According to Welspun, the payments could not be linked to receipts from Nafto Gaz and it had asserted so in its e-mail dated 22.07.2011. Thereafter, Welspun sent another letter dated 09.09.2011 calling upon NCC to pay the said amount. This was again followed by another letter dated 31.10.2011. There were also certain other e-mails that were sent by Welspun. Finally, on 21.08.2012, Welspun issued a notice through its counsel.

95. It is material to note that NCC responded to the said notice by a letter dated 10.09.2012. In its response, NCC reiterated its stand that

the contract between the parties was on back-to-back basis and the payments to Welspun were subject to NCC receiving corresponding payments from Nafto Gaz. The relevant extract of the said letter is set out below:

> "…….Your client is well aware that the payments to be made to your client are subject to receiving the corresponding payment from Naftogaz. Your Client is well aware that huge amounts due and payable by Naftogaz not only pertaining to the flyover project executed by your Client but also in respect of the other projects executed by NCC have been withheld by Naftogaz/IOCL. Your client knowing fully well that the LOI which was issued on back to back basis is the foundation for the contract awarded to your Client willfully concealed the same. We also observe that your client vide letters dated 17.05.2011, 30.08.2011 and 09.09.2011 demanded payment of Rs.13.17 Crores towards the supposed out standings in respect of the contract executed by them and whereas through the legal notice you have claimed an amount of Rs.16,68,89,114/- towards the supposed out standings. The figures appearing in the above referred letters of your Client and also those appearing in your notice are imaginary and have no basis. We observed from our records that subject to receiving the corresponding payment from Naftogaz an amount of Rs.2.56 Crores appears to be payable to your Client in respect of the works executed by them. As the contract awarded to your Clients is on back to back basis, the liability to make the payment even in respect of the said amount of Rs.2.56 Crores would arise only on receipt of the corresponding payment from Naftogaz. Your client is well aware that huge amounts for the works done by your client and also for the works done by NCC for Naftogaz are outstanding from Naftogaz for a very long time.

Your Client is also well aware that on account of failure of the various contractors who have executed the various items of work forming part of the EPCC – 9 project awarded by IOCL to Naftogaz the said IOCL has levied LDs including on the scope of work executed by your client. We reliably understand that discussions are in progress between Naftogaz and IOCL for refunding the amount recovered by them towards LDs. Your Clint willfully withheld disclosing the aforesaid levy of LDs in respect of the works executed by them. You will also note that the amounts claimed by your Client towards extra items of works were never submitted on time. Our liability to pay the amounts that were recovered towards LDs and also the payments towards extra claims if any could be considered only after we receive the corresponding payment from the Employer i.e. Naftogaz. You will also note that the amounts recovered by IOCL towards Retention Money is yet to be refunded till date. Our liability to remit the amounts due to your Client towards the Retention Money will arise only after release of the corresponding payment by Naftogaz.

Time and again, we have been continually appealing to your Client that the payments if any shall be cleared, if and only, upon the receipt of payments from the M/s Naftogaz. Therefore, we request your good selves to advise your Client that to be bound by the agreed terms and conditions of the LOI as such till M/s Naftogaz India Pvt. Ltd., releases the pending payments to us, we are not liable to clear the amounts as claimed by your Client and the same are disputed for the reasons stated above."

[emphasis supplied]

96. Welspun was not expected to immediately institute the dispute resolution mechanism on the Completion Certification being issued on 30.11.2010. The letter dated 10.09.2012 indicates that the controversy

between the parties had crystalized after 30.11.2010. However, it is also clear from the letter dated 10.09.2012 that the disputes had arisen between the parties and the parties had failed to resolve the same. Within a period of three months after receipt of the letter dated 10.09.2012, Welspun invoked the dispute resolution mechanism and by a letter dated 26.11.2012, made a request for their respective Chief Executives to meet to resolve the disputes.

97. It is not clear as and when the negotiations between the parties to amicably resolve the disputes commenced and failed. However, it is clear that Welspun had escalated resolution of the disputes to the second tier by seeking a reference to the respective Chief Executives well within the period of limitation. Clearly, Welspun could not have sought a reference to arbitration prior to referring the disputes for resolution to the respective Chief Executives. Concededly, an attempt to resolve the disputes by the Chief Executives failed on 21.12.2012. It is on the said date that the right to refer the disputes arose in favour of Welspun. Welspun could not have referred the disputes prior to exhausting the remedies of referring the disputes to the respective Chief Executives for resolution. The period of limitation for referring the disputes to arbitration thus, must commence from the said date, that is, 21.12.2012. Welspun commenced arbitration on 27.01.2014, that is, after a period of thirteen months and six days, which was within the period of three years from the date on which the right to refer the disputes to arbitration arose.

98. In view of the above, it is clear that the decision of the Arbitral Tribunal (majority) to reject the claims made by Welspun as being barred by limitation is erroneous and the impugned award is liable to be set aside. The said error is self-evident from the record.

99. The learned Single Judge accepted that it was necessary for the parties to explore the possibility of settlement through reference of the disputes to the Chief Executives before invoking the arbitration. However, the learned Single Judge erroneously concluded that Welspun was not considering the reference to the Chief Executives as a pre-condition for invocation of the arbitration but as a step for attempting an amicable resolution of the disputes.

100. This Court is unable to concur with the said view. Once it is accepted that it is necessary for Welspun to make a reference of the disputes to the Chief Executives of the parties, it follows that Welspun could seek a reference to arbitration only if the said proceedings were terminated. As noted above, the reference to the Chief Executives of the parties resulted in failure on 21.12.2012. Welspun could have invoked the arbitration immediately thereafter but its failure to do so does not render its reference barred by the Limitation Act.

101. Insofar as Welspun's Claim no. IV – claim relating to reimbursement of various invoices, which Welspun claims that it had paid on behalf of NCC – is concerned, this Court finds no fault with the decision that the same is barred by limitation. This is because Welspun has taken no steps to escalate any dispute in regard to this claim within a reasonable period of time. The last of the invoices was dated

30.06.2008 and the same was not reimbursed. Welspun/MSK was required to take steps for escalating the disputes within the period of limitation. It is apparent that no such dispute was escalated to the Chief Executives of the parties within a period of three years from the date when the cause of action for claiming such reimbursement had arisen. The impugned award warrants no interference to the extent it rejects the said claim.

102. In view of the above, the impugned award to the extent it holds that Welspun's Claim nos. I, II and III, as included in the Final Bill, are barred by limitation, is set aside. Accordingly, denial of other claims, which are premised on the said findings including claim for interest and costs, cannot be sustained as well. The impugned award to the extent it denies the said claims is set aside. The impugned order is also set aside.

103. It is clarified that the claimant is entitled to take steps for reference of the disputes to arbitration afresh.

104. The appeal is, accordingly, allowed in the aforesaid terms. Pending applications, if any, are also disposed of.

105. The parties to bear their own costs.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

OCTOBER 10, 2022
'gsr'