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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment pronounced on: 11.02.2025

\+ **ARB.P. 1285/2024**

ORIGINET TECHNOLOGIES LTD & ORS. ..... Petitioners

Through: Mr. Akshat Vachher, Mr. Yashvardhan Singh, Mr. Shrey Lodha, Mr. Jaswinder Choudhary, Ms. Abhiti Vachher, Advocates for Petitioner nos.1 to 3.

versus

TECHNOLOGY DEVELOPMENT BOARD ..... Respondent

Through: Mr. Yashvardhan, Ms. Kritika Nagpal, Mr. Gyanendra Shukla, Mr. Pranav Das, Advocates.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the A&C Act') seeks appointment of a sole arbitrator to adjudicate the disputes between the parties.

2. The disputes between the parties have arisen in the context of a Loan Agreement dated 18.07.2012 and a Deed of Personal Guarantee dated 18.07.2012. The petitioner no. 1 entered into the said Loan Agreement with the respondent, under which financial assistance of INR 960 Lakhs was sanctioned for *"Development, Commercialization, and Indigenization of Nuclear Radiation Monitoring Systems"* (hereinafter referred to as 'the

project').

3. The loan was to be disbursed in four tranches, subject to the fulfilment of pre-defined project milestones. The sanctioned tranches were as under -

i. INR 300 Lakhs as the first tranche

ii. INR 350 Lakhs as the second tranche

iii. INR 260 Lakhs as the third tranche

iv. INR 40 Lakhs as the fourth tranche

4. To fulfil the conditions for the first tranche, petitioner nos. 2 and 3 executed a Deed of Personal Guarantee in favour of the respondent on 18.07.2012. The first tranche of INR 300 Lakhs was disbursed on 02.08.2012. Similarly, after successfully completing the milestones for the second tranche, the second tranche of INR 350 Lakhs was disbursed on 24.10.2013. A First Supplementary Agreement dated 18.10.2013 was also executed between the parties to extend certain deadlines due to practical exigencies.

5. The Loan Agreement dated 18.07.2012 between the parties also contains a dispute resolution clause which reads as under:-

> *"11.1 a) If any dispute or difference arises between the Parties hereto as to the rights or liabilities or any claim or demand of any Party against other or to the construction, interpretation, effect and implication of any provision of this Agreement or in regard to any matter under these presents but excluding any matter, decisions or determination of which is expressly provided for in this Agreement, such disputes or differences shall be referred to the sole arbitration of the Chairperson, Technology Development Board or that of his nominee and the decision of such*

arbitrator shall be conclusive and binding on the Parties hereto. This Clause is applicable to the Director(s) of the company also and therefore the Director(s) would also be party/parties to such Arbitration. A reference to the arbitration under this Clause shall be deemed to be submission within the meaning of the Arbitration and Conciliation Act, 1996 and the rules framed there under and any statutory modifications thereof for the time being in force, which shall be deemed to apply to the arbitration proceedings under this Clause.

b) Delay/non-payment of dues and matters arising thereto are also covered in the dispute or differences. In case of any default in repayment the entire outstanding dues together with all outstanding interest and other charges will become due and repayable and the dispute may be referred to Arbitration.

11.2 a) The venue of the arbitration shall be at Delhi.

b) Each party shall bear and pay its own cost of the arbitration proceedings unless the arbitrator otherwise decides in the award.

c) The provision of this Article shall not be frustrated, abrogated or become in-operative, notwithstanding this Agreement expires or ceases to exist or is terminated or revoked or declared unlawful.

11.3 The Courts at Delhi shall have exclusive jurisdiction in all matters concerning this Agreement, including any matter arising out of the arbitration proceedings or any award made therein. The Indian Laws including Indian Laws on Contract shall be applicable. "

6. The Deed of Personal Guarantee dated 18.07.2012 between the parties also contains a dispute resolution clause which reads as under:-

"21 The Guarantor hereby agrees that if any dispute or difference arises between the borrower and lender as to the rights or liabilities or any claim or demand of any Party against other or to the construction, interpretation, effect and implication of any provision of the Loan Agreement or in regard to any matter under these presents but excluding any matters, decisions or determination of which is expressly provided for in the Loan Agreement, such disputes or differences shall be referred to the sole arbitration of the Chairperson, Technology Development Board or that of his nominee under Article XI of the Loan Agreement and the Guarantor shall also be a party of the Arbitration proceedings, as the decision of the Arbitration may affect position of the Guarantor, and the decision of such arbitrator shall be conclusive and binding on the Parties

including the Guarantor hereto. A reference to the arbitration under this Clause shall be deemed to be submission within the meaning of the Arbitration and Conciliation Act, 1996 and the rules framed there under and any statutory modifications thereof for the time being in force, which shall be deemed to apply to the arbitration proceedings under this Clause."

7. The disputes/differences between the parties aggravated when despite meeting all the stipulated conditions, the respondent delayed the disbursement of the third tranche (INR 260 Lakhs) for a period of 2.5 years, causing severe financial distress to the petitioners.

8. It is submitted that Project Monitoring Committee (PMC) had conducted an inspection on 26.07.2014 and recommended the disbursement. However, despite multiple reminders from the petitioners, the respondent continued to withhold the funds. In response to repeated requests, the respondent decided to conduct a re-inspection of the project through a Review Committee, despite the PMC already giving a favourable report. This additional inspection was completed, and all necessary clarifications were provided by the petitioners, yet the respondent still did not release the funds.

9. Due to the prolonged delay, the project came to a standstill, leading the petitioners to escalate the matter to the Minister of Science and Technology through a representation dated 10.08.2015. The Minister acknowledged the financial distress caused by the delay and forwarded the grievance to the respondent for resolution. However, instead of addressing the petitioners' concerns, the respondent, through letters dated 21.08.2015 and 26.10.2015, made demands for repayment of the loan, disregarding both

the PMC and Review Committee's recommendations for an extension of the completion date.

10. Subsequently, the respondent constituted a Dispute Resolution Committee (DRC) on 23.11.2015, which approved the extension of the project's completion date, a one-year moratorium on repayment, and non-levy of additional interest due to the delay in disbursement. These approvals were formalized in a Second Supplementary Agreement dated 28.03.2016, and finally, on 30.03.2016, the third tranche was disbursed.

11. The fourth tranche of INR 40 Lakhs was disbursed after the execution of another Supplementary Agreement dated 19.10.2016, which further extended the project's completion date to 30.06.2016 and granted an additional moratorium of one year for repayment.

12. It is submitted that the petitioners repaid INR 3,84,97,946/- in compliance with the revised schedule. The repayment schedule was revised based on the PMC's recommendations, which took into account project developments. The loan repayment was structured into nine half-yearly instalments starting from 01.07.2017.

13. It is submitted that the unwarranted 2.5-year delay in disbursing the third tranche caused significant financial distress to petitioner no. 1. The total project cost escalated by INR 155 Lakhs, and funds earmarked for post-completion activities had to be diverted to sustain the project. The delay led to client attrition, resulting in a loss of projected sales amounting to INR 2564 Lakhs in the first two years.

14. Petitioner no. 1, through a letter dated 18.12.2019, sought restructuring of loan repayment under Rule 19(11), 19(13), and 19(15) of the TDB Rules, 1996.

15. In August 2020, a Dispute Resolution Committee deliberated on the petitioners' request and acknowledged the respondent's failure to disburse the third tranche in time. The committee provided two options, either an immediate repayment of outstanding dues or a deferred payment over five years. Petitioner no. 1 opted for the deferred payment plan. However, in March 2021, the respondent constituted an Expert Committee, which added a condition requiring petitioner no. 1 to furnish a letter from its banker regarding the settlement of other credit facilities.

16. It is submitted that from June 2021 to September 2023, the respondent failed to make any decisions regarding the petitioners' restructuring proposal. Repeated letters dated 16.10.2023 and 23.11.2023 from petitioner no. 1 emphasized the financial distress caused by the delayed disbursement of the third tranche and sought a resolution. However, on 12.02.2024, the respondent rejected the proposal without considering the Dispute Resolution Committee's prior decision.

17. On 15.03.2024, the respondent, through its advocate, issued a notice invoking the personal guarantees of petitioner nos. 2 and 3 for the outstanding loan amount. In response, the petitioners, through a legal notice dated 24.05.2024, reiterated their losses and requested relief under Rule 19(13) of the TDB Rules. Subsequently, through another legal notice dated 22.05.2024, the petitioners claimed compensation of INR 68 Crores for direct and indirect financial losses, including INR 13 Crores in promoter

investments, INR 35 Crores for loss of profits, and INR 20 Crores for reputational damages.

18. Upon non-payment of the claimed amount within the stipulated period, the petitioners, through legal notices dated 22.05.2024 and 12.06.2024, invoked arbitration under Clause 11 of the Loan Agreement dated 18.07.2012 and Clause 21 of the Deeds of Personal Guarantee.

19. It is submitted that the respondent, to cover up its default and evade liability for damages claimed by petitioner no. 1, issued demand notices dated 04.04.2024. However, these were served only after receiving a legal notice from the petitioners on 18.04.2024 seeking damages. The respondent's demand notices, issued under the Insolvency and Bankruptcy Code, 2016, aimed to initiate insolvency proceedings against petitioner nos. 2 and 3, bypassing the arbitration clauses in the Loan Agreement and Personal Guarantee Deeds. Despite the contractual requirement for arbitration, the respondent has not invoked it.

20. Petitioner nos. 2 and 3, through a letter dated 24.05.2024, contested the respondent's claims as false and baseless. The respondent, through letters dated 10.06.2024 and 07.07.2024, refused to settle the disputes.

21. The dispute stems from the respondent's refusal to pay INR 68 Crores claimed as damages by the petitioners. In the above backdrop, the present petition has been filed by the petitioners seeking appointment of a sole arbitrator to adjudicate the disputes between the parties.

22. The respondent objects to the appointment of the sole arbitrator in the present petition by submitting as under –

a) The claims raised by the petitioners are time barred claims and hence cannot be referred to arbitration. It is submitted that claims are based on a report by the Project Monitoring Committee dated 26.07.2014 regarding losses due to the delayed disbursal of the third loan instalment, which was released on 30.03.2016. However, these claims were raised for the first time only on 18.04.2024, nearly eight years later.

b) Since the claims were only raised in 2024, far beyond the statutory three-year limitation period under Article 137 of the Limitation Act, 1963, they are clearly time-barred. Reliance has been placed on ***B and T AG v. Ministry of Defence*** (2024) 5 SCC 358 and ***BSNL v. Nortel Networks (India) (P) Ltd.*** (2021) 5 SCC.

c) Further reliance is placed on ***Arif Azim Company Ltd. v. Aptech Ltd.,*** (2024) 5 SCC 313 and ***Geo Miller & Co. Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.***, (2020) 14 SCC 643, wherein the Court observed that claims barred by limitation are not arbitrable.

d) The recent ***SBI General Insurance Co. Ltd. v. Krish Spinning*** 2024 SCC OnLine SC 1754 does not overrule these precedents and clarifies that Courts must determine at the Section 11 stage whether the petition is filed within the limitation period.

23. This Court does not find merits in the contentions of the respondent. The scope of the present proceedings is confined to ascertaining the existence of the arbitration agreement, as explicitly stated by the Supreme Court in ***SBI General Insurance Co. Ltd. v. Krish Spinning*** (Supra) and ***Interplay between Arbitration Agreements under the Arbitration &***

Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re, 2023 SCC OnLine SC 1666, the above objections of the respondent would be required to be considered by a duly constituted arbitral tribunal. In ***SBI General*** (Supra) it has been specifically held as under:

> *"113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in In Re : Interplay (supra) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a prima facie arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:*
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> > *"209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and not other issues". These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. […]"*
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> > *(Emphasis supplied)*
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> *114. In view of the observations made by this Court in In Re: Interplay (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in Vidya Drolia (supra) and adopted in NTPC v. SPML (supra) that the jurisdiction of the referral court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out ex-facie nonarbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re : Interplay (supra).*
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> *118. Tests like the "eye of the needle" and "ex-facie meritless", although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal.*
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> *119. Appointment of an arbitral tribunal at the stage of Section 11 petition also does not mean that the referral courts forego any scope of judicial review of the adjudication done by the arbitral tribunal. The Act, 1996 clearly vests the national courts with the power of subsequent review by which the award passed by an arbitrator may be subjected to challenge by any of the parties to the arbitration.*
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> *125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material."*

24. ***SBI General Insurance Co. Ltd. v. Krish Spinning*** (Supra), has further clarified the position of law, with respect to the time barred claims. The relevant observation of the Court is reproduced as under –

> *"126. Before, we close the matter, it is necessary for us to clarify the dictum as laid in Arif Azim Co. Ltd. v. Aptech Ltd. reported in 2024 INSC 155, so as to streamline the position of law and prevent the possibility of any conflict between the two decisions that may arise in future.*
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> *127. In Arif Azim (supra), while deciding an application for appointment of arbitrator under Section 11(6) of the Act, 1996, two issues had arisen for our consideration:*
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> > *Whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act,*

1996? If yes, whether the petition filed by M/s Arif Azim was barred by limitation?

Whether the court may decline to make a reference under Section 11 of Act, 1996 where the claims are ex-facie and hopelessly time-barred?

128. On the first issue, it was observed by us that the Limitation Act, 1963 is applicable to the applications filed under Section 11(6) of the Act, 1996. Further, we also held that it is the duty of the referral court to examine that the application under Section 11(6) of the Act, 1996 is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963, i.e., 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to when the right to apply would accrue, we had observed in paragraph 56 of the said decision that "the limitation period for filing a petition under Section 11(6) of the Act, 1996 can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice."

129. Insofar as the first issue is concerned, we are of the opinion that the observations made by us in Arif Azim (supra) do not require any clarification and should be construed as explained therein.

130. On the second issue it was observed by us in paragraph 67 that the referral courts, while exercising their powers under Section 11 of the Act, 1996, are under a duty to "prima-facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process."

131. Our findings on both the aforesaid issues have been summarised in paragraph 89 of the said decision thus:—

"89. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that while considering the issue of limitation in relation to a petition under Section 11(6) of the Act, 1996, the courts should satisfy themselves on two aspects by employing a two-pronged test - first, whether the petition under Section 11(6) of the Act, 1996 is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex-facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration, the court may refuse to appoint an arbitral tribunal."

> *132. Insofar as our observations on the second issue are concerned, we clarify that the same were made in light of the observations made by this Court in many of its previous decisions, more particularly in Vidya Drolia (supra) and NTPC v. SPML (supra). However, in the case at hand, as is evident from the discussion in the preceding parts of this judgment, we have had the benefit of reconsidering certain aspects of the two decisions referred to above in the light of the pertinent observations made by a seven-Judge Bench of this Court in In Re : Interplay (supra).*
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> *133. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the Act, 1996, the referral court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in Arif Azim (supra). As a natural corollary, it is further clarified that the referral courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in In Re : Interplay (supra).*
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> *134. The observations made by us in Arif Azim (supra) are accordingly clarified. We need not mention that the effect of the aforesaid clarification is only to streamline the position of law, so as to bring it in conformity with the evolving principles of modern-day arbitration, and further to avoid the possibility of any conflict between the two decisions that may arise in future. These clarifications shall not be construed as affecting the verdict given by us in the facts of Arif Azim (supra), which shall be given full effect to notwithstanding the observations made herein."*

25. ***SBI General*** (supra) reaffirms that while assessing limitation under Section 11(6) of the Arbitration and Conciliation Act, 1996, the referral court's role is restricted to verifying whether the application was filed within the three-year limitation period prescribed under Article 137 of the Limitation Act, 1963**.** The starting point for this limitation period must be determined in line with ***Arif Azim*** (supra).

26. In ***Arif Azim*** (supra), the Court emphasized that it is the duty of the referral court to ensure that the Section 11(6) application is not time-barred. The three-year limitation period begins from the date when the right to apply accrues, which is triggered only after a valid notice invoking arbitration is sent by the applicant and the opposing party fails or refuses to comply with its terms.

27. In the present case, the notices invoking arbitration were sent on 22.05.2024 and 12.06.2024, and the petition has been filed within three years from the said dates.

28. Furthermore, the ***SBI General*** (Supra) underscores that, at the stage of appointing an arbitrator, Courts must not engage in a detailed evidentiary inquiry to determine whether the claims are time-barred; such issues are to be left for determination by a duly constituted arbitral tribunal, in line with Section 11(6-A) of the Act and the principles set out in ***In Re: Interplay*** (supra).

29. Since the existence of the arbitration agreement is apparent from a perusal of the Agreement between the parties, there is no impediment to appointing an independent sole arbitrator to adjudicate the disputes between the parties. Moreover, in terms of the law laid down in ***Perkins Eastman Architects DPC v. HSCC (INDIA) Limited***, (2020) 20 SCC 760, ***TRF Limited v. Energo Engineering Projects Limited***, (2017) 8 SCC 377 and ***Bharat Broadband Network Limited v. United Telecoms Limited***, (2019) 5 SCC 755, it is incumbent to appoint an independent sole arbitrator. The stipulation in the arbitration agreement to the effect that *"...such disputes or differences shall be referred to the sole arbitration of the Chairperson,*

Technology Development Board or that of his nominee and the decision of such arbitrator shall be conclusive and binding on the Parties hereto", is not a valid stipulation.

30. Accordingly, Mr. Justice (Retd.) Hrishikesh Roy, Former Judge, Supreme Court of India (Mob. No.: +91 9435040196) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties under the Loan Agreement dated 18.07.2012 and the Deed of Personal Guarantee dated 18.07.2012. It is made clear that the reference under both the agreements shall be independent of each other, even though the same learned Arbitrator has been appointed given the commonality of the subject matter. Needless to say, it shall be open for the learned Arbitrator to hold common sittings and/or allow common evidence to be adduced, for the sake of convenience, and as may be deemed expedient.

31. The respondent shall be entitled to raise appropriate objections as regards limitation/jurisdiction, if any, before the learned sole arbitrator which shall be duly considered and decided by the learned sole arbitrator before adjudication of the claim/s on merits.

32. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties the requisite disclosure as required under Section 12 of the A&C Act.

33. The learned Sole Arbitrator shall fix his fees in consultation with the parties.

34. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

35. The present petition stands disposed of.

SACHIN DATTA, J

FEBRUARY 11, 2025/*sv*