2024 INSC 851

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 12233 OF 2024

(ARISING OUT OF SLP (C) NO. 5589 OF 2024)

M/S HPCL BIO-FUELS LTD. …APPELLANT

VERSUS

M/S SHAHAJI BHANUDAS BHAD …RESPONDENT

J U D G M E N T

J. B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts:

1. Leave granted.

2. This appeal arises from the final judgment and order dated 31.01.2024 ("**impugned order**") passed by the High Court of Judicature at Bombay in Commercial Arbitration Petition No. 1 of 2023, wherein the High Court allowed the petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, "**the Act, 1996**") at the instance of the M/s Shahaji Bhanudas Bhad ("**the respondent**") and appointed Justice (Retd.) Dilip Bhosale as the sole arbitrator to adjudicate the disputes and differences between HPCL Biofuels Ltd. ("**the appellant**") and the respondent.

A. FACTUAL MATRIX

3. The appellant is a Government company within the meaning of Section 4(35) of the Companies Act, 2013 and is engaged *inter alia* in the business of manufacturing bio-fuels. The appellant is a wholly-owned subsidiary of Hindustan Petroleum Corporation Ltd.

4. The respondent is engaged in the business of manufacture, supply and erection of the equipment and machinery required for the setting up of sugar factories and allied products in the name of M/s S.S. Engineer, as a sole proprietor.

5. Between 27.06.2012 and 30.08.2012, the appellant floated tenders for enhancing the capacity of various process stations and Boiling House at Lauriya (West Champaran) and Sugauli (East Champaran). The respondent participated in the bidding process and was declared as the successful bidder. Subsequently, in accordance with the terms and conditions of the tender, the appellant in October and November of 2012 issued purchase orders in favour of the respondent for enhancing the capacity of the concerned Boiling House on a turn-key basis. Between 21.11.2012 and 25.03.2014, the respondent supplied various equipment under the purchase orders and raised invoices for the same.

6. While the work was in progress, the appellant expressed its concerns about the slow progress of work, quality of materials supplied and non-adherence to timelines by the respondent and attempts were made to resolve the same through mutual discussions between the parties.

7. On 13.06.2013, the appellant floated two more tenders for the purpose of completion of certain work and supplies at the Sugauli and Lauriya plants respectively. In August 2013, the appellant issued purchase orders in favour of the respondent, for completing various works including supplies on a lump-sum turnkey basis. The respondent raised invoices between 29.03.2013 & 25.03.2014 for the service portion of the turn-key contract. Accordingly, as per the respondent, the total sum payable to it under the various purchase orders aggregated to Rs. 38,18,71,026/-.

8. Between 18.12.2012 and 07.11.2013, the appellant made an aggregate payment of Rs. 19.02 crore to the respondent, with the last payment being made on 07.11.2013**.** As per the case of the respondent, the balance amount of Rs. 18,12,21,452/- remained outstanding. The discussions between the parties undertaken between October 2013 and January 2014 did not yield any fruits as the issues relating to payment and deficiency in services rendered could not be resolved. In this regard, the respondent *vide* an e-mail dated 02.02.2014 made a request to release the balance amount at the earliest, so as to enable it to complete the balance work. The appellant *vide* an e-mail dated 04.02.2014 responded to the said email and reiterated that the performance of the respondent was unsatisfactory and it had failed in fulfilling its obligations in accordance with the terms of the purchase orders. In such circumstances, the appellant refused to clear the outstanding dues of the respondent.

9. On 09.07.2016, the respondent issued a legal notice to the appellant, seeking release of the alleged outstanding payment amounting to Rs. 18,12,21,452/- along with interest. The respondent also specified in the said notice that in the event of failure of the appellant to settle the outstanding amount, the notice shall be construed as the notice for invocation of arbitration in terms of Clause 14 of the tender. The appellant, however, did not respond to the aforesaid notice.

10. On 16.02.2018, the respondent filed Arbitration Petition (ST) No. 5095 of 2018 before the High Court of Judicature at Bombay seeking appointment of an arbitrator in terms of Section 11 of the Act, 1996. However, prior to filing the Section 11 application, the respondent also sent a demand notice dated 30.08.2017 under Section 8 of the Insolvency & Bankruptcy Code, 2016 (for short "**the IBC**") to the appellant, claiming the alleged outstanding amount along with interest.

11. On 01.10.2018, upon the request made by the respondent, the Arbitration Petition (ST) No. 5095 of 2018 was disposed of as withdrawn. The relevant portions of the order dated 01.10.2018 are reproduced below: -

> *"1. Not on board. Upon mentioning, taken on board.*
>
> *2. The Learned Advocate appearing for the Petitioner on instructions seeks to withdraw the above Arbitration Petition. In view thereof, the above Arbitration Petition is disposed of as withdrawn."*

i. <u>Proceedings under the IBC</u>

12. After withdrawing the Section 11(6) application from the High Court, the respondent, on 15.10.2018, filed CP(IB) No. 1422/KB/2018 under Section 9 of the IBC before the National Company Law Tribunal, Kolkata ("**NCLT, Kolkata**") seeking initiation of the corporate insolvency resolution process of the appellant. The appellant opposed the application, *inter alia*, on the ground that there were disputes between the parties even prior to the issuance of demand

notice under Section 8 of IBC. The appellant also relied on the notice invoking the arbitration clause in support of its contention.

13. The NCLT, Kolkata vide order dated 12.02.2020, admitted the application of the respondent and appointed an Interim Resolution Professional (**IRP**). On the aspect of existence of disputes between the parties, the following observations were made:

> *"17. As regards the pre-existing dispute, we have gone through all the facts stated by the Corporate Debtor but having regard to the quantum of claim in respect of supplies order, in our considered view, the amount of disputed claim due and payable will be more than Rs. One lakh in any case. Hence, such claims do not help the case of Corporate Debtor in substantial manner. Having said so, we would further refer to the provisional statement attached with the letter of the Corporate Debtor dated June 25, 2014 copy of which has been placed at Page 1779 of Vol. 10 of the paper book to find as to what is the factual position as per the stand of Corporate Debtor on various issues. As per this provisional statement, the total purchase order value has been shown as Rs. 3818.72 lakhs. There have been several deductions including for services provided by Corporate Debtor to the Operational Creditor in the execution of the contract, entry tax, TDS, WCD, payment to parties/ payment to Operational Creditor by the Corporate Debtor / sub-vendors and sub-contractors/vendors of the Operational Creditor. These are normal deductions as per business practice and terms of contract. However, it is noteworthy that Liquidated Damage @ 5% amounting to Rs. 190.94 lakhs, Performance Bank Guarantee to the tune of 673.6 lakhs, work claim of Rs. 352.00 lakhs for boiler house extension P.O. finalisation and additional work 71 lakh have also been considered. The net effect has been worked out by Corporate Debtor as Rs. 500 lakhs receivable from the Operational Creditor. If the boiler house extension and additional work are ignored, the amount recoverable from the Operational Creditor gets reduced to 63.13 lakhs. Further, if the amount retained for Performance Bank Guarantee is taken into consideration, then the amount payable to Operational Creditor*

works out at Rs. 610.23 lakhs (i.e., 673-63.13). As noted earlier, L.D. is applicable @ 5% amounting to Rs. 190.94 lakhs has already been deducted. Further, amount of Rs. 400.55 lakhs in respect of Purchase Orders issued at the risk and cost of the vendor have also been deducted. Thus, all recoveries for non-performance / default has been considered and therefore, amount of Performance Bank Guarantee minus recovery i.e., 610.23 lakhs at least becomes payable by Corporate Debtor to the Operational Creditor. As an adjudicating authority in the proceedings, we are not supposed to do this kind of working, but to find out the genuineness of the claim of pre-existing dispute, and amount of outstanding debt, it was necessary in the facts and circumstances of the case, hence, it has been so analysed on the basis of the provisional statement prepared and filed by the Corporate Debtor itself. At the cost of repetition, we again state that this statement takes into consideration all these disputes raised by the Corporate Debtor, hence, the amount payable by the Corporate Debtor remains in positive which is more than one lakh ultimately that too when we have considered the project as a whole against the claim of Operational Creditor of undisputed dues of supply portion only. We have also gone through the emails which have been taken into consideration while preparing this provisional statement. Hence, on the basis of material on record, it cannot be said that any other dispute remains to be considered. Apart from this, the fact which is crucial to note is that the Corporate Debtor has awarded new work orders to the Operational Creditor subsequently which means that all the disputes relating to this contract had been considered / resolved and this fact has remained undisputed. Further, Form "C"s have been issued as late as up to March 2018. We further make it clear that we have analysed the provisional statement with limited objective of admissibility of this application and this analysis cannot be considered as expression of opinion on the amount of claim in any manner which may be actually due and payable."

(Emphasis supplied)

14. The order of the NCLT, Kolkata was subsequently set aside by the NCLAT, New Delhi *vide* order dated 10.01.2022. The NCLAT, on the aspect of pre-existing disputes between the parties, observed thus:

"18. It is clear from Section 8(2)(a) that 'Existence of a Dispute', (if any, or) record of the pendency of the Suit or Arbitration Proceeding filed before the receipt of such Notice or invoice in relation to such dispute should be brought to the notice of the 'Operational Creditor' within 10 days of receipt of the Demand Notice. In this case, the Demand Notice under Section 8 of the Code claiming a sum of Rs.13.69 Crores was issued on 25.07.2018. On 07.08.2018, the 'Corporate Debtor' responded to the Demand Notice referring to various communications, Minutes of the Meeting and submitted that there was a 'Pre-Existing Dispute'. Though we are conscious of the fact that the 'Corporate Debtor' responded to the Demand Notice belatedly, the fact remains that the Appellant raised the issue of Existence of a Dispute' in their Reply filed before the Adjudicating Authority with all the supporting documents.

19. It is pertinent to note that on 09.07.2016, 'prior to the issuance of the Demand Notice under Section 8 of the Code', the 'Operational Creditor' invoked Arbitration pursuant to the 8 project orders issued by the 'Corporate Debtor', which itself substantiates the 'Existence of a Dispute'. In the 'Notice' invoking Arbitration, the 'Operational Creditor' has stated that there is an outstanding of Rs. 18,12,21,452/- and has further stated that they are ready to settle the disputes through Arbitration. A brief perusal of the documents on record evidence that the 'Operational Creditor' admitted that the contract was on lumpsum turnkey basis and stated in the Arbitration 'Notice' that the 'Corporate Debtor' had raised issues relating to non-adherence of the terms of the contract.

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21. The facts of the present case are being examined in the light of the law laid down by the Hon'ble Supreme Court, though the Learned Counsel for the 'Operational Creditor' has strenuously contended that the issuance of further work orders and the Notice issued by the Operational Creditor invoking Arbitration does not amount to Existence of a Dispute', the nature of communication on record with rival contentions clarify the 'Existence of a Dispute' between the parties prior to issuance of the Demand Notice. It has been time and again held that it is enough that a 'dispute exists' between the parties.

> *22. The communication between the parties as noted in para 10 read together with the Arbitration invoked by the 'Operational Creditor', we are of the considered view that there is an Existence of a Dispute between the parties which is a genuine dispute and not a spurious, patently feeble legal argument or an assertion of fact unsupported by evidence. Therefore, we are of the opinion that the ratio laid down by the Hon'ble Apex Court in the aforenoted* ***'Mobilox Innovations (P) Ltd.' (Supra)*** *and* ***'K. Kishan' (Supra)*** *is squarely applicable to the facts of this case."*
>
> (Emphasis supplied)

15. The respondent challenged the aforesaid order of the NCLAT before this Court by filing the Civil Appeal No. 4583 of 2022. The appeal ultimately came to be dismissed by a two-Judge Bench *vide* judgment dated 15.07.2022 wherein the order of the NCLAT was upheld. The relevant observations made by this Court are reproduced below:

> *"30. This Court finds that there was a pre-existing dispute with regard to the alleged claim of the appellant against HPCL or its subsidiary HBL. The NCLAT rightly allowed the appeal filed on behalf of HBL. It is not for this Court to adjudicate the disputes between the parties and determine whether, in fact, any amount was due from the appellant to the HPCL/HBL or vice-versa. The question is, whether the application of the Operational Creditor under Section 9 of the IBC, should have been admitted by the Adjudicating Authority. The answer to the aforesaid question has to be in the negative. The Adjudicating Authority (NCLT) clearly fell in error in admitting the application.*
>
> *31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor.*
>
> *32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and*

initiation of CIRP by an operational creditor. On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.

33. We find no grounds to interfere with the judgment and order of the NCLAT impugned in this appeal.

34. The appeal is dismissed.

35. Needles to mention that the appellant may avail such other remedies as may be available in accordance with law including arbitration to realise its dues, if any."

ii. <u>Proceedings before the High Court</u>

16. Consequent to the dismissal of the insolvency proceedings, the respondent, on 09.12.2022, filed a fresh petition under the Section 11(6) of the Act, 1996 before the High Court of Bombay seeking appointment of an arbitrator in terms of clause 14 of the tender. The appellant opposed the petition, *inter-alia* on the ground that the same was barred by limitation and that the claim sought to be referred to arbitration was also a deadwood.

17. The High Court *vide* the impugned order allowed the application of the respondent and proceeded to appoint an arbitrator. The High Court took the view that the fresh Section 11 petition filed by the respondent, after withdrawal of the

first, was not time-barred and neither the claim was a deadwood. The relevant observations of the High Court are reproduced below:

> *"8. As regards the first submission of Mr. Paranjape, that once the Section 11 Petition is withdrawn no second Petition shall lie, I do not find any provision in the Act imposing such a restrain.*
>
> *It is not the case, where the appointment of Arbitrator was prayed before the Court and the Application was turned down on merits, holding that no arbitrator deserves to be appointed in absence on an Arbitration Agreement. The Petitioner chose to withdraw the Petition and as it is categorically stated in the Petition that he was under advise to do so and pursuant thereto he approached NCLT under the IBC but did not succeed in the endeavour as the NCLT did not find such proceedings to be maintainable and even the Apex Court upheld the said order by recording that an Operational Creditor can only trigger the CIRP process when there is an undisputed debt and default in payment thereof, but if the debt is disputed, then the Application of the Operational Creditor for initiation of CIRP must be declined.*
>
> *Be that as it may be, while dismissing the Appeal, being conscious of the position that the dues of the Petitioner/Appellant are yet to be realized, liberty was conferred to avail such remedies in accordance with law which shall include the remedy of arbitration.*
>
> *With this clear indication, by the Highest Court of the country, I am not persuaded to accept the submission of Mr. Paranjape that an Application under Section 11 of the Act seeking appointment of an Arbitrator is not maintainable.*
>
> *9. The Petitioner by his invocation notice had triggered the arbitration and accordingly approached the Court seeking appointment of an Arbitrator as the Respondent failed to agree to the appointment of Arbitrator within the period stipulated under Section 11, but instead of prosecuting the said remedy, he chose to adopt the path of initiating the proceedings under the IBC, but unfortunately, remained unsuccessful.*

It is, thus, imperatively clear that the Petitioner was prosecuting the IBC proceedings before the NCLT or NCLAT, which was a completely wrong forum for him for redressal of his grievance, he was ultimately turned away by the Apex Court on 15.07.2022 by declaring that since the debt which he claims is disputed, he cannot initiate the CIRP.

10. Since he was availing a wrong remedy, he was turned down on 15.07.2022, by availing the liberty conferred, he has filed the Arbitration Petition.

Worth it to note that initially when he approached the NCLT, Kolkata, under Section 8 and 9 of the IBC for institution of CIRP process against the Respondent, his claim was entertained and it is only the Respondents, who approached the Appellate Tribunal, the order passed by the NCLT in favour of the Applicant came to be reversed. Therefore, it cannot be said that the Petitioner was sitting idle and not taking any steps for recovery of his dues, but it is a case where he was availing remedy for recovery of his dues before a wrong forum and he is entitled to take benefit of Section 14 of the Limitation Act, 1963.

In fact, the NCLT by its order dated 28.02.2020, admitted the Application under Section 8 and 9 of the IBC and even declared the said moratorium public announcement and in accordance with Section 13 and 14 of the IBC and Moratorium under Section 14 of the IBC was also imposed.

11. Another point raised by Mr. Paranjape in respect of time barred claim being prosecuted by the Petitioner must also meet the same fate.

The learned counsel would place reliance upon the decision in case of Bharat Sanchar Nigam Limited and Another vs. Nortel Networks India Private Limited (2021) 5 SCC 738, where it is held that since there is no provision in the 1996 Act specifying the period of limitation for filing an application under Section 11, recourse must be held to the Limitation Act as per Section 43 of the 1996 Act and since none of the Articles in the schedule to Limitation Act provide time for filing such Application, it would be governed by residual provision in Article 137.

A reading of the said decision would also disclose that, it has been held that limitation is normally mixed question of fact and law and would lie within the domain of Arbitral Tribunal, but claim is hopelessly barred or a deadwood, in that case, the Court exercising the power under Section 11 may not deem it expedient to refer an exfacie time barred and dead claim to the Arbitrator. […]

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13. I do not agree with the learned counsel that the claim of Petitioner is ex facie time-barred as a deadwood, as all the while the claim was kept alive, though it was being agitated before a wrong forum, but ultimately when the Petition was turned down by the Apex Court, he was granted liberty to stake his claim by availing such remedies as may be available to him, in accordance with law, including the remedy of Arbitration. Since the remedy of Arbitration cannot be denied to him, merely on the ground that he had at earlier point of time, before knocking the doors of NCLT withdrew the Petition filed for appointment of Arbitrator, on validly invoking arbitration. Since I do not find that the claim is ex facie time-barred for it was being prosecuted though before a wrong forum, the objection cannot be sustained.

14. In the wake of existence of an arbitration agreement between the parties, the dispute must be referred to an Arbitrator, though I leave it open to the Respondent to agitate the point of limitation before the Arbitrator.

15. In the wake of the above, Mr. Justice Dilip Bhosale (retired Chief Justice of Allahabad High Court) is appointed as Sole Arbitrator to adjudicate the disputes and differences that have arisen between the applicant and the respondent in the two applications.

The Arbitrator shall, within a period of 15 days before entering the arbitration reference forward a statement of disclosure as contemplated u/s.11(8) r/w Section 12 of the Arbitration and Conciliation Act, 1996, to the Prothonotary and Senior Master of this Court to be placed on record. […]"

18. Aggrieved by the aforesaid order appointing an arbitrator for adjudicating the disputes between the parties, the appellant has come up before this Court with the present appeal.

B. SUBMISSIONS ON BEHALF OF THE APPELLANT

19. Mr. Tushar Mehta, the learned Solicitor General of India, appearing for the appellant submitted that the Section 11(6) petition filed by the respondent before the High Court as well as the claims sought to be referred to arbitration were time-barred.

20. He submitted that the cause of action in the present case arose on 04.02.2014, i.e., on the date when the claim of the respondent was denied by the appellant. The respondent invoked arbitration *vide* the notice dated 09.07.2016 and filed a Section 11 petition on 16.02.2018 before unconditionally withdrawing the same. The period of limitation as per Article 137 of the First Schedule to the Limitation Act, 1963 ("**the Limitation Act**") for filing a Section 11 petition is three years. In the present case, the limitation period for filing an application under Section 11(6) of the Act, 1996 came to an end on 07.08.2019. Therefore, the subsequent Section 11 application filed before the High Court on 09.12.2022 was clearly time-barred.

21. He further submitted that in addition to the limitation period for filing the Section 11 application having expired, the underlying claim sought to be referred to arbitration also became time barred on 04.02.2017, that is, after the expiry of three years from the date when the cause of action first arose. To buttress his submissions on the aspect of limitation, he placed reliance on the decisions of this Court in ***Arif Azim Co. Ltd. v. Aptech Ltd.*** reported in **2024 SCC OnLine SC 215** and ***BSNL v. Nortel Networks (India) (P) Ltd.*** reported in **(2021) 5 SCC 738.**

22. By placing reliance on the decision of this Court in ***Sarguja Transport Service v. S.T.A.T*** reported in **(1987) 1 SCC 5**, he argued that although the Code of Civil Procedure, 1908 (for short "**CPC**") may not apply *stricto sensu* to the arbitration proceedings, yet the principle underlying Order 23 Rule 1(3) which imposes a bar on the institution of subsequent proceedings against the same defendant for the same cause of action where liberty to institute fresh proceedings is not granted by the court, can be extended to it in view of the expeditious and time-bound nature of arbitration proceedings.

23. He submitted that the respondent is not entitled to avail the benefit available under Section 14 of the Limitation Act, 1963 (for short **"the Limitation Act"**) as the said provision would not be applicable to the present case. He argued that Section 14 of the Limitation Act provides for exclusion of time spent in prosecuting proceedings in a non-jurisdictional court, where the earlier and later

proceedings relate to the same matter in issue or are for seeking the same relief. However, he submitted, that the insolvency and arbitral proceedings are distinct proceedings and are not for seeking the same relief. The remedy in arbitral proceedings is *in personam* whereas the remedy in insolvency proceedings is *in rem*. He submitted that the High Court failed to appreciate this distinction and erroneously allowed the arbitration petition filed by the respondent by extending to it the benefit under Section 14 of the Limitation Act.

24. He further submitted that the IBC was enacted to consolidate and amend the laws relating to the reorganisation and insolvency resolution of corporate persons in a time-bound manner for maximising the value of assets and balance the interests of all the stakeholders. On the other hand, arbitration proceedings are for the purpose of adjudication of disputes. Therefore, the objective, relief that may be granted and the procedure governing IBC and arbitration proceedings are widely divergent.

25. He argued that the period spent by the respondent pursuing insolvency proceedings instead of arbitration does not entitle them to the benefit of Section 14 of the Limitation Act, more particularly having unconditionally withdrawn the first Section 11 petition. In this regard reliance was placed by him on the decisions of this Court in ***Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari*** reported in **1950 SCR 852** and ***Natesan Agencies (Plantations) v. State*** reported in **(2019) 15 SCC 70**.

26. In the last, he submitted that this Court while dismissing the appeal filed by the respondent against the order of the NCLAT, had only granted conditional liberty to the respondent to pursue arbitration, which would be permitted only if it is available in law. However, in the present case, since the Section 11 application as well as the claims are time-barred, the remedy of pursuing arbitration cannot be available to the respondent in law.

C. SUBMISSIONS ON BEHALF OF THE RESPONDENT

27. Mr. Jay Savla, the learned Senior Counsel appearing on behalf of the respondent submitted that the High Court rightly excluded the time taken by the respondent in pursuing the IBC proceedings, that is, the period between the date of filing of the Section 9 application before the NCLT and the date of the order of this Court concluding the IBC proceedings by disposing of the appeal filed by the respondent against the order of the NCLAT, while calculating the limitation period for the purpose of filing a fresh application under Section 11(6) of the Act, 1996.

28. He submitted that the aforesaid period is liable to be excluded under Section 14 of the Limitation Act as the respondent was pursuing the IBC proceedings diligently and in a *bonafide* manner. He relied on the following decisions of this Court to submit that the phrase "other cause of like nature" used

in Section 14 of the Limitation Act should be given a wide and liberal interpretation:

i. ***Consolidated Engg. Enterprises & Ors. v. Principal Secy. Irrigation Department & Ors.*** reported in **(2008) 7 SCC 169**

ii. ***J. Kumaradasan Nair v. Iric Sohan*** reported in **2009 (12) SCC 175**

iii. ***Union of India v. West Coast Paper Mills Ltd.*** reported in **2004 (3) SCC 458**

iv. ***Maharashtra State Farming Corporation Ltd. v. Belapur Sugar & Allied Industries Ltd.*** reported in **2004 (3) MHLF 414**

29. He submitted that the second application under Section 11(6) of the Act, 1996 was maintainable as the first application was withdrawn without any adjudication on merits and even before any formal notice could be issued by the High Court. By placing reliance on the decision of this Court in ***Sarva Shramik Sanghatana v. State of Maharashtra*** reported in ***2008 1 SCC 494***, he argued that the withdrawal of an application under Section 11(6) of the Act, 1996 is not the same as withdrawal of a suit or a claim, and thus the principles enshrined under Order 23 Rule 1 of the CPC will have no application to the present case.

30. It was submitted that Section 32 of the Act, 1996 provides for termination of arbitration proceedings and is the only provision that relates to termination of arbitration proceedings upon their commencement under Section 21. In the

present case, arbitration was invoked by the respondent *vide* notice dated 09.07.2016, and there has been no termination of such arbitration proceedings as per Section 32 of the Act, 1996. Hence, in the absence of any express bar on filing of more than one 11(6) application under the provisions of the Act, 1996, the second 11(6) application filed by the respondent cannot be said to be not maintainable.

D. ISSUES FOR DETERMINATION

31. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:

i. **WHETHER A FRESH APPLICATION UNDER SECTION 11(6) OF THE ACT, 1996 FILED BY THE RESPONDENT COULD BE SAID TO BE MAINTAINABLE MORE PARTICULARLY WHEN NO LIBERTY TO FILE A FRESH APPLICATION WAS GRANTED BY THE HIGH COURT AT THE TIME OF WITHDRAWAL OF THE FIRST APPLICATION UNDER SECTION 11(6) OF THE ACT, 1996?**

ii. **WHETHER THE FRESH APPLICATION UNDER SECTION 11(6) OF THE ACT, 1996 FILED BY THE RESPONDENT ON 09.12.2022 COULD BE SAID TO BE TIME-BARRED? IF YES, WHETHER THE RESPONDENT IS ENTITLED TO**

THE BENEFIT OF SECTION 14 OF THE LIMITATION ACT? IN OTHER WORDS, WHETHER THE PERIOD SPENT BY THE RESPONDENT IN PURSUING PROCEEDINGS UNDER THE IBC IS LIABLE TO BE EXCLUDED WHILE COMPUTING THE LIMITATION PERIOD FOR FILING THE APPLICATION UNDER SECTION 11(6)?

iii. WHETHER THE DELAY CAUSED BY THE RESPONDENT IN FILING THE FRESH ARBITRATION APPLICATION UNDER SECTION 11(6) OF THE ACT, 1996 CAN BE CONDONED UNDER SECTION 5 OF THE LIMITATION ACT?

E. ANALYSIS

32. Clause 14 of the General Terms and Conditions of the tender document contained the arbitration clause and is reproduced hereinbelow:

> *"14. ARBITRATION*
>
> ***14.1*** *All disputes and differences of whatsoever nature, whether existing or which shall at any time arise between the parties hereto touching or concerning the agreement, meaning, operation or effect thereof or to the rights and liabilities of the parties or arising out of or in relation thereto whether during or after completion of the contract or whether before after determination, foreclosure, termination or breach of the agreement (other than those in respect of which the decision of any person is, by the contract, expressed to be final and binding) shall, after written notice by either party to the agreement to the other of them and to the Appointing Authority hereinafter mentioned, be referred for adjudication to the Sole Arbitrator to be appointed as hereinafter provided.*

14.2 *The appointing authority shall either himself act as the Sole Arbitrator or nominate some officer/retired officer of HBL/Hindustan Petroleum Corporation Limited (referred to as owner or HBL) or any other Government Company, or any retired officer of the Central Government not below the rank of a Director, to act as the Sole Arbitrator to adjudicate the disputes and differences between the parties. The contractor/vendor shall not be entitled to raise any objection to the appointment of such person as the Sole Arbitrator on the ground that the said person is/was an officer and/or shareholder of the owner, another Govt. Company or the Central Government or that he/she has to deal or had dealt with the matter to which the contract relates or that in the course of his/her duties, he/she has/had expressed views on all or any of the matters in dispute or difference.*

14.3 *In the event of the Arbitrator to whom the matter is referred to, does not accept the appointment, or is unable or unwilling to act or resigns or vacates his office for any reasons whatsoever, the Appointing Authority aforesaid, shall nominate another person as aforesaid, to act as the Sole Arbitrator.*

14.4 *Such another person nominated as the Sole Arbitrator shall be entitled to proceed with the arbitration from the stage at which it was left by his predecessor. It is expressly agreed between the parties that no person other than the Appointing Authority or a person nominated by the Appointing Authority as aforesaid, shall act as an Arbitrator. The failure on the part of the Appointing Authority to make an appointment on time shall only give rise to a right to a Contractor to get such an appointment made and not to have any other person appointed as the Sole Arbitrator.*

14.5 *The Award of the Sole Arbitrator shall be final and binding on the parties to the Agreement.*

14.6 *The work under the Contract shall, however, continue during the Arbitration proceedings and no payment due or payable to the concerned party shall be withheld (except to the extent disputed) on account of initiation, commencement or pendency of such proceedings.*

14.7 *The Arbitrator may give a composite or separate Award(s) in respect of each dispute or difference referred to him and may also make interim award(s) if necessary.*

14.8 *The fees of the Arbitrator and expenses of arbitration, if any, shall be borne equally by the parties unless the Sole Arbitrator otherwise directs in his award with reasons. The lumpsum fees of the Arbitrator shall be Rs 60,000/- per case and if the sole Arbitrator completes the arbitration including his award within 5 months of accepting his appointment, he shall be paid Rs.10,000/- additionally as bonus. Reasonable actual expenses for stenographer, etc. will be reimbursed. Fees shall be paid stage wise i.e. 25% on acceptance, 25% on completion of pleadings/ documentation, 25% on completion of arguments and balance on receipt of award by the parties.*

14.9 *Subject to the aforesaid, the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules made thereunder, shall apply to the Arbitration proceedings under this Clause.*

14.10 *The Contract shall be governed by and constructed according to the laws in force in India. The parties hereby submit to the exclusive jurisdiction of the Courts situated at Mumbai for all purposes. The Arbitration shall be held at Mumbai and conducted in English language.*

14.11 *The Appointing Authority is the Functional Director of Hindustan Petroleum Corporation Limited."*

33. Neither the existence nor the validity of the arbitration agreement has been disputed by the appellant. However, the appellant has challenged the allowing of the application for appointment of arbitrator by the High Court on two grounds – (i) the application before the High Court was not maintainable as it was filed for the second time having been withdrawn previously without seeking any liberty to file afresh; and (ii) the application is time-barred for being beyond the time period

of three years prescribed under Article 137 of the Limitation Act. We shall address both these contentions in seriatim as they are pivotal to the fate of the present appeal.

i. <u>Issue No. 1</u>

34. Section 11 of the Act, 1996 lays down the procedure for appointment of arbitrators through the intervention of the High Court or the Supreme Court, as the case may be. A reading of the said provision indicates that there is nothing therein which prevents a party from filing more than one application seeking the appointment of arbitrator for adjudicating disputes arising from the same contract.

35. However, the appellant has contended that in lieu of the principles contained in Order 23 Rule 1 of the CPC, the respondent could not have filed a subsequent application under Section 11(6) for adjudication of the same disputes, having previously withdrawn unconditionally an application filed for the same purpose. To address the contention of the appellant, we need to determine whether the principles contained in Order 23 Rule 1 of the CPC will apply to an application under Section 11(6) of the Act, 1996.

a. Scope and applicability of Order 23 Rule 1 of the CPC to proceedings other than suits

36. Prior to its amendment by the Code of Civil Procedure (Amendment) Act, 1976, Order 23 Rule 1 of the CPC provided for two kinds of withdrawal of a suit,

namely absolute withdrawal and withdrawal with the permission of the court to institute a fresh suit on the same cause of action. The first category of withdrawal was governed by sub-rule (1) thereof, as it stood then, which provided that at any time after the institution of a suit, the plaintiff may, as against all or any of the defendants withdraw his suit or abandon a part of his claim. The second category was governed by sub-rule (2) thereof which provided that where the court was satisfied (*a*) that a suit must fail by reason of some formal defect, or (*b*) that there were sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thought fit, grant the plaintiff permission to withdraw from such suit or abandon a part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. Sub-rule (3) of the former Order 23 Rule 1 of the CPC provided that where the plaintiff withdrew from a suit or abandoned a part of a claim without the permission referred to in sub-rule (2), he would be liable to such costs as the court may award and would also be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The legislature felt that the use of the word "withdrawal" in relation to both the aforesaid categories had led to confusion and thus amended the rule to avoid such confusion.

37. Order 23 Rule 1 of the CPC as it stands now post the amendment is reproduced hereinbelow:

*"**Withdrawal of suit or abandonment of part of claim.—***

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of suit or part of a claim,

It may, on such terms as it thinks fit grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a

claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiff"

38. The key difference between Order 23 Rule 1 as it stood prior to the amendment and as it stands now is that while in sub-rule (1) of the former Order 23 Rule 1, the expression "withdraw his suit" had been used, whereas in sub-rule (1) of the amended Order 23 Rule 1, the expression "abandon his suit" has been used. The new sub-rule (1) is applicable to a case where the court declines to accord permission to withdraw from a suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. In the new sub-rule (3) which corresponds to the former sub-rule (2), practically no change is made. Under sub-rule (3), the court is empowered to grant, subject to the conditions mentioned therein, permission to withdraw from a suit with liberty to institute a fresh suit in respect of the subject-matter of such suit. Sub-rule (4) of the amended Order 23 Rule 1 provides that where the plaintiff abandons any suit or part of claim under sub-rule (1) or withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he would be liable for such costs as the court may award and would also be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

39. Order 23 Rule 1, as it now stands post the amendment, makes a distinction between "abandonment" of a suit and "withdrawal" from a suit with permission

to file a fresh suit and provides for – *first,* abandonment of suit or a part of claim; and *secondly,* withdrawal from suit or part of claim with the leave of the court. Abandonment of suit or a part of claim against all or any of the defendants is an absolute and unqualified right of a plaintiff and the court has no power to preclude the plaintiff from abandoning the suit or direct him to proceed with it. Sub-rule (1) of Order 23 Rule 1 embodies this principle. However, if the plaintiff abandons the suit or part of claim, then he is precluded from instituting a fresh suit in respect of such subject-matter or such part of claim. Upon abandoning the suit or part of claim, the plaintiff also becomes liable to pay such costs as may be imposed by the Court. This is specified under sub-rule (4) of Order 23 Rule 1.

40. However, if the plaintiff desires to withdraw from a suit or part of a claim with liberty to file a fresh suit on the same subject matter or part of the claim, then he must obtain the permission of the court under sub-rule (3) of Order 23 Rule 1. The failure to obtain such permission would preclude the plaintiff from instituting any fresh suit in respect of such subject-matter or such part of the claim, and also to any costs that may be imposed by the court.

41. The court granting liberty under sub-rule (3) of Order 23 Rule 1 may do so only upon being satisfied of one of the following two conditions– *first*, that the suit suffers from some formal defect and would fail by reason of such defect; and *second*, that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the same subject-matter or part of the claim. The court may grant

liberty on such terms as it deems fit. It is also apparent from the text of the provision that the liberty under sub-rule (3) can only be granted by the court trying the earlier suit and not by the court before which the subsequent suit is instituted.

42. On meaning of the phrase 'subject-matter' appearing in Order 23 Rule 1, this Court in ***Vallabh Das v. Madan Lal (Dr)*** reported in **(1970) 1 SCC 761** held thus:

> *"5. Rule 1 of the Order 23, Code of Civil Procedure empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The term imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subject-matter that was in litigation in the previous suit. The expression "subject-matter" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said, that the subject-matter of the second suit is the same as that in the previous suit. Now coming to the case before us in the first suit Dr Madan Lal was seeking to enforce his right to partition and separate possession. In the present suit he seeks to get possession of the suit properties from a trespasser on the basis of his title. In the first suit the cause of action was the division of status between Dr Madan Lal and his adoptive father and the relief claimed was the conversion of joint possession into separate possession. In the present suit the plaintiff is seeking possession of the suit properties from a trespasser. In the first case his cause of action arose on the day he got separated from his family. In the present suit the cause of action, namely, the series of transactions which formed the basis of his title to the suit properties, arose on the death of his adoptive*

> *father and mother. It is true that both in the previous suit as well as in the present suit the factum and validity of adoption of Dr Madan Lal came up for decision. But that adoption was not the cause of action in the first nor is it the cause of action in the present suit. It was merely an antecedent event which conferred certain rights on him. Mere identity of some of the issues in the two suits do not bring about an identity of the subject-matter in the two suits. As observed in Rukhma Bai v. Mahadeo Narayan, [ILR 42 Bom 155] the expression "subject-matter" in Order 23 of the Rule 1, Code of Civil Procedure means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words "subject-matter" means the bundle of facts which have to be proved in order to entile the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis, C.J., in Singa Reddi v. Subba Reddi [ILR 39 Mad 987] that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit."*
>
> (Emphasis supplied)

43. Discussing on the meaning of the phrases 'formal defect' and 'sufficient grounds', a two-Judge Bench of this Court in ***V. Rajendran v. Annasamy Pandian*** reported in **(2017) 5 SCC 63** observed thus:

> *"9. […] As per Order 23 Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order 23 Rules 1(3)(a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order 23 Rule 1(3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b), that is, existence of a "formal defect" or "sufficient grounds". The principle under Order 23 Rule 1(3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action.*

10. In K.S. Bhoopathy v. Kokila [(2000) 5 SCC 458], it has been held that it is the duty of the Court to be satisfied about the existence of "formal defect" or "sufficient grounds" before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the "formal defect" or "sufficient grounds", such right cannot be considered to be so absolute as to permit or encourage abuse of process of court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant. When an application is filed under Order 23 Rule 1(3) CPC, the Court must be satisfied about the "formal defect" or "sufficient grounds". "Formal defect" is a defect of form prescribed by the rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, misjoinder of parties, failure to disclose a cause of action, etc. "Formal defect" must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.

11. In terms of Order 23 Rule 1(3)(b) where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the words "sufficient grounds", there are two views : one view is that these grounds in clause (b) must be "ejusdem generis" with those in clause (a), that is, it must be of the same nature as the ground in clause (a), that is, formal defect or at least analogous to them; and the other view was that the words "other sufficient grounds" in clause (b) should be read independent of the words a "formal defect" and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). Since in the present case, we are only concerned with "formal defect" envisaged under clause (a) of Rule 1 sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b), that is, "sufficient grounds"."

(Emphasis supplied)

44. The main purpose of permitting the withdrawal of a suit and its re-filing is to ensure that justice is not thwarted due to technicalities. Where permission under Order 23 Rule 1 is granted, the principle of estoppel does not operate and the principle of *res judicate* would also not apply. However, Order 23 Rule 1 is not intended to enable the plaintiff to get a chance to commence litigation afresh in order to avoid the results of his previous suit, or to engage in multiple proceedings with the motive of bench-hunting.

45. Order 23 Rule 2 stipulates that any fresh suit instituted on permission granted under Order 23 Rule 1 shall be governed by the law of limitation in the same manner as if the first suit had not been instituted. The object underlying this Rule is to prevent a party from misusing the liberty of filing a fresh suit for evading the limitation period governing the said suit. The said rule is reproduced hereinbelow:

> *"2. Limitation law not affected by first suit.—In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted."*

46. Undoubtedly, an application under Section 11(6) of the Act, 1996 is not a suit and hence will not be governed *stricto-sensu* by Order 23 Rule 1 of the CPC. However, in a number of decisions, this Court has extended the principle underlying Order 23 Rule 1 to proceedings other than suits on the ground of public policy underlying the said rule. The appellant has submitted that in view

of the aforesaid decisions, there is no reason why the principles of Order 23 Rule 1 should not be extended to an application for appointment of arbitrator under Section 11(6) of the Act, 1996.

47. A two-Judge Bench of this Court in ***Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and Others*** reported in **(1987) 1 SCC 5** while elaborating upon the principle underlying Order 23 Rule 1 of CPC, extended them to writ petitions under Articles 226 and 227. Relevant observations from the said decision are as follows:

> *"7. […] The principle underlying Rule 1 of Order XXIII of the Code is that when a plaintiff once institutes a suit in a court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the court to file fresh suit. Invito beneficium non datur — the law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will loose it. In order to prevent a litigant from abusing the process of the court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of Rule 1 of Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata contained in Section 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a court. In the case of abandonment or withdrawal of a suit without*

the permission of the court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in sub-rule (4) of Rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the court.

8. The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying Rule 1 of Order XXIII of the Code is adopted in respect of writ petitions filed under Articles 226/227 of the Constitution of India also. It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. A court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is plain that when once a writ petition filed in a High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court."

(Emphasis supplied)

48. The principles enunciated in ***Sarguja Transport*** *(supra)* were extended to Special Leave Petitions filed before this Court by a two-Judge Bench of this Court in ***Upadhyay & Co. v. State of U.P. and Others*** reported in **(1999) 1 SCC 81**. It was observed by the bench thus:

11. […] It is not a permissible practice to challenge the same order over again after withdrawing the special leave petition without obtaining permission of the court for withdrawing it with liberty to move for special leave again subsequently.

xxx xxx xxx

> *13. The aforesaid ban for filing a fresh suit is based on public policy. This Court has made the said rule of public policy applicable to jurisdiction under Article 226 of the Constitution (Sarguja Transport Service v. STAT [(1987) 1 SCC 5). The reasoning for adopting it in writ jurisdiction is that very often it happens, when the petitioner or his counsel finds that the court is not likely to pass an order admitting the writ petition after it is heard for some time, that a request is made by the petitioner or his counsel to permit him to withdraw it without seeking permission to institute a fresh writ petition. A court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit withdrawal of the petition. When once a writ petition filed in a High Court is withdrawn by the party concerned, he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. If so, he cannot file a fresh petition for the same cause once again. […]*
>
> ***xxx xxx xxx***
>
> *15. We have no doubt that the above rule of public policy, for the very same reasoning, should apply to special leave petitions filed under Article 136 of the Constitution also. […]"*
>
> (Emphasis supplied)

49. The respondent has relied upon the decision of this Court in ***Sarva Shramik Sanghatana*** *(supra)* to contend that the principles underlying Order 23 Rule 1 of the CPC cannot be applied as a matter of fact in every legal proceeding. In the said case, an application seeking permission for closure under Section 25-O(1) of the Industrial Disputes Act, 1947 had been filed by the respondent Company therein. However, before the application could be decided, the Company received a letter from the Deputy Commissioner of Labour, Mumbai inviting it to a meeting for exploring the possibility of an amicable settlement. The Company

withdrew its application in lieu of the invite and Section 25-O(3) which provides that an application made under Section 25-O(1) will be deemed to have been allowed if it is not decided within a period of 60 days from the date of filing. However, after the attempts for an amicable settlement failed, the Company moved a fresh application under Section 25-O(1). The application was opposed by the appellant therein, *inter-alia*, on the ground that since the first application was withdrawn by the Company without obtaining liberty to file a fresh application, the same would not be maintainable as per the principles underlying Order 23 Rule 1 of the CPC. In this regard, reliance was placed by the appellant therein upon the decision of this Court in ***Sarguja Transport*** *(supra)*. However, this Court distinguished the decision in ***Sarguja Transport*** *(supra)* on the ground that the objective in the said decision was to prevent such situations where the petitioner withdraws a case to file it before a more convenient Bench or for some other *mala fide* purpose. The relevant observations from the said decision are reproduced hereinbelow:

> *"19. In the present case, we are satisfied that the application for withdrawal of the first petition under Section 25-O(1) was made bona fide because the respondent Company had received a letter from the Deputy Labour Commissioner on 5-4-2007 calling for a meeting of the parties so that an effort could be made for an amicable settlement. In fact, the respondent Company could have waited for the expiry of 60 days from the date of filing of its application under Section 25-O(1), on the expiry of which the application would have deemed to have been allowed under Section 25-O(3). The fact that it did not do so, and instead applied for withdrawal of its application under Section 25-O(1), shows its bona fide. The respondent Company was trying for an*

> *amicable settlement, and this was clearly bona fide, and it was not a case of Bench-hunting when it found that an adverse order was likely to be passed against it. Hence, Sarguja Transport case [(1987) 1 SCC 5 : 1987 SCC (Cri) 19 : AIR 1987 SC 88] is clearly distinguishable, and will only apply where the first petition was withdrawn in order to do Bench-hunting or for some other mala fide purpose.*
>
> *20. We agree with the learned counsel for the appellant that although the Code of Civil Procedure does not strictly apply to proceedings under Section 25-O(1) of the Industrial Disputes Act, or other judicial or quasi-judicial proceedings under any other Act, some of the general principles in CPC may be applicable. For instance, even if Section 11 CPC does not in terms strictly apply because both the proceedings may not be suits, the general principle of res judicata may apply vide Pondicherry Khadi & Village Industries Board v. P. Kulothangan [(2004) 1 SCC 68 : 2004 SCC (L&S) 32] . However, this does not mean that all provisions in CPC will strictly apply to proceedings which are not suits.*
>
> *22. No doubt, Order 23 Rule 1(4) CPC states that where the plaintiff withdraws a suit without permission of the court, he is precluded from instituting any fresh suit in respect of the same subject-matter. However, in our opinion, this provision will apply only to suits. An application under Section 25-O(1) is not a suit, and hence, the said provision will not apply to such an application."*
>
> (Emphasis supplied)

50. While we agree with the decision in the aforesaid case to the extent that it declined to apply the principles of Order 23 Rule 1 and refused to dismiss a *bonafide* subsequent application filed after the earlier one was withdrawn in good faith to attempt conciliation, we are of the view that it cannot be declared as a general rule that merely because a legal proceeding is not a 'suit', it would be completely exempted from the application of principles underlying Order 23 Rule

1. These principles, being in the nature of public policy, bring efficiency and certainty to the administration of justice by any court and should be invoked and enforced unless they are expressly prohibited by statute or appear to counter serve the interest of justice, rather than advancing it.

51. One important policy consideration which permeates the scheme of Order 23 Rule 1 is the legislative intent that legal proceedings in respect of a subject-matter are not stretched for unduly long periods by allowing a party to reagitate the same issue over and over again, which also leads to uncertainty for the responding parties. Arbitration as a dispute resolution method, too, seeks to curtail the time spent by disputing parties in pursuing legal proceedings. This is evident from the various provisions of the Act, 1996 which provide a timeline for compliance with various procedural requirements under the said Act. An application for appointment of arbitrator under Section 11(6) of the Act, 1996 is required to be filed when there is failure on the part of the parties or their nominated arbitrators to commence the arbitration proceedings as per the agreed upon procedure. This Court, being conscious of the temporally sensitive nature of proceedings under Section 11(6), has issued various directions from time to time to ensure that applications for appointment of arbitrators are decided in an expeditious manner. Keeping in view the approach of this Court and the nature of applications under Section 11(6) of the Act, 1996, we find no reason to not extend the principles of Order 23 Rule 1 to such proceedings, when the very same

principles have been extended to writ proceedings before High Courts under Articles 226 & 227 and SLPs before this Court under Article 136.

52. One important aspect that needs to be kept in mind while applying the principles of Order 23 Rule 1 to applications under Section 11(6) of the Act, 1996 is that it will act as a bar to only those applications which are filed subsequent to the withdrawal of a previous Section 11(6) application filed on the basis of the same cause of action. The extension of the aforesaid principle cannot be construed to mean that it bars invocation of the same arbitration clause on more than one occasion. It is possible that certain claims or disputes may arise between the parties after a tribunal has already been appointed in furtherance of an application under Section 11(6). In such a scenario, a party cannot be precluded from invoking the arbitration clause only on the ground that it had previously invoked the same arbitration clause. If the cause of action for invoking subsequent arbitration has arisen after the invocation of the first arbitration, then the application for appointment of arbitrator cannot be rejected on the ground of multiplicity alone.

53. The principles of Order 23 Rule 1 are extended to proceedings other than suits with a view to bring in certainty, expediency and efficiency in legal proceedings. However, at the same time, it must also be kept in mind while extending the principles to legal proceedings other than suits that the principles are not applied in a rigid or hyper-technical manner. While the nature of the

proceedings, that is, whether such proceeding is a suit or otherwise, should not be a consideration in deciding whether the principles of Order 23 Rule 1 should be extended to such proceedings or not, the *bonafide* conduct of a party in the unique facts of a case must be considered before precluding such a party from moving ahead with the proceedings.

54. In the case of ***Vanna Claire Kaura v. Gauri Anil Indulkar & Ors.*** reported in **(2009) 7 SCC 541** the applicant filed a Section 11(6) application before the High Court of Bombay. A dispute was raised that the application was not maintainable as the agreements were in the nature of international commercial arbitration agreement under the Act, 1996 and the application for appointment would only lie before the Chief Justice of India. Accordingly, the applicant withdrew the Section 11 application and filed a Section 11(6) application before this Court. The subsequent application was opposed *inter alia* on the ground that arbitration was invoked by notice dated 14.03.2006 and was thereafter abandoned with the withdrawal of the petition from the High Court. Hence, the second application without the leave of the High Court would not be maintainable. However, this Court, negatived the objections against the application and proceeded to appoint the arbitrator.

55. Coming to the facts of the case at hand, both the applications under Section 11(6) of the Act, 1996 were filed seeking adjudication of the dispute which arose on 02.02.2014 upon refusal of the appellant to pay the dues of the respondent.

The first application under Section 11(6) was filed on 16.02.2018 and was subsequently withdrawn unconditionally on 01.10.2018. After a gap of more than four years, the respondent filed a subsequent application under Section 11(6) before the High Court on 09.12.2022 which came to be allowed by the impugned order.

56. The High Court was of the view that the respondent chose to withdraw the petition under legal advice and thereafter approached NCLT under the IBC but did not succeed in its endeavor. Further, the High Court observed that while dismissing the appeal, this Court vide Order dated 15.07.2022 granted liberty to the respondent to avail such remedies in accordance with law, which shall include the remedy of arbitration. Accepting the explanation given by the respondent as *bonafide* and relying on the order dated 15.07.2022 of this Court, the High Court held the fresh petition under Section 11(6) to be maintainable.

57. A perusal of paragraph 18 of the order dated 10.01.2022 passed by the NCLAT setting aside the order of the NCLT reveals that after invoking the arbitration clause by the notice dated 09.07.2016, the respondent issued a statutory demand notice to the appellant under Section 8 of the IBC on 30.08.2017. When no reply was sent by the appellant to the said demand notice, the respondent, rather than filing an application under Section 9 of the IBC, filed an application for the appointment of arbitrator on 16.02.2018. During the pendency of the application under Section 11(6) of the Act, 1996 before the High

Court, the respondent issued a second statutory demand notice under Section 8 of the IBC to the appellant on 25.07.2018. The appellant filed a reply to the said demand notice on 07.08.2018, wherein, *inter alia*, it took the defence that there was a pre-existing dispute between the parties, which was evidenced by the existence of the pending arbitration proceedings. Subsequently, the respondent withdrew the arbitration application on 01.10.2018 and thereafter proceeded to file an application before the NCLT, Kolkata on 05.10.2018.

58. The chronology of events as discussed above clearly indicates that the respondent did not withdraw the first arbitration application because of some defect which would have led to its dismissal. It is also clear from the order dated 01.10.2018 of the High Court permitting the respondent to withdraw the application that neither any liberty was sought by the respondent nor the court had granted any liberty to file a fresh arbitration application. It appears to us that the only reason the respondent withdrew the arbitration application was to get his application under Section 9 of the IBC any how admitted by the NCLT. It is also evident that the existence of a pre-existing dispute was brought to the notice of the respondent by the appellant much prior to the withdrawal of the arbitration application in reply to the demand notice issued by the respondent under Section 8 of the IBC. Thus, it can be said without any doubt that the respondent took a calculated risk of abandoning the arbitration proceedings to maximise the chances of succeeding in the IBC proceedings.

59. The respondent was within its right to abandon the arbitration proceedings in favour of IBC proceedings. However, having done so, it would no longer be open to it to file a fresh application for appointment of arbitrator without having obtained the liberty of the court to file a fresh application at the time of the withdrawal. We say so particularly because the withdrawal of the first arbitration application was not with a view to cure some formal defect or any other sufficient ground. The application was withdrawn with the hope that the application filed by the respondent under Section 9 of the IBC may succeed, as the pendency of the arbitration application would have proven to be an indicator of existence of a pre-existing dispute between the parties, and thus fatal to the IBC proceedings.

60. As we are of the view that the principles underlying Order 23 Rule 1 can be extended to applications for appointment of arbitrator, the only recourse to the respondent to defend the second application as maintainable despite it having been withdrawn earlier without liberty was to show *bona fides* on its part. From the conduct of the respondent, it is evident that it thought fit to initiate insolvency proceedings perhaps thinking that the issues existing between the parties may not get resolved through arbitration. Further, no document has been placed on record to substantiate the so called incorrect legal advice the respondent claims to have received. Therefore, the failure on the part of the respondent to withdraw the first Section 11 application without seeking any liberty cannot be condoned in the facts of the present case.

61. In light of the aforesaid discussion, we are of the view that in the absence of any liberty sought by the respondents from the High Court at the time of withdrawal of the first arbitration application, the fresh Section 11 petition arising out of the same cause of action cannot be said to be maintainable.

62. Another way of looking at the abandonment of Section 11(6) application is by understanding the importance of such an application in view of Sections 21 and 43(2) of the Act, 1996 respectively. By virtue of Section 21, the arbitral proceedings commence on the date on which the respondent receives the petitioner's notice invoking arbitration. The said provision is reproduced below:

> *"**21. Commencement of arbitral proceedings.—**Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."*

63. Section 43(2) of the Act, 1996 provides that for the purposes of limitation, an arbitration shall be 'deemed' to have commenced on the date referred to in Section 21. Section 43(2) is reproduced below:

> *"(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred to in section 21."*

64. As is clear from the word "deemed" used in Section 43(2), the commencement of arbitration proceedings, as contemplated in Section 21, is in the nature of a legal or deeming fiction. It is a notional commencement and not a

factual or actual commencement of arbitration. However, the factual or actual arbitration proceeding commences only once an arbitrator is appointed either by the High Court under Section 11 or by consent of parties.

65. Hence, a petition under Section 11(6) of the Act, 1996 is not a proceeding merely seeking the appointment of an arbitrator. It is in reality a proceeding for appointing an arbitrator and for commencing the actual or real arbitration proceedings.

66. If that is so, the unconditional withdrawal of a Section 11(6) petition amounts to abandoning not only the formal prayer for appointing an arbitrator but also the substantive prayer for commencing the actual arbitration proceedings. It amounts to abandoning the arbitration itself. It results in abandonment of the notional 'arbitration proceeding' that had commenced by virtue of Section 21 and thus amounts to an abandonment of a significant nature. Therefore, it is all the more important to import and apply the principles underlying Order 23 Rule 1 of the CPC to abandonment of applications under Section 11(6).

ii. <u>Issue No. 2</u>

67. It was submitted by the appellant that the fresh application filed by the respondent under Section 11(6) of the Act, 1996 before the High Court was

beyond the period of limitation prescribed for filing of such an application and was not maintainable. The appellant also contended that the substantive claims raised by the respondent are also *ex-facie* time-barred and thus the High Court ought to have dismissed the fresh arbitration application filed by the respondent on this ground as well.

68. The basic premise behind the statutes providing for a limitation period is encapsulated by the maxim *"Vigilantibus non dormientibus jura subveniunt"* which means that the law assists those who are vigilant and not those who sleep over their rights. The object behind having a prescribed limitation period is to ensure that there is certainty and finality to the litigation and assurance to the opposite party that it will not be subject to an indefinite period of liability. Another object achieved by a fixed limitation period is that only those claims which are initiated before the deterioration of evidence takes place are allowed to be litigated. The law of limitation does not act to extinguish the right but only bars the remedy.

69. The limitation period governing applications under Section 11(6) of the Act, 1996 has recently been explained by a three-Judge Bench of this Court, to which My Lord, the Chief Justice of India and myself were a part, in ***M/s Arif Azim Co. Ltd. v. M/s Aptech Ltd.*** reported in **2024 INSC 155**. The said decision has referred to Article 137 of the Limitation Act, 1963 to hold that the limitation

period for making an application under Section 11(6) of the Act, 1996 is three years from the date when the right to apply accrues.

70. On the aspect of when the limitation period for filing an application seeking appointment of arbitrator would commence, the aforesaid decision has held that it is only after a valid notice invoking arbitration has been issued by one of the parties to the other party and there has been either a failure or refusal on part of the other party to make an appointment as per the appointment procedure agreed upon between the parties, that the clock would start ticking for the purpose of the limitation of three years.

71. In the case at hand, the respondent invoked the arbitration clause vide a notice dated 09.07.2016. Since there was no response to the said notice by the appellant, the respondent filed an application for appointment of arbitrator before the High Court under Section 11(6) of the Act, 1996 on 16.02.2018. Subsequently, it abandoned the application to pursue proceedings under the IBC.

72. On 15.10.2018, the respondent filed an application under Section 9 of the IBC for initiation of Corporate Insolvency Resolution Process against the appellant. The IBC proceedings initiated by the respondent under Section 9 were ultimately dismissed by this Court vide order dated 15.07.2022 by way of which the order of the NCLAT was upheld and the order of the NCLT was set-aside. This Court took the view that the NCLT had committed a grave error of law by admitting the application of the respondent even though there was a pre-existing

dispute between the parties. Placing reliance on the decision of this Court in ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited*** reported in **(2018) 1 SCC 353**, this Court held that upon the occurrence of a pre-existing dispute regarding the alleged claims of the respondent against the appellant, the Section 9 application of the respondent as an 'Operational Creditor' could not have been entertained.

73. Upon rejection of the Section 9 application by this Court, the respondent filed a fresh application under Section 11(6) on 09.12.2022 before the High Court. The High Court allowed the application and proceeded to appoint the arbitrator vide the impugned order.

74. An overview of the facts as discussed above indicates that the first application under Section 11(6) filed on 16.02.2018 was well within the prescribed limitation period of three years for filing such applications. However, even assuming that the second application under Section 11(6) is not barred by the principles underlying Order 23 Rule 1, the same was required to be filed within a period of three years from the expiry of one month from the date of receipt of the notice invoking arbitration by the appellant. This period of three years came to an end in August, 2019. The second application under Section 11(6) came to be filed by the respondent much later on 12.12.2022 and is clearly time-barred.

75. However, to save the second Section 11(6) application from being dismissed on account of being time-barred, the respondent has contended that it is entitled to invoke the benefit under Section 14 of the Limitation Act, 1963 to seek exclusion of the period spent by it in pursuing the proceedings under Section 9 of the IBC. The respondent has further submitted that even otherwise, this Court in exercise of its discretion available under Section 5 of the Limitation Act may condone the delay in filing the second 11(6) application before the High Court, as it was pursuing the insolvency proceedings in a *bona fide* manner and would be left remediless if the appointment of arbitrator by the High Court is set aside by this Court.

76. Section 14 of the Limitation Act provides for exclusion of time of proceeding bona fide in court without jurisdiction and is reproduced below: -

> *"**14. Exclusion of time of proceeding bona fide in court without jurisdiction.—***
>
> *(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*
>
> *(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first*

instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.
Explanation.—For the purposes of this section,—
(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;
(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;
(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

77. There is a body of decisions of this Court taking the view that by virtue of Section 43 of the Act, 1996, the Limitation Act is applicable to applications for appointment of arbitrator filed under Section 11(6) of the said Act. It thus follows that the benefit under Section 14 of the Limitation Act can be availed by an applicant subject to the fulfilment of the conditions specified therein. However, a bare perusal of the aforesaid provision indicates that sub-sections (1) and (2) respectively of Section 14 are materially different from each other. Thus, it is important to ascertain as to which provision would be applicable to an application for appointment of arbitrator under Section 11(6) of the Act, 1996.

78. Under Section 14(1), in computing the period of limitation for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. Thus, the following ingredients need to be fulfilled for the applicability of Section 14(1):

i. The subsequent proceeding must be a suit;

ii. Both the earlier and the subsequent proceeding must be civil proceedings;

iii. Both the earlier and subsequent proceedings must be between the same parties;

iv. The earlier and subsequent proceeding must have the same matter in issue;

v. The earlier proceeding must have failed owing to a defect of jurisdiction of the earlier court or any other cause of a like nature;

vi. The earlier proceedings must have been prosecuted in good faith and with due-diligence; and

vii. Both the earlier and the subsequent proceedings must be before a court.

79. A three-Judge Bench of this Court in ***Consolidated Engg. Enterprises v. Irrigation Deptt.*** reported in **(2008) 7 SCC 169**, dealt with the question as to whether Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the Act, 1996 for setting aside the award made by the arbitrator. The Court enumerated the conditions for the applicability of Section 14(1) as follows:

> *"21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:*
> *(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;*
> *(2) The prior proceeding had been prosecuted with due diligence and in good faith;*
> *(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;*
> *(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;*
> *(5) Both the proceedings are in a court."*

80. Section 2 of the Limitation Act provides certain definitions. Some of them which are pertinent to the present discussion are reproduced hereinbelow:

> *"In this Act, unless the context otherwise requires,--*
> *(a) "applicant" includes—*
> *(i) a petitioner;*
> *(ii) any person from or through whom an applicant derives his right to apply;*
> *(iii) any person whose estate is represented by the applicant as executor, administrator or other representative;*

xxx xxx xxx

(b) "application" includes a petition;

xxx xxx xxx

(h) "good faith" - nothing shall be deemed to be done in good faith which is not done with due care and attention;

xxx xxx xxx

(j) "period of limitation" means the period of limitation prescribed for any suit, appeal or application by the Schedule, and "prescribed period" means the period of limitation computed in accordance with the provisions of this Act;

xxx xxx xxx

(l) "suit" does not include an appeal or an application;

81. Section 2(l) as reproduced above clearly provides for a distinction between a 'suit' and an 'application' under the Limitation Act. Thus, the clear intention of the legislature was that they are not to be considered as the same for the purpose of Limitation Act.

82. In Section 11(6) of the Act, 1996, the words 'the appointment shall be made, on an application of the party' are used, thereby signifying that a Section 11 petition is in the nature of an 'application' and cannot be considered to be a 'suit' for the purposes of the Limitation Act. Even otherwise, 'application' under

the Limitation Act includes a 'petition', thereby leaving no room for any doubt that a Section 11(6) petition is to be treated as an application.

83. As a petition under Section 11(6) of the Act, 1996 is not a suit, hence it would not be governed by sub-section (1) of Section 14 of the Limitation Act. Instead, it would be governed by sub-section (2) of Section 14 of the Limitation Act. Some of the conditions required to be fulfilled for seeking the benefit of exclusion under Section 14(2) are materially different from those required under Section 14(1) and are as follows:

i. Both the earlier and the subsequent proceeding must be civil proceedings;

ii. Both the earlier and subsequent proceedings must be between the same parties;

iii. The earlier and subsequent proceeding must be for the same relief;

iv. The earlier proceeding must have failed owing to a defect of jurisdiction of the earlier court or any other cause of a like nature;

v. The earlier proceedings must have been prosecuted in good faith and with due-diligence; and

vi. Both the earlier and the subsequent proceedings are before a court.

84. With every other ingredient remaining the same, the key difference between sub-sections (1) and (2) of Section 14 respectively is two-fold:

i. First, the benefit of Section 14(1) can be availed of where the subsequent proceeding is a suit, whereas the benefit of Section 14(2) can be availed of where the subsequent proceeding is an application.

ii. Secondly, Section 14(1) applies if both the earlier and the subsequent proceedings have the same matter in issue, whereas Section 14(2) applies when both the earlier and the subsequent proceedings are filed for seeking the same relief.

85. Clearly, the scope of the expression "same matter in issue" appearing in Section 14(1) is much wider than that of the expression "for the same relief" appearing in Section 14(2) of the Limitation Act. This is evident on account of the difference between the nature of a suit vis-à-vis an application. In a suit, a party generally seeks relief in the nature of the cause of action which is established on the basis of oral and documentary evidence and arguments. Whereas, an application is made under a particular provision of a statute and if it appears to the court that such provision of the statute is not applicable, then the application as a whole cannot be sustained. Thus, an application is made for a specific purpose as provided by the statutory provision under which it is made unlike a suit which is instituted based on a cause of action and is for seeking remedies falling in a wider conspectus.

86. Sub-section (3) of Section 14 stipulates that where liberty to withdraw any suit is granted under sub-rule (3) of Order 23 Rule 1 on the ground of defect of jurisdiction or other cause of a like nature, then, the exclusion of limitation period as provided by Section 14(1) will be available to the plaintiff to institute any fresh suit on the same subject-matter.

87. The respondent has contended that the expression "other cause of a like nature" used in Section 14 of the Limitation Act should be given a wide interpretation as Section 14 is meant to advance the cause of the justice and not thwart it by procedural impediments. In view of liberal interpretation of Section 14, the respondent submitted that the case at hand is one fit for the grant of relief under Section 14 of the Limitation Act.

88. This Court in ***M.P. Housing Board v. Mohanlal & Co.*** reported in **(2016) 14 SCC 199** observed thus on the liberal interpretation of Section 14 of the Limitation Act:

> *"16. From the aforesaid passage, it is clear as noonday that there has to be a liberal interpretation to advance the cause of justice. However, it has also been laid down that it would be applicable in cases of mistaken remedy or selection of a wrong forum. As per the conditions enumerated, the earlier proceeding and the latter proceeding must relate to the same matter in issue. It is worthy to mention here that the words "matter in issue" are used under Section 11 of the Code of Civil Procedure, 1908. As has been held in Ramadhar Shrivas v. Bhagwandas [(2005) 13 SCC 1], the said expression connotes the matter which is directly and substantially in issue. We have only referred to the said authority to highlight*

> *that despite liberal interpretation placed under Section 14 of the Act, the matter in issue in the earlier proceeding and the latter proceeding has to be conferred requisite importance. That apart, the prosecution of the prior proceeding should also show due diligence and good faith.*
>
> (Emphasis supplied)

89. Undoubtedly, this Court over a period of time has taken a consistent view that the expression "other cause of a like nature" appearing in Section 14 should be given a wide interpretation. However, while considering the applicability of Section 14 of the Limitation Act, one must not lose sight of the fact that the applicability of the provision is contingent upon not just the reason for the failure of the earlier proceedings, but is also dependent on several other factors as explained in the preceding paragraphs. It is only when all the ingredients required for the applicability of Section 14 are fulfilled that the benefit would become available. In this context the appellant has submitted that as the proceedings undertaken by the respondent before the IBC and the proceedings for the appointment of arbitrator before the High Court are not for the "same relief", hence the benefit of Section 14 of the Limitation Act will not be available to the respondent. To address this contention of the appellant, it is important to understand the purpose of IBC proceedings vis-à-vis proceedings under Section 11(6) of the Act, 1996.

a. Application under Section 11(6) of the Act, 1996 is not for the same relief as an application under Section 9 of the IBC

90. In the introduction to the *Treatise on the Insolvency and Bankruptcy Code, 2016* by *Dr. Dilip K. Sheth,* the author has opined that IBC was enacted on the basis of recommendations of various committees and suggestions received from various stakeholders to address the infirmities of the erstwhile insolvency regime and fulfil the following objectives:

i. To balance the interest of stakeholders and creditors by reviewing and restructuring insolvent businesses having potential for a turn-around.

ii. To provide robust mechanism for earlier resolution of insolvency in time-bound manner.

91. A reading of the Preamble to the IBC reveals the following avowed objects behind its enactment:

i. To consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a timebound manner for maximization of value of assets of such persons;

ii. To promote entrepreneurship and availability of credit;

iii. To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues; and

iv. To establish the Insolvency and Bankruptcy Board of India.

92. One of the cardinal objectives of the IBC is to protect and preserve the life of the corporate debtor "as a going concern" by providing for the resolution of its insolvency through restructuring and keeping liquidation only as a measure of last resort.

93. One of the essential ingredients of an application filed under Section 9 of the IBC is that there is an existence of a default. The term 'default' is defined under Section 3(12) of the IBC to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor.

94. 'Debt' is defined under Section 3(11) of the IBC to mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

95. On the other hand, arbitration is a consent-based private dispute resolution method for the expeditious adjudication of disputes. Arbitration is initiated when one or both parties are not able to resolve their disputes amicably and seek to have the matter resolved by an independent arbitrator.

96. The High Court in the impugned order thought fit to exclude the time-period spent by the respondent before the NCLT, Kolkata under the IBC since it was of the view that the respondent was availing remedy for recovery of dues before a wrong forum and was thus squarely covered by Section 14(2) of the

Limitation Act. The High Court took the view that since the proceedings for initiating corporate insolvency resolution process ("**CIRP**") under IBC as well as the proceeding sought to be initiated by way of arbitration were ultimately for the recovery of debts, both proceedings could be said to be for the same relief, and thus entitled the respondent for the benefit under Section 14(2) of the Limitation Act. The relevant observations read as under: -

> *"10. [...] Worth it to note that initially when he approached the NCLT, Kolkata, under Section 8 and 9 of the IBC for institution of CIRP process against the Respondent, his claim was entertained and it is only the Respondents, who approached the Appellate Tribunal, the order passed by the NCLT in favour of the Applicant came to be reversed. Therefore, it cannot be said that the Petitioner was sitting idle and not taking any steps for recovery of his dues, but it is a case where he was availing remedy for recovery of his dues before a wrong forum and he is entitled to take benefit of Section 14 of the Limitation Act, 1963."*

97. We are of the view that the High Court fell in error in holding that an application under Section 9 of the IBC and an application under Section 11(6) of the Act, 1996 are filed for seeking the same relief. While the relief sought in the former is the initiation of the CIRP of the corporate debtor, the relief sought in the latter is the appointment of an arbitrator for the adjudication of disputes arising out of a contract.

98. The object of initiation of insolvency proceedings under the IBC is to seek rehabilitation of the corporate debtor by appointment of a new management, whereas the objective behind the appointment of an arbitrator is to resolve the

disputes arising between the parties out of a private contract. As soon as the CIRP of a corporate debtor is initiated, it becomes a proceeding in rem. On the contrary, arbitration being concerned with private disputes is not an in-rem proceeding.

99. In ***Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.*** reported in **(2019) 4 SCC 17** this Court, speaking through R.F Nariman J., held that IBC was not a mere recovery legislation for the creditors but rather a beneficial legislation intended to revive and rehabilitate the corporate debtor. The relevant observations read as under:

> *"28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."*
>
> (Emphasis supplied)

100. Similarly, in ***Pioneer Urban Land & Infrastructure Ltd. & Anr. v. Union of India & Ors.*** reported in **(2019) 8 SCC 416**, this Court reiterated that IBC is not a debt recovery mechanism. It observed that when CIRP is initiated the aspect of recovery of debt is completely outside the control of the creditor and there is no guarantee of recovery or refund of the entire amount in default. A creditor initiates insolvency under the Code not for the relief of recovery of debt but rather for rehabilitating the corporate debtor and for a new management to take over. The relevant observations read as under:

> *"It is also important to remember that the Code is not meant to be a debt recovery mechanism (see para 28 of Swiss Ribbons). It is a proceeding in rem which, after being triggered, goes completely outside the control of the allottee who triggers it. Thus, any allottee/home buyer who prefers an application under Section 7 of the Code takes the risk of his flat/apartment not being completed in the near future, in the event of there being a breach on the part of the developer. Under the Code, he may never get a refund of the entire principal, let alone interest. […]"*
>
> (Emphasis supplied)

101. In yet another decision of this Court in ***Hindustan Construction Company Ltd. & Anr. v. Union of India*** reported in **(2020) 17 SCC 324** it was held that IBC is not meant to be a recovery mechanism as it is an economic legislation meant for the resolution of stressed assets. The relevant observations read as under: -

> *"79. Dr Singhvi then argued that under Section 5(9) of the Insolvency Code, "financial position" is defined, which is only*

taken into account after a resolution professional is appointed, and is not taken into account when adjudicating "default" under Section 3(12) of the Insolvency Code. This does not in any manner lead to the position that such provision is manifestly arbitrary. As has been held by our judgment in Pioneer Urban Land & Infrastructure Ltd. v. Union of India, IBC is not meant to be a recovery mechanism (see para 41 thereof)—the idea of the Insolvency Code being a mechanism which is triggered in order that resolution of stressed assets then takes place. For this purpose, the definitions of "dispute" under Section 5(6), "claim" under Section 3(6), "debt" under Section 3(11), and "default" under Section 3(12), have all to be read together. Also, IBC, belonging to the realm of economic legislation, raises a higher threshold of challenge, leaving Parliament a free play in the joints, as has been held in Swiss Ribbons (P) Ltd. v. Union of India [...]"

(Emphasis supplied)

102. Similarly, in ***Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd.,*** reported in **(2022) 1 SCC 401** this Court held that the focus of IBC was more on ensuring the revival and continuation of the corporate debtor rather than mere recovery of the debt owed by the corporate debtor to its creditors. The relevant observations read as under: -

"*88.2. In the judgment delivered on 25-1-2019 in Swiss Ribbons (P) Ltd. v. Union of India82 (hereinafter also referred to as the case of "Swiss Ribbons"), this Court traversed through the historical background and scheme of the Code in the wake of challenge to the constitutional validity of various provisions therein. One part of such challenge had been founded on the ground that the classification between "financial creditor" and "operational creditor" was discriminatory and violative of Article 14 of the Constitution of India. This ground as also*

several other grounds pertaining to various provisions of the Code were rejected by this Court after elaborate dilation on the vast variety of rival contentions. In the course, this Court took note, inter alia, of the pre-existing state of law as also the objects and reasons for enactment of the Code. While observing that focus of the Code was to ensure revival and continuation of the corporate debtor, where liquidation would be the last resort, this Court pointed out that on its scheme and framework, the Code was a beneficial legislation to put the corporate debtor on its feet, and not a mere recovery legislation for the creditors."

(Emphasis supplied)

103. What can be discerned from aforesaid decisions is that insolvency proceedings are fundamentally different from proceedings for recovery of debt such as a suit for recovery of money, execution of decree or claims for amount due under arbitration, etc. The first distinguishing feature that sets apart ordinary recovery proceedings from insolvency proceedings is that under the former the primary relief is the recovery of dues whereas under the latter the primary concern is the revival and rehabilitation of the corporate debtor. No doubt both proceedings contemplate an aspect of recovery of debt, however in insolvency proceedings, the recovery is only a consequence of the rehabilitation/resolution of the corporate debtor and not the main relief.

104. The second distinguishing feature is that although both proceedings entail recovery of debt to a certain extent, however they are different inasmuch as when it comes to recovery proceedings it is the individual creditor's debt which is sought to be recovered, whereas in insolvency proceedings it is the entire debt of

the company which is sought to be resolved. The former is only for the benefit of the individual creditor who initiates the recovery proceedings whereas the latter is for the benefit of all creditors irrespective of who initiates insolvency.

105. The last distinguishing feature is that, a recovery proceeding be it a suit or arbitration is initiated by a creditor where an amount is due and is unpaid by a debtor, in other words the intention behind initiating a recovery proceeding is *simpliciter* for the full recovery of amount which is unpaid to it. However, in an insolvency proceeding there is no guarantee of recovery of the entire debt. A creditor opts for insolvency where an amount of such threshold is unpaid, that the creditor has an apprehension that the debtor in its current state and under the existing management in all likelihood will be unable to repay that debt in the future i.e., there is no likely prospect of any recovery, and thus it would be beneficial to take the risk of initiating insolvency which even though does not guarantee full recovery, in order for a new management to take over the corporate debtor and to recover at least some amount of debt before it is too late. Thus, the underlying intention behind initiating insolvency is not with the intention of recovering the amount owed to it, but rather with the intention that the corporate debtor is resolved / rehabilitated through a new management as soon as possible before it becomes unviable with no prospect of any meaningful recovery of its dues in the near future.

106. Thus, by no stretch of imagination can insolvency proceedings be construed as being for the same relief as any ordinary recovery proceedings, and therefore no case is made out for exclusion of time under Section 14(2) of the Limitation Act, 1963.

107. As the relief sought in an application under Section 11(6) of the Act, 1996 is not the same as the relief sought in an application under Section 9 of the IBC, the benefit of Section 14(2) cannot be given to the respondent in the present case.

108. In ***Yeshwant Deorao Deshmukh v. Walchand Ramchand Kothari*** reported in **(1950) 1 SCR 852** this Court held that the relief sought under insolvency is completely different from the relief sought under an execution application for a decree for recovery of money. In the former, the estate of the insolvent is apportioned or realised for the benefit of all creditors whereas in the latter the money due is sought to be realised only for the benefit of the decree-holder alone. Although both proceedings envisage an aspect of recovery of debt, yet in insolvency, the recovery is a mere consequence and not the ultimate relief. Thus, insolvency proceedings are not one for recovery of debt and cannot be equated with execution proceedings as both proceedings are different in nature and for different reliefs and as such no benefit can be given under Section 14(2) of the Limitation Act which stipulates the requirement of "*same relief*". The relevant observations read as under: -

> *"5. [...] There could be no exclusion for the time occupied by the insolvency proceedings which clearly was not for the purpose of obtaining the same relief. The relief sought in insolvency is obviously different from the relief sought in the execution of application. In the former, an adjudication of the debtors as insolvency is sought as preliminary to the vesting of all his estate and the administration of it by the Official Receive or the Official Assignee, as the case may be, for the benefit of all the creditors; but in the latter the money due is sought to be realised for the benefit of the decree-holder alone, by processes like attachment of property and arrest of person. It may that ultimately in the insolvency proceedings the decree-holder may be able to realise his debt wholly or in part, but this is a mere consequence or result. Not only is the relief of a different nature in the two proceedings but the procedure is also widely divergent."*
>
> (Emphasis supplied)

109. This Court in ***Commissioner, Madhya Pradesh Housing Board & Ors. v. Mohanlal and Company*** reported in **(2016) 14 SCC 199** considered whether benefit of Section 14 of the Limitation Act would be available when a party instead of challenging an arbitral award under Section 34, filed a Section 11 application for appointment of arbitrator. This Court while setting aside the appointment, observed that the proceedings for appointment of an arbitrator are entirely different from the proceedings for challenging an award. Therefore, even after adopting a liberal interpretation, it would not be appropriate to grant benefit of exclusion of time-period under Section 14.

110. Even otherwise, the respondent couldn't be said to have had been prosecuting the IBC proceedings in good faith and in a bonafide manner. It was observed by this Court in ***Consolidated Engg. Enterprises*** *(supra)* and ***M.P.***

Housing Board *(supra)* that an element of mistake is inherent in the relief envisaged under Section 14 of the Limitation Act. However, in the present case, the respondent had initially approached the High Court with an application under Section 11(6). However, for reasons best known to it, the respondent abandoned the said proceedings for appointment of arbitrator and approached the NCLT, Kolkata with an application under Section 9 of the IBC. The respondent was fully aware of the objection of a pre-existing dispute raised by the appellant in response to its second statutory demand notice issued under Section 8 of the IBC. Despite having preferred an application under 11(6) of the Act, 1996 before the jurisdictional court, and also being fully aware of the infirmities in the Section 9 application filed under the IBC, the respondent took a conscious decision to abandon the right course of proceedings. The conduct of the respondent cannot be termed to be a mistake in any manner. Having taken a conscious decision to opt for specific remedy under the IBC which is not for the same relief as an application under Section 11(6) of the Act, 1996, the respondent cannot be now allowed to take the plea of ignorance or mistake and must bear the consequences of its decisions.

iii. <u>Issue No. 3</u>

111. It was submitted on behalf of the respondent that in the event the benefit under Section 14(2) of the Limitation Act is not extended to it, then in such circumstance, this Court may consider to condone the delay in filing the second

arbitration petition by exercising its discretion under Section 5 of the Limitation Act. In response to the said submission, the appellant contended that the benefit of condonation of delay under Section 5 of the Limitation Act cannot be extended to a petition for the appointment of an arbitrator under Section 11(6) of the Act, 1996. The appellant also submitted that assuming without conceding that delay can be condoned in exercise of powers under Section 5 of the Limitation Act, the facts do not warrant exercise of discretionary powers as no application for the condonation of delay has been filed by the respondent. It was further contended that the nature of relief sought for under Section 5 of the Limitation Act being discretionary in nature, the conduct of the respondent disentitles him to grant of such relief.

112. The following three questions fall for our consideration on the basis of the aforesaid submissions –

i. Whether the benefit of condonation of delay under Section 5 of the Limitation Act is available in respect of an application for appointment of arbitrator under Section 11(6) of the Act, 1996?

ii. Whether it is permissible for the courts to condone delay under Section 5 of the Limitation Act in the absence of any application seeking such condonation?

iii. Whether the facts of the present case warrant the exercise of discretion in favour of the respondent to condone the delay in filing the second arbitration application?

113. Section 5 of the Limitation Act provides that any appeal or application other than an application under the provisions of Order 21 of the CPC may be admitted after the prescribed period of limitation if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within the prescribed period. The provision is extracted hereinbelow:

> *"**5. Extension of prescribed period in certain cases.—**Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.*
>
> *Explanation.—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."*

114. The use of the expression "may be admitted" in the aforesaid provision indicates that the nature of relief that can be granted under Section 5 is discretionary and not mandatory in nature. The applicant or the appellant, even upon showing sufficient cause, cannot assert as a matter of right that the delay be condoned. Thus, unlike Section 14 of the Limitation Act, where the applicant can

seek the exclusion of time period as a matter of right upon fulfilment of the mandatory conditions, Section 5 of the Limitation Act leaves the ultimate decision of extending the benefit of condonation of delay to the court before which the application for such condonation is made.

115. In a recent pronouncement in ***Pathapati Subba Reddy (Died) by LRs and Others*** **v.** ***The Special Deputy Collector (LA)*** reported in **(2024) 4 SCR 241** this Court observed thus:

> *"12. In view of the above provision, the appeal which is preferred after the expiry of the limitation is liable to be dismissed. The use of the word 'shall' in the aforesaid provision connotes that the dismissal is mandatory subject to the exceptions. Section 3 of the Act is peremptory and had to be given effect to even though no objection regarding limitation is taken by the other side or referred to in the pleadings. In other words, it casts an obligation upon the court to dismiss an appeal which is presented beyond limitation. This is the general law of limitation. The exceptions are carved out under Sections 4 to 24 (inclusive) of the Limitation Act but we are concerned only with the exception contained in Section 5 which empowers the courts to admit an appeal even if it is preferred after the prescribed period provided the proposed appellant gives 'sufficient cause' for not preferring the appeal within the period prescribed. In other words, the courts are conferred with discretionary powers to admit an appeal even after the expiry of the prescribed period provided the proposed appellant is able to establish 'sufficient cause' for not filing it within time. The said power to condone the delay or to admit the appeal preferred after the expiry of time is discretionary in nature and may not be exercised even if sufficient cause is shown based upon host of other factors such as negligence, failure to exercise due diligence etc."*
>
> (Emphasis supplied)

116. This Court in ***Ramlal*** **v.** ***Rewa Coalfields Ltd.*****, 1961 SCC OnLine SC 39** observed as follows:

> *"12. It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration; but the scope of the enquiry while exercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the court may regard as relevant. It cannot justify an enquiry as to why the party was sitting idle during all the time available to it. In this connection we may point out that considerations of bona fides or due diligence are always material and relevant when the court is dealing with applications made under Section 14 of the Limitation Act. In dealing with such applications the court is called upon to consider the effect of the combined provisions of Sections 5 and 14. Therefore, in our opinion, considerations which have been expressly made material and relevant by the provisions of Section 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only under Section 5 without reference to Section 14."*
>
> (Emphasis supplied)

117. As discussed in the foregoing parts of this judgment, the period of limitation to file an application under Section 11(6) of the Act, 1996 is governed as provided in Article 137 of the Schedule to the Limitation Act, that is, three years. We have observed that the benefit available under Section 14 of the Limitation Act will also be available in respect of applications made under Section 11(6) of the Act, 1996. Thus, in the absence of any specific statutory exclusion, there is no good reason to hold that the benefit under Section 5 of the Limitation Act cannot be availed for the purpose of condonation of delay caused in filing a Section 11(6) application.

118. In ***Deepdharshan Builders Pvt. Ltd. v. Saroj, Widow of Satish Sunderrao Trasikar*** reported in **2018 SCC OnLine Bom 4885**, the Bombay High Court held that Section 5 of the Limitation Act would apply to an application filed under Section 11(6) of the Act, 1996. The relevant observations from the said decision are extracted hereinbelow:

> *"42. In my view, since the proceedings under Section 11(6) of the Arbitration Act are required to be filed before the High Court, Article 137 of the Schedule to the Limitation Act, 1963 would apply to such application filed under Section 11(6) of the Arbitration Act. In my view, since Article 137 of the Schedule to the Limitation Act, 1963 would apply to the arbitration application under Section 11(6) of the Arbitration Act, Section 5 of the Limitation Act, 1963 would also apply to the arbitration application filed under Section 11(6) of Arbitration Act."*

119. Similarly, the Delhi High Court in ***Yogesh Kumar Gupta v. Anuradha Rangarajan*** reported in **2007 SCC OnLine Del 287** had observed that in view of Section 43 of the Act, 1996, Section 5 of the Limitation Act would be applicable to applications filed under Section 11(6) of the Act, 1996. Relevant observations from the said decision are extracted hereinbelow:

> *"30. There is yet another alternative route which leads to some conclusion. Section 21 of the Act states that unless otherwise agreed by the parties (there is no agreement of the parties on this aspect), the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Consequently, when the petitioner issued the notice dated 10.4.2002 raising the dispute regarding rendition of accounts of the partnership business, the arbitral proceedings commenced as soon as the communication dated 10.4.2002 was received by the respondent. It is not the respondent's case that he did not receive the communication dated*

10.4.2002 sent by the petitioner and since it was sent by registered post (as appears from the postal receipt filed on record along with the said communication), it can be safely presumed that the communication was received by the respondent within a matter of few days. Consequently, the arbitral proceedings stood commenced sometime in middle of April, 2002. The application under Section 11(5) of the Act is an application or a petition in relation to arbitral proceedings which have commenced with the issuance of a request for the reference of disputes to arbitration (Section 2(b) of the Limitation Act). Since Limitation Act, 1963 specifically applies to arbitrations, Section 5 of the Limitation Act would also apply to an application/petition under Section 11 (5) of the Limitation Act. Any application (other than under the provisions of Order 21 of CPC) may be admitted after the prescribed period, if the applicant satisfies the Court that he had sufficient cause for not preferring or making the application within such period. In my view, therefore, Section 5 of the Limitation Act would apply to, and be available to the petitioner filing an application/petition under Section 11 (5) of the Act."

(Emphasis supplied)

120. The necessary pre-condition for availing the remedy under Section 5 of the Limitation Act is that the applicant must satisfy the court that there was a sufficient cause which prevented him from instituting the application within the prescribed time period. Although it is a general practice that a formal application under Section 5 of the Limitation Act has to be filed by the applicant, yet no such requirement can be gathered from a bare reading of the statute. Thus, even in the absence of a formal application, a court or tribunal may consider exercising its discretion under Section 5 of the Limitation Act subject to the applicant assigning sufficient cause for condoning the delay. A similar view was taken by this Court in ***Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd.*** reported in **(2021) 7 SCC** 313 wherein it was observed thus:

"63. Section 5 of the Limitation Act, 1963 does not speak of any application. The Section enables the Court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act, 1963, in order to enable the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to approach the Court/Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal of its discretion to condone delay, in the absence of a formal application.

64. A plain reading of Section 5 of the Limitation Act makes it amply clear that, it is not mandatory to file an application in writing before relief can be granted under the said section. Had such an application been mandatory, Section 5 of the Limitation Act would have expressly provided so. Section 5 would then have read that the Court might condone delay beyond the time prescribed by limitation for filing an application or appeal, if on consideration of the application of the appellant or the applicant, as the case may be, for condonation of delay, the Court is satisfied that the appellant/applicant had sufficient cause for not preferring the appeal or making the application within such period."

(Emphasis supplied)

121. The position of law that emerges from the aforesaid discussion is that the benefit under Section 5 of the Limitation Act is available in respect of the applications filed for appointment of arbitrator under Section 11(6) of the Act, 1996. Further, the requirement of filing an application under Section 5 of the Limitation Act is not a mandatory prerequisite for a court to exercise its discretion under the said provision and condone the delay in institution of an application or appeal. Thus, the only question that remains to be considered is whether in the facts of the present case, the respondent could be said to have made out a case for condonation of delay in instituting the fresh Section 11(6) application.

122. As discussed, the respondent took a conscious decision to abandon its first Section 11(6) application with a view to pursue proceedings under Section 9 of the IBC. The respondent made such choice despite a specific objection raised by the appellant in its reply to the statutory demand notice that there were pre-existing disputes between the parties. In view of this, maximisation of the chances of getting the application under Section 9 of the IBC admitted by the NCLT seems to have been the only reason for the abandonment of the first Section 11(6) application by the respondent. In light of such conduct on the part of the respondent, we are of the view that the present case does not warrant the exercise of our discretion under Section 5 of the Limitation Act.

123. The primary intent behind Section 5 of the Limitation Act is not to permit litigants to exploit procedural loopholes and continue with the legal proceedings in multiple forums. Rather, it aims to provide a safeguard for genuinely deserving applicants who might have missed a deadline due to unavoidable circumstances. This provision reflects the intent of the legislature to balance the principles of justice and fairness, ensuring that procedural delays do not hinder the pursuit of substantive justice. Section 5 of the Limitation Act embodies the principle that genuine delay should not be a bar access to justice, thus allowing flexibility in the interest of equity, while simultaneously deterring abuse of this leniency to prolong litigation unnecessarily.

124. The legislative intent of expeditious dispute resolution under the Act, 1996 must also be kept in mind by the courts while considering an application for condonation of delay in the filing of an application for appointment of arbitrator under Section 11(6). Thus, the court should exercise its discretion under Section 5 of the Limitation Act only in exceptional cases where a very strong case is made by the applicant for the condonation of delay in filing a Section 11(6) application.

125. Before we part with the matter, we would like to address the submission of the respondent that this Court, while dismissing its appeal against the order of the NCLAT, had granted it liberty to avail such remedies, including arbitration, as may be available to it in law, to realise its dues from the appellant. The relevant paragraph is reproduced hereinbelow:

> *"35. Needless to mention that the appellant may avail such other remedies as may be available in accordance with law including arbitration to realise its dues, if any."*

126. The liberty granted by this Court to the respondent has been prefixed by the words "*Needless to mention…*". Hence, it is amply clear that the observations were merely clarificatory and not intended to confer upon the respondent a special right or privilege to file a proceeding which is not otherwise permissible under law. The intention cannot be said to have been to help the respondent come out of its action of unconditionally withdrawing the first Arbitration Petition or to deprive the appellant of defences available to it under law. Such intention cannot

be attributed to this Court, particularly in the absence of any discussion on this point.

127. Further, the said paragraph only gives liberty to the respondent to avail such other remedies "*as may be available*" "*in accordance with law*". Hence, it cannot be construed as giving the respondent the liberty to file a proceeding that is not available or that is not in accordance with law.

128. The reliance placed by the petitioner upon the paragraph 35 referred to above is nothing but a completely incorrect reading of the said paragraph. In ***BSNL v. Telephone Cables Limited*** reported in **2010 5 SCC 213**, this Court observed thus:

> *"41. Instances abound where observations of the court reserving liberty to a litigant to further litigate have been misused by litigants to pursue remedies which were wholly barred by time or to revive stale claims or create rights or remedies where there were none. It is needless to say that courts should take care to ensure that reservation of liberty is made only where it is necessary, such reservation should always be subject to a remedy being available in law, and subject to remedy being sought in accordance with law."*
>
> (Emphasis supplied)

129. The liberty to avail remedies available in law does not confer a right to avail such remedies. Seen from the perspective of Hohfeld's analysis of jural relations, liberties (or privileges) do not entail corresponding duties on others. Thus, having the freedom to seek a remedy does not imply an enforceable claim

to it. This distinction underscores the fine difference between what one is free to do and what one is entitled to demand.

130. Hence, we are of the view that paragraph 35 as extracted above does not help the respondent as the fresh Section 11 petition could be said to be hit by the principles analogous to Order 23 Rule 1 and is also barred by limitation for being beyond the prescribed period of 3 years.

F. CONCLUSION

131. In view of the aforesaid discussion, we have reached to the following conclusion:

(i) In the absence of any liberty being granted at the time of withdrawal of the first application under Section 11(6) of the Act, 1996, the fresh application filed by the respondent under the same provision was not maintainable;

(ii) The fresh application filed by the respondent under Section 11(6) of the Act, 1996 was time-barred;

(iii) The respondent is not entitled to the benefit of Section 14(2) of the Limitation Act; and

(iv) The respondent is also not entitled to the benefit of condonation of delay under Section 5 of the Limitation Act.

132. As a result, the appeal filed by the appellant is allowed and the impugned order passed by the High Court of Bombay is hereby set aside.

133. Pending application(s), if any, shall stand disposed of.

134. The parties shall bear their own costs.

…...……..…..…….……CJI.
(Dr. Dhananjaya Y. Chandrachud)

…….…..…….…..……J.
(J.B. Pardiwala)

New Delhi;

7th November, 2024.