HIGH COURT OF GUJARAT

BANASKANTHA DISTRICT CO-OPERATIVE MILK PRODUCERS UNION LTD PALANPUR

Versus

NAGAR DAIRY PRIVATE LIMITED

Date of Decision: 10 November 2023

Citation: 2023 LawSuit(Guj) 2157

Hon'ble Judges: Sunita Agarwal

Case Type: Petition Under Arbitration Act

Case No: 123 of 2020

Subject: Arbitration, Civil, Limitation

Acts Referred:
Arbitration Act, 1940 Sec 20, Sec 43
Limitation Act, 1963 Art 55, Art 137
Arbitration And Conciliation Act, 1996 Sec 29A, Sec 21, Sec 11

Final Decision: Petition allowed

Advocates: Rohan Lavkumar, Pritha Mitra, **Nanavati Associates**, A H Mohapatra, Mit S Thakkar

Cases Referred in (+): 23

Sunita Agarwal, C.J.

[1] The question in the present Arbitration Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act, 1996' for short), revolves around two questions namely (i) whether at the referral stage this Court can examine the question as to the period of limitation for filing an application under Section 11 of the Act, 1996; (ii) whether this Court may refuse to make reference under Section 11 treating the claim as ex facie time barred and dead.

[2] To answer these questions, the facts in brief relevant for the purposes are to be noted hereinunder :

2.1 The petitioner namely Banaskantha District Cooperative Milk Producers Union Ltd. Palanpur, is a cooperative society registered under the provisions of the Gujarat State Co-operative Societies Act, 1961 and is engaged in the business of production and distribution of the milk and milk products. The petitioner is a member of the Gujarat Co-operative Milk Marketing Federation Ltd., which is an Apex Society. The present petitioner had entered into an agreement dated 01.04.2015 with the respondent No. 1 namely Nagar Dairy Private Ltd., under which the respondent No. 1 was required to process and pack milk supplied by the petitioner.

2.2 The petitioner, on the other hand, under the agreement had to supply raw milk / homogenized milk / pasteurized milk to the respondent No. 1 in milk tankers. The respondent No. 1 agreed to create and provide facilities for receiving, storage, standardization, pasteurizing, homogenization etc. of at least 20,000 litres of milk on daily basis as per design and layout of the petitioner.

2.3 It is stated in the petition that the respondent No. 1 was responsible for receiving the incoming of the milk and storage of the same under proper conditions so that quality of the milk did not get deteriorated. It was agreed that in case of any spoiling of the milk due to improper handling and storage of the same, the petitioner would be entitled to recover such losses from respondent No. 1, and that the respondent No. 1 would be allowed a handling loss of 0.35% loss on fat and 0.90% loss in packaging film.

2.4 The said agreement came to an end on 31.03.2016 as it has been terminated on the consent terms for termination dated 09.04.2016 recording that the operations under the agreement were terminated with effect from April, 2016 by consent of the parties and that the respondent No. 1 would pay the amount of losses (Rs. 82,50,280/-) to the petitioner through Sabar Dairy.

2.5 The Director of the respondent No. 1 signed the document and stated that it would repay the outstanding amount either in the monthly installment of Rs. 5,00,000/- by RTGS directly into the account of the petitioner or through Sabarkantha Co-operative Milk Producers Union Ltd. (Sabar Dairy).

2.6 It is stated that during the tenure of the agreement i.e. between April, 2015 and March, 2016, due to milk leakage, fat loss, poly film loss, etc. caused by the respondent No. 1, the petitioner is entitled to recover the aforesaid amount of Rs. 82,50,280/- from the respondent No. 1. However, the respondent No. 1 did not release the payment as agreed in the consent terms. The demand letters were thereafter sent, copies whereof are annexed with the present petition as Annexure

- III (colly.). By a letter dated 28.07.2016, the respondent No. 1 gave detail of deduction of Rs. 30,00,000/- by Sabar Dairy for the amount which is to be released to the petitioner. A copy of the said letter is appended as Annexure - IV to the instant petition.

2.7 A perusal of the record indicates that after intimation with regard to the deductions made through Sabar Dairy, was sent to the petitioner. Another communication dated 08.08.2016 was made by the Managing Director, Banaskantha District Co-operative Milk Producers' Union Ltd., Palanpur, namely the petitioner herein to the Managing Director, Sabarkantha District Co-operative Milk Producers' Union Ltd. namely Sabar Dairy, wherein it is stated that the operations of Nagar Dairy (Packing Station), Hapud was closed by Banaskantha District Co-operative Milk Producers' Union Ltd., wherein Banas Milk Producers has due amount of Rs. 82,50,280/-, intimation of which was given to Sabar Dairy. However, it was informed that deduction of Rs. 30,00,000/- for the due amount of Banas Dairy was made by the Sabar Dairy. The prayer made was, thus, made to refund the deducted amount.

2.8 In response thereto, a communication dated 12.08.2016 sent by the Managing Director, Sabar Dairy to the petitioner herein is relevant, wherein it is categorically stated that the Sabar Dairy owed Rs. 24.46 lacs from Nagar Dairy and the said amount was due to Sabar Dairy. Whatever appropriation of money had happened, it was credited to their outstanding amount and no such amount was recovered from the Nagar Dairy on behalf of the petitioner namely Banaskantha DistrictCo-operative Milk Producers' Union Ltd. (Banas Dairy). On 08.09.2016, the petitioner wrote a letter to the respondent No.1 stating that there was a debit balance of Rs.82,50,280/- of Nagar Dairy (respondent No.1) towards the petitioner. By letter dated 28.07.2016, it was informed by respondent No.1 that Sabar Dairy had deducted/recovered Rs.30 Lacs towards outstanding dues of Banas Dairy (the petitioner herein). However, Sabar Dairy had informed the petitioner that they have not recovered anything towards the dues of the petitioner. It was reiterated that under the terms of the agreement, financial settlement needs to be done within 30 days from closing of operations. Six months had expired since closing of operations, but the respondent No.1 hadnot settled outstanding dues. It seems that the petitioner herein kept on sending reminders to respondent No. 1 for releasing of outstanding payment, but no proper response was given by the respondent No. 1. The notice dated 17.09.2020 was sent through the Advocate invoking Section 21 of the Act, 1996 for appointment of Arbitrator in terms of Clause 10 of the agreement dated 01.04.2015 to adjudicate various disputes arising out of the said

contract. The respondent No. 1, however, did not respond to the same, the present petition was, thus, filed on 22.12.2020.

[3] In the affidavit-in-reply, the respondent No. 1 has taken a stand that the claims raised by the petitioner herein vide notice dated 17.09.2020, are time barred claims, inasmuch as, the last letter of purported claim of Rs. 82,50,280/- was raised by the petitioner on 02.05.2016 with the clear instruction to pay the dues. The limitation period of three years under Section 43 of the Act, 1996 read with Article 137 of the Limitation Act, 1963, would run from the date of demand i.e. 02.05.2016, the date when the right to apply accrued. Repeated letters or reminders sent by the petitioner will not postpone the accrual of cause of action. The limitation period of three years expired on 01.05.2019, whereas reference of dispute for arbitration was made by the petitioner on 17.09.2020. The present petition and the claims raised by the petitioner are, thus, not maintainable being ex facie time barred. A dead claim cannot be revived by representations / letters / reminders sent by the petitioner from time to time as the respondent no. 1 was not obliged to respond to the same. Reliance is placed on the decision of the Apex Court in the case of B and T AG versus Ministry of Defence,2023 SCCOnLineSC 657, by Mr. A.H. Mohapatra, learned counsel for the respondent No. 1 to assert that ex facie time barred claim cannot be entertained and have to be turned down at the referral stage itself.

[4] In rejoinder, Shri Rohan Lavkumar and Pritha Mitra, learned advocates appearing for Nanavati Associates for the petitioner would place reliance on the decision of the Apex Court in the case of Bharat Sanchar Nigam Ltd. and Another versus Nortel Networks India Private Limited, 2021 5 SCC 738, to submit that admissibility of the claim on the issue of limitation is a question which can be decided by the Arbitral Tribunal, on appreciation of the question as to the date of accrual of the cause of action. As factual inquiry is required to be made to decide the issue of limitation, which would normally a mix question of fact and law, the examination of it would lie within the domain of the Arbitral Tribunal. At the referral stage, this Court is to confine its inquiry into the existence of the agreement and the admissibility of the claim, is to be left open to the Tribunal.

[5] Heard learned counsels for the parties and perused the records. Before entering into the merits of the rival contentions of the learned counsels for the parties it would be apt to go through the legal position pertaining to the issues before us.

[6] In **BSNL (supra)**, the issues considered by the Apex Court are; (i) period of limitation for filing an application under Section 11 of the Arbitration and Conciliation Act, 1996; (ii) Whether the Court may refuse to make reference under Section 11 where the claims are ex facie time barred.

[7] On the first question of limitation for filing an application under Section 11, it was observed that Section 11 does not prescribe any time period for filing an application under sub-section (6) for appointment of an arbitrator. However, one would have to take recourse to the Limitation Act, 1963, as per Section 43 of the Arbitration Act, which provides that the Limitation Act shall apply to arbitrations, as it applies to proceedings in Court. It is noted that now it is fairly well settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days' from issuance of the notice invoking arbitration. An application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s) / dispute(s) as to be referred to arbitration, as contemplated by Section 21 of the Act is made, and there is failure to make the appointment. The period of limitation for filing a petition seeking appointment of an arbitrator/s cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognized even under Section 20 of the Arbitration Act 1940.

[8] It was further observed taking note of various decisions of different High Courts on the question of limitation for filing an application under Section 11 of the Act, 1996 that though the Courts have taken recourse to the position that the limitation period would be governed by Article 137, which provides a period of 3 years from the date when the right to apply accrues, however, this is an unduly long period for filing an application under Section 11, since it would defeat the very object of the Act, which provides for expeditious resolution of commercial disputes within a time bound period. The 1996 Act has been amended twice over in 2015 and 2019 to provide for further time limits to ensure that the arbitration proceedings are conducted and concluded expeditiously. Section 29A mandates the arbitral tribunal to conclude the proceedings within a period of 18 months. In view of the legislative intent, the period of 3 years for filing an application under Section 11 would run contrary to the scheme of the Act. It was, thus, observed that it would be necessary for the Parliament to effect an amendment to Section 11, prescribing a specific period of limitation within which a party may move the court for making an application for appointment of the arbitration under Section 11 of the 1996 Act. However, applying the law to limitation prescribing a period of three years under Article 137 from the date when the right to apply accrues, the arbitration application therein was held to have been filed within a period of three years of rejection of the request for appointment of an Arbitrator.

[9] On the second question as to whether the Court exercising jurisdiction under Section 11 is obligated to appoint an arbitrator even in a case where the claims are ex facie time barred. Legislative history of Section 11 post amendment position, 2019 amendment to Section 11 were considered. The Apex Court has further considered the nature of inquiry into the question of limitation noticing that the limitation is normally a mixed question of fact and law and would lie within the domain of the arbitral tribunal. However, there is a distinction between jurisdictional and admissibility issues. It was observed that the issue of 'jurisdiction' pertains to the power and authority of the arbitrators to hear and decide a case. However, "admissibility issues" related to procedural requirements, such as a breach of pre-arbitration requirements. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal. Whereas, admissibility issues are such as a breach of pre-arbitration requirements, for instance, a mandatory requirement for mediation before the commencement of arbitration, or a challenge to a claim or a part of the claim being either time barred, or prohibited, until some precondition has been fulfilled. Admissibility relates to the nature of the claim or the circumstances connected therewith. Admissibility is not a challenge to the jurisdiction of the arbitrator to decide the claim. It was further observed in paragraphs 40, 41, 42, 43 and 44 as under : -

> "**40.** The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the arbitral tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some pre- condition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.
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> **41.** In Swisbourgh Diamond Mines (Pty) Ltd. & Ors. v. Kingdom of Lesotho17, the Singapore Court of Appeal distinguished between "jurisdiction" and "admissibility" in paragraphs 207 and 208, which read as :
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> **"207.** Jurisdiction is commonly defined to refer to the "power of the tribunal to hear a case", whereas admissibility refers to "whether it is appropriate for the tribunal to hear it" : Waste Management, Inc. v. United Mexican States ICSID Case No. ARB (AF) / 98 / 2. To this, Zachary Douglas adds clarity to this discussion by referring to "jurisdiction" as a concept that deals with "the existence of [the] adjudicative power" of an arbitral tribunal, and to "admissibility" as a concept dealing with "the exercise of that power" and the suitability of the claim brought pursuant to that power for adjudication:[Zachary Douglas, The Press, 2009] at paras 291 and 310.

208. The conceptual distinction between jurisdiction and admissibility is not merely an exercise in linguistic hygiene pursuant to a pedantic hair-spitting endeavour. This distinction has significant practical import in investment treaty arbitration because a decision of the tribunal in respect of jurisdiction is reviewable by the supervisory courts at the seat of the arbitration (for non-ICSID arbitrations) or before an ICSID ad hoc committee pursuant to Art 52 of the ICSID Convention (for ICSID arbitrations,) whereas a decision of the tribunal on admissibility is not reviewable : see Jan Paulsson, "Jurisdiction and Admissibility" in Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner (Gerald Aksen et al, eds) (ICC Publishing, 2005) at p 601, Douglas at para 307, Waibel at p 1277, paras 257 and 257 and 258, Hanno Wehland, "Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules" in ICSID Convention after 50 Tears : Unsettled Issues (Crina Baltag, ed) (Kluwer Law International, 2016) at pp 233-234, and Chin Leng at p 124."

42. The judgment in Lesotho (supra) was followed by in BBA & Ors. v. BAZ & Anr., wherein the Court of Appeal held that statutory time bars go towards admissibility. The Court held that the "tribunal versus claim" test should be applied for purposes of distinguishing whether an issue goes towards jurisdiction or admissibility. The "tribunal versus claim" test asks whether the objection is targeted at the tribunal (in the sense that the claim should not be arbitrated due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself is defective and should not be raised at all).

43. Applying the "tribunal versus claim" test, a plea of statutory time bar goes towards admissibility as it attacks the claim. It makes no difference whether the applicable statute of limitations is classified as substantive (extinguishing the claim) or procedural (barring the remedy) in the private international law sense.

44. The issue of limitation which concerns the "admissibility" of the claim, must be decided by the arbitral tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties."

[10] Having said that, the Apex Court has proceeded to note a recent decision of three Bench of the Apex Court in Vidya Drolia Versus Durga Trading Corporation, 2021 2 SCC 1, wherein considering the scope of power under Section 8 and 11, it has been held that the Court must undertake a primary first review to weed out "manifestly ex facie non-existent and invalid arbitration agreements, or non-arbitrable disputes." The prima facie review at the reference stage is to cut the deadwood, where dismissal is bare faced and pellucid, and when on the facts and law, the litigation must stop at the first

stage. Only when the Court is certain that no valid arbitration agreement exists, or that the subject matter is not arbitrable, a reference may be refused. The observations in paragraph 144, 148, 154.4, 244.4 of **Vidya Drolia (Supra)** were noticed in paragraph 45.1, 45.2 and 45.3 as under : -

"**45.1** In paragraph 144, the Court observed that the judgment in Mayavati Trading had rightly held that the judgment in Patel Engineering had been legislatively overruled. Paragraph 144 reads as :

"**144.** As observed earlier, Patel Engg. Ltd. explains and holds that Sections 8 and 11 are complementary in nature as both relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Amendments to Section 8 vide Act 3 of 2016 have not been omitted. Section 11 covers the situation where the parties approach a court for appointment of an arbitrator. Mayavati Trading (P) Ltd., in our humble opinion, rightly holds that Patel Engg. Ltd. has been legislatively overruled and hence would not apply even post omission of sub-section (6-A) to Section 11 of the Arbitration Act. Mayavati Trading (P) Ltd. has elaborated upon the object and purposes and history of the amendment to Section 11, with reference to sub-section (6-A) to elucidate that the section, as originally enacted, was facsimile with Article 11 of the Uncitral Model of law of arbitration on which the Arbitration Act was drafted and enacted."

(emphasis supplied)

While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time barred and dead, or there is no subsisting dispute. Paragraph 148 of the judgment reads as follows :

"**148.** Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Subsection (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to

the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no-claim certificate" or defence on the plea of novation and "accord and satisfaction". As observed in Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40: 2007 Bus LR 1719 (HL)] , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen."

(emphasis supplied)

45.2 In paragraph 154.4, it has been concluded that :

"**154.4.** Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to nonarbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

(emphasis supplied)

45.3 In paragraph 244.4 it was concluded that :

"**244.4.** The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. **"when in doubt, do refer"**.

[11] It was, thus, observed that the upshot of the judgment in **Vidya Drolia (supra)** is affirmation of the position of law expounded in Duro Felguera S.A. versus Gangavaram Port Ltd., 2017 9 SCC 729 and Mayavati Trading (P) Ltd. versus Pradyuat Deb Burman, 2019 8 SCC 714, the post amendment position on the scope of power under Section 11 of the Arbitration Act, 1996. It was, thus, held that it is only in the

very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.

[12] Taking note of the above, in the facts of the said case, before the Apex Court, it was held that it was a case of deadwood / no subsisting dispute since the cause of action arose about 51/2 years prior to filing of Section 11 application. It was noted that the respondent therein did not take any action whatsoever after rejection of its claim by th appellant - BSNL. The notice of arbitration was invoked after 51/2 years and there was no averment even in the notice of arbitration and the petition filed under Section 11 or before the Apex Court of any intervening facts which may have occurred, which would extend the period of limitation falling within the scope of Section 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable Section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation.

[13] The respondent has not stated any event which may extend the period of limitation, which commence as per Article 55 of the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the final bill by making deductions. Referring to the statement made in the arbitration application about various communications exchanged between the parties, it was observed and held in paragraph 50 and 51 as under : -

> "**50.** In the notice invoking arbitration dated 29.04.2020, it has been averred that:
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> "Various communications have been exchanged between the Petitioner and the Respondents ever since and a dispute has arisen between the Petitioner and the Respondents, regarding non payment of the amounts due under the Tender Document."
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> **51.** The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that : "where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it." There must be a clear notice invoking arbitration setting out the "particular dispute" 21 (including claims / amounts) which must be received by the other party within a

period of 3 years from the rejection of a final bill, failing which, the time bar would prevail."

[14] It was, thus, concluded that in rare and exceptional cases, where the claims are ex facie time barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.

[15] In a recent decision in **B and T AG (supra)**, the Apex Court was dealing with the petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying for appointment of an Arbitrator for adjudication of the disputes and claims arising out of the contract therein. The question considered by the Apex Court therein was whether time barred claims or claims which are barred by limitation, can be said to be live claims, which can be referred to arbitration. Taking note of the provisions of Section 43 of the Arbitration Act, 1996, Article '137' of the Schedule of the Limitation Act, 1963, it was held that a plain reading of the Article 137 would indicates that period of limitation in cases covered by the said provision thereunder is three years and the said period would begin to run when the "right to apply" accrues. It was further held that the starting point of limitation under Section 137 occurring to the third column of the Article is the first date when 'the right to apply accrues'. That being a residuary Article to be adopted to different classes of applications, the expression 'the right to apply' is an expression of a broad common law principle and should be interpreted according to the circumstances of each case. 'The right to apply' has been interpreted to mean 'the right to apply first arises'. It was noted that in Merla Ramanna v. Nallaparaju and Others, 1955 2 SCR 938, Section 9 of the Limitation Act, 1963 in paragraph 35 it was recorded as under : -

"**35.** Further, it would be necessary to refer to Section 9 of the Act 1963 of the Act which reads thus:

"9. Continuous running of time. - Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it:

Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues."

(Emphasis supplied)

[16] The Apex Court has considered further law laid down in Major (Retd.) Inder Singh Rekhi versus Delhi Development Authority,1988 AIR(SC) 1887, in paragraph 36 as under : -

"**36.** In the case of Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority,1988 AIR(SC) 1887, it has been held that the existence of a dispute is essential for the appointment of an Arbitrator under Section 8 or a reference under Section 20 of the Arbitration Act, 1940 (for short, 'the Act 1940') and that a dispute can arise only when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference about the existence of a dispute as the expression "dispute" contains a positive element of assertion and in denying and merely an inaction to accede to a claim or a request. With respect to the period of time, in the light of the facts of that particular case as to when did the dispute actually arises, despite the fact that the contract work in question was completed in the year 1980, the Court observed that even though it was true that on completion of the contract work right to get payment would normally arise, but where the final bill had not been prepared and when the assertion of the claim was made much after the completion of the work and there was nonpayment, the cause of action arose from the date when the assertion was made. The Court then went on to observe that it was also true that a party cannot postpone the accrual of a cause of action by writing letters or sending reminders but where the bill had been finally prepared, the claim made by the claimant is the accrual of the cause of action. For a proper understanding of the ratio in the aforesaid judgment, we reproduce hereinbelow para 4 of the judgment in its entirety. Para 4 reads thus:

"4. Therefore, in order to be entitled to order of reference under S. 20 , it is necessary that there should be an arbitration agreement and secondly, difference must arise to which this agreement applied. In this case, there is no dispute that there was an arbitration agreement. There has been an assertion of claim by the appellant and silence as well as refusal in respect of the same by respondent. Therefore, a dispute has arisen regarding nonpayment of the alleged dues of the appellant. The question is for the present case when did such dispute arise. The High Court proceeded on the basis that the work was completed in 1980 and, therefore, the appellant became entitled to the payment from that date and the cause of action under Art. 137 arose from that date. But in order to be entitled to ask for a reference under Section 20 of the Act there must not only be an entitlement to money but there must be a difference or a dispute must arise. It is true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on 28th Feb. 1983 and there was non-payment, the cause of action from that date, that is to say, 28th of Feb. 1983. It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally

prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under S. 8 or a reference under S. 20 of the Act. See Law of Arbitration by R.S. Bachawat, 1st Edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion in denying, not merely inaction to accede to a claim or a request. When in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

(Emphasis supplied)

[17] It was, thus, observed that three principles of law are discernible from the aforesaid decision of the Apex Court :

(i) ordinarily on the completion of the work, the right to receive the payment begins;

(ii) a dispute arises when there is a claim on one side and its denial / repudiation by the other

(iii) a person cannot postpone the accrual of cause of action by repeatedly writing letters or sending reminders. In other words, 'bilateral discussions' for an indefinite period of time would not save the situation so far as the accrual of cause of action and the right to apply for appointment of arbitrator is concerned.

[18] Taking note of the decision of Union of India and Another v. M/s L. K. Ahuja and Company, 1988 3 SCC 76, it was noted with reference to the old Act, 1940 that in order to be a valid claim with reference to Section 28 of the Act 1940, it was necessary that there should be an arbitration agreement, secondly, the differences must arise to which the agreement-in-question applies and thirdly, that application must be within time as stipulated in Section 20 of the Act 1940. It was further clarified therein that it would be wrong to mix up the two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act 1940, and whether the claim to be adjudicated by the Arbitrator was barred by lapse of time. On the aspect of distinction between the period of limitation for filing a petition under Section 11 and as to the claims being time barred by time, the decision in the case of J.C. Budhraja v. Chairman, Orissa Mining Corporation Ltd. and Another, 2008 2 SCC 444, and SBP & Co. v. Patel Engineering Ltd. and Another, 2005 8 SCC 618 were considered to note that dragging a party to an arbitration when there existed no arbitrable dispute, can

certainly affect the right of that party, and, even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration.

[19] Further, on the question whether time barred claim should be referred for decision in the arbitration proceedings, the decision of the Apex Court in the case of **BSNL (Supra)**, was noted and the observations noted hereinabove were taken into consideration. The principle to determine and decide all question of non-arbitrability, with respect to pre-referral jurisdiction under Section 11 of the Act, 1996, as laid down in **Vidya Drolia (supra)** and NTPC Ltd. versus SPML Infra Ltd.,2023 SCCOnLineSC 389, were noted in paragraph 62 as under :

> "62. NTPC Ltd. v. SPML Infra Ltd.,2023 SCCOnlineSC 389, noted that an overarching principle with respect to the pre-referral jurisdiction under Section 11(6) of the Act 1996 as laid down in Vidya Drolia and Ors. v. Durga Trading Corporation, 2021 2 SCC 1, and following the decision in Vidya Drolia's case, it has been consistently held by the Courts that the arbitral tribunal was the preferred first authority to determine and decide all questions of non-arbitrability. The Court held that:
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> "**25. Eye of the Needle:** The above-referred precedents crystallise the position of law that the pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the referral court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.
>
> **26.** As a general rule and a principle, the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the referral court may reject claims which are manifestly and ex-facie nonarbitrable [Vidya Drolia supra note 7, para 154.4.]. Explaining this position, flowing from the principles laid down in Vidya Drolia (supra), this Court in a subsequent decision in Nortel Networks (supra) held [Nortel Networks supra note 22, para 45.1.]:
>
> "**45.1** ...While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage,

the Court can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute..."

27. The standard of scrutiny to examine the nonarbitrability of a claim is only prima facie. Referral courts must not undertake a full review of the contested facts; they must only be confined to a primary first review [Vidya Drolia supra note 7, para 134.] and let facts speak for themselves. This also requires the courts to examine whether the assertion on arbitrability is bona fide or not [ibid.]. The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable [Nortel Networks supra note 22, para 47.]. On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration [Vidya Drolia supra note 7, para 154.4.].

28. The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the referral court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable [ibid para 154.4.]. It has been termed as a legitimate interference by courts to refuse reference in order to prevent wastage of public and private resources [[ibid para 139]. Further, as noted in Vidya Drolia (supra), if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court [ibid]. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator [DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd.,2021 SCCOnLineSC 781, paras 18, 20.], as explained in DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd."

(Emphasis supplied)

[20] It was, thus, finally held that the period of limitation would run when a party acquires right to refer the disputes to the arbitration. If the arbitration agreement requires the party to exhaust the dispute resolution process as a precondition for invoking arbitration, the right to refer the dispute to arbitration would arise only after the parties have exhausted the said procedure. The counter party could raise a valid objection to any step taken to refer the disputes to arbitration in avoidance of the agreed pre-reference dispute resolution procedure. If the parties have agreed that they would first endeavour to resolve the disputes amicably in a particular manner, it is necessary for them to first exhaust that procedure before exercising any right to refer the disputes to arbitration.

[21] The decisions of the Apex Court in the case of Hari Shankar Singhania v. Gaur Hari Singhania, 2006 4 SCC 658, and Zillon Infraprojects Pvt. Ltd. v. Bharat Heavy Electricals Limited,2023 SCCOnLineCal 756, were considered to note that a reference to arbitration is required to file within a period of three years when the right to apply accrues. The right to apply would accrue when differences between the parties to the arbitration agreement were evident, when the parties reach a 'breaking point', that is, when a settlement with or without conciliation is no longer possible. The limitation period would not start so long as the parties were in dialogue even if differences surfaced during such period, as an interpretation to the contrary would inevitably "compel the parties to resort to litigation / arbitration even when there is serious hope of the parties themselves resolving the issues". Thus, the right to apply can be said to have accrued "only on the date of the last correspondence between the parties and the period of limitation commences from the date of the last communication between the parties."

[22] However, it would not be incorrect to state that the cause of action would be of "continuous nature" and the claim of the parties never attained finality, and remained a 'live claim' as the parties were in mutual discussion to resolve the disputes between them. It was held that what is discernible is that there is a fine distinction between the plea that the claims raised are barred by limitation and the plea that the application for appointment of an arbitrator is barred by limitation. The true test to determine when a cause of action could be said to have accrued, as explained in Mookerjee, J. in Dwijendra Narain Roy v. Joges Chandra De and others, 1924 AIR(Cal) 600, was noted in paragraph 66 as under : -

> "**66.** Mookerjee, J. in Dwijendra Narain Roy v. Joges Chandra De and others, 1924 AIR(Cal) 600 has explained the true test to determine when a cause of action could be said to have accrued observing as under:
>
> "**10.** The substance of the matter is that time runs when the cause of action accrues and a cause of action accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed ; Coburn v. Colledge,1897 1 QB 702 ; Gelmani v. Morriggia, 1913 2 KB 549]. The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief : Whalley v. Whalley,1816 1 MR 436]. The statute does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result. ."

(Emphasis supplied)

[23] It was further observed in paragraph 67, 68, 69, 70 and 71 as under : -

"**67.** "Cause of action" means the whole bundle of material facts, which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit. In delivering the judgment of the Board in Mussummat Chand Kour and Another v. Partab Singh and Others, 1889 16 ILR(Cal) 98, Lord Watson observed:

"Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff it refers entirely to the grounds set forth in the plaint as the cause of action, or in other words to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour." (Emphasis supplied)

68. Cause of action becomes important for the purposes of calculating the limitation period for bringing an action. It is imperative that a party realises when a cause of action arises. If a party simply delays sending a notice seeking reference under the Act 1996 because they are unclear of when the cause of action arose, the claim can become timebarred even before the party realises the same.

69. Russell on Arbitration by Anthony Walton (19th Edn.) at pp. 4-5 states that the period of limitation for commencing an arbitration runs from the date on which the "cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued:

"Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued."

70. Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.

71. In Law of Arbitration by Justice Bachawat at p. 549, commenting on Section 37, it is stated that subject to the Act 1963, every arbitration must be commenced within the prescribed period. Just as in the case of actions the claim is not to be

brought after the expiration of a specified number of years from the date when the cause of action accrues, so in the case of arbitrations the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) "action" and "cause of arbitration" should be construed as arbitration and cause of arbitration. The cause of arbitration arises when the claimant becomes entitled to raise the question, that is, when the claimant acquires the right to require arbitration. An application under Section 11 of the Act 1996 is governed by Article 137 of the Schedule to the Act 1963 and must be made within 3 years from the date when the right to apply first accrues. There is no right to apply until there is a clear and unequivocal denial of that right by the respondent. It must, therefore, be clear that the claim for arbitration must be raised as soon as the cause for arbitration arises as in the case of cause of action arisen in a civil action."

[24] It was, thus, held in paragraph 72 and 77 as under :

"**72.**Whether any particular facts constitute a cause of action has to be determined with reference to the facts of each case and with reference to, the substance, rather than the form of the action. If an infringement of a right happens at a particular time, the whole cause of action will be said to have arisen then and there. In such a case, it is not open to a party to sit tight and not to file an application for settlement of dispute of his right, which had been infringed, within the time provided by the Limitation Act, and, allow his right to be extinguished by lapse of time, and thereafter, to wait for another cause of action and then file an application under Section 11 of the Act 1996 for establishment of his right which was not then alive, and, which had been long extinguished because, in such a case, such an application would mean an application for revival of a right, which had long been extinguished under the Act 1963 and is, therefore, dead for all purposes. Such proceedings would not be maintainable and would obviously be met by the plea of limitation under Article 137 of the Act 1963.

77. Negotiations may continue even for a period of ten years or twenty years after the cause of action had arisen. Mere negotiations will not postpone the "cause of action" for the purpose of limitation. The Legislature has prescribed a limit of three years for the enforcement of a claim and this statutory time period cannot be defeated on the ground that the parties were negotiating."

[25] The observations in paragraph Nos. 78 and 79 are also relevant to be extracted hereinunder : -

"**78.** In Panchu Gopal Bose v. Board of Trustees for Port of Calcutta, 1993 4 SCC 338, this Court had held that the provisions of the Act 1963 would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party, in respect of any such matter at the time when it should have accrued but for the contract. Cause of arbitration shall be deemed to have commenced when one party serves the notice on the other party requiring the appointment of an arbitrator. The question was when the cause of arbitration arises in the absence of issuance of a notice or omission to issue notice for a long time after the contract was executed? Arbitration implies to charter out timeous commencement of arbitration availing of the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aids promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. It was further held that where the arbitration agreement does not really exist or ceased to exist or where the dispute applies outside the scope of arbitration agreement allowing the claim, after a considerable lapse of time, would be a harassment to the opposite party. It was accordingly held in that case that since the petitioner slept over his rights for more than 10 years, by his conduct he allowed the arbitration to be barred by limitation and the Court would be justified in relieving the party from arbitration agreement under Section 5 and 12(2)(b) of the Act. [See: State of Orissa v. Damodar Das, 1996 2 SCC 216].

79. The observations made by this Court in Panchu Gopal (supra) in paras 10, 11, 12, 13, 14 and 15 respectively, are also relevant. The observations read as under:

"**10.** In West Riding of Yorkshire County Council v. Huddersfield Corpn., 1957 1 AllER 669 the Queen's Bench Division, Lord Goddard, C.J. (as he then was) held that the Limitation Act applies to arbitrations as it applies to actions in the High Court and the making, after a claim has become statutebarred, of a submission of it to arbitration, does not prevent the statute of limitation being pleaded. Russel on Arbitration, 19th Edn., reiterates the above proposition. At page 4 it was further stated that the parties to an arbitration agreement may provide therein, if they wish, that an arbitration must be commenced within a shorter period than that allowed by statute; but the court then has power to enlarge the time so agreed. The period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned.

11. Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

12. In Russell on Arbitration, at pages 72 and 73 it is stated thus:

"Disputes under a contract may also be removed, in effect, from the jurisdiction of the court, by including an arbitration clause in the contract, providing that any arbitration under it must be commenced within a certain time or not at all, and going on to provide that if an arbitration is not so commenced the claim concerned shall be barred. Such provisions are not necessarily found together. Thus the contract may limit the time for arbitration without barring the claim depriving a party who is out of time of his right to claim arbitration but leaving open a right of action in the courts. Or it may make compliance with a time-limit a condition of any claim without limiting the operation of the arbitration clause, leaving a party who is out of time with the right to claim arbitration but so that it is a defence in the arbitration that the claim is out of time and barred. Nor, since the provisions concerned are essentially separate, is there anything to prevent the party relying on the limitation clause waiving his objection to arbitration whilst still relying on the clause as barring the claim." At page 80 it is stated thus:

"An extension of time is not automatic and it is only granted if 'undue hardship' would otherwise be caused. Not all hardship, however, is 'undue hardship'; it may be proper that hardship caused to a party by his own default should be borne by him, and not transferred to the other party by allowing a claim to be reopened after it has become barred. The mere fact that a claim was barred could not be held to be 'undue hardship'."

13. The Law of Arbitration by Justice Bachawat in Chapter 37 at p. 549 it is stated that just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the claim accrues, so also in the case of arbitrations, the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) 'action' and 'cause of action' in the Limitation Act should be construed as arbitration and cause of arbitration. The cause of arbitration, therefore, arises when the claimant becomes entitled to raise the question, i.e. when the claimant acquires the right to require arbitration. The limitation would run

from the date when cause of arbitration would have accrued, but for the agreement.

14. Arbitration implies to charter out timeous commencement of arbitration availing the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aid the promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. The question, therefore, as posed earlier is whether the court would be justified to permit a contracting party to rescind the contract or the court can revoke the authority to refer the disputes or differences to arbitration. Justice Bachawat in his Law of Arbitration, at p. 552 stated that "in an appropriate case leave should be given to revoke the authority of the arbitrator". It was also stated that an ordinary submission without special stipulation limiting or conditioning the functions of the arbitrator carried with it the implication that the arbitrator should give effect to all legal defences such as that of limitation. Accordingly the arbitrator was entitled and bound to apply the law of limitation. Section 3 of the Limitation Act applied by way of analogy to arbitration proceedings, and like interpretation was given to Section 14 of the Limitation Act. The proceedings before the arbitration are like civil proceedings before the court within the meaning of Section 14 of the Limitation Act. By consent the parties have substituted the arbitrator for a court of law to arbiter their disputes or differences. It is, therefore, open to the parties to plead in the proceedings before him of limitation as a defence.

15. In Mustiu and Boyd's Commercial Arbitration (1982 Edn.) under the heading "Hopeless Claim" in Chapter 31 at page 436 it is stated thus:

"There is undoubtedly no jurisdiction to interfere by way of injunction to prevent the respondent from being harassed by a claim which can never lead to valid award for example in cases where claim is brought in respect of the alleged Arbitration agreement which does not really exist or which has ceased to exist. So also where the dispute lies outside the scope of arbitration agreement.""

(Emphasis supplied)

[26] In the facts of that case, it was held by the Apex Court that it was one of a case of hopelessly barred claim, as the petitioner therein by its conduct slept over its right for more than five years. The petition seeking for appointment of Arbitrator, therefore, failed and rejected.

[27] In light of the above legal position, reverting to the facts of the instant case, there is no dispute about the fact that termination of the tripartite agreement dated

01.04.2015 was made with the consent of the parties with effect from 01.04.2016. Clause 12, termination clause of the agreement reads as under : -

> "**12. <u>Termination of the agreement :</u>**
>
> **12.1** Banas Dairy will have the right to terminate this agreement by giving one month's notice in writing to Nagar Dairy and vice-aversa.
>
> **12.2** On termination of this agreement by either of the party, each party shall return the assets and also settle their accounts within 30 days from the date of receipt of termination notice by other two parties."

[28] A perusal of the communication dated 09.04.2016, sent by the petitioner indicates that no dispute was raised by the respondent No. 1 about termination of the agreement and it was agreed by respondent No. 1 that Rs. 5,00,000/- per month would be transmitted through RTGS in the accounts of Banas Dairy namely the petitioner herein, endorsement in this regard can be found in the communication itself at page '17' of the paper-book. There is categorical statement in the arbitration petition that on the demand raised by the petitioner vide letter dated 02.05.2016 and 12.07.2016, it was intimated in the communication dated 28.07.2016 by the respondent No. 1 namely Nagar Dairy giving details of deduction that the dues of Banas Dairy amount were paid through Sabar Dairy. The said communication is appended at page '30' of the paper-book. Pursuant thereto, the petitioner wrote a letter dated 08.08.2016 to the Managing Director, Sabarkantha District Cooperative Milk Producers Union Ltd., Sabar Dairy with regard to amount deducted from Nagar Dairy, Hapud. It is stated therein that the petitioner had dues of Rs. 82,50,280/- and that it was intimated by the respondent No. 1 on 28.07.2016 in writing that Sabar Dairy had made the deduction of Rs. 30,00,000/- dues of Banas Dairy. It was, thus, requested to make payment of the deduction amount to the Banas Dairy, i.e. to the petitioner. A communication dated 14.04.2016 was also sent to Gujarat Milk Marketing Federation Ltd., Anand, one of the signatories to the agreement, to request to give necessary instructions to the Nagar Dairy and Sabar Dairy to make the payments. A communication dated 18.04.2016 sent by Gujarat Cooperative Milk Marketing Federation Ltd. to Sabar Dairy has been placed to asset that it had instructed to Sabar Dairy to clear debit balance of Banas Dairy for Nagar Dairy operations as the packing operations were being done by the Sabar Dairy at Nagar Dairy, Hapud.

[29] On 12.08.2016, with reference to the letter dated 06.08.2016 of the petitioner herein, the response was given by Sabar Dairy to state that they owed Rs. 24.46 lacs from Nagar Dairy and whatever appropriation of money had happened, it was credited to their outstanding amount and no such amount was recovered from the Nagar Dairy

(respondent No. 1) on behalf of the petitioner. The information provided by the Nagar Dairy (respondent No. 1) was patently wrong. On receipt of the said letter, a communication dated 08/09.09.2016 was sent by the petitioner to Nagar Dairy (Respondent No. 1) asking them to clear the accounts, failing which they would be forced to initiate legal action. In response thereto, a letter dated 15.10.2016 was sent by the respondent No. 1 namely Nagar Dairy, referring the same previous communication, requesting the petitioner to use its facility for Banas Dairy (petitioner) and that they were ready to give their plant on rent or lease basis.

[30] The petitioner reiterated its demand to clear balance of Rs. 82,50,280/- vide a communication dated 18.10.2016, in continuation of the demand raised by letters dated 02.05.2016, 12.07.2016 and 15.10.2016. On 13.11.2017, a letter was sent by the respondent No. 1 on the subject of clearance of debit balance, denying the demand raised by the petitioner stating that demand of Rs. 82,50,280/- of the petitioner is wholly unjustified, unreasonable and not based on factual position, which was given in the said letter. It was reiterated that some amount out of the aforesaid balance was debited by Sabar Dairy for and on behalf of the petitioner namely Banas Dairy. By raising various issues therein with regard to the transactions between the parties, it was stated that earlier there was always difference in processing of the bill with regard to TS Loss (milk sample for SNF) by us and or organisation. This difference was brought to the knowledge to the officers of the petitioner and the demand, so raised, was unjustified and incorrect, and much less than the huge loss suffered by the respondent No. 1. Therefore, the question of debit note did not arise and the claims were vehemently and categorically denied.

[31] It may further be noted that despite getting of the said response from the respondent No. 1, the petitioner herein wrote letters on the subject of clearance of balance, and on further response of the respondent No. 1, reiterating the denial / refusal, vide letter dated 13.11.2017, the notice dated 17.09.2020 was sent to invoke clause 10 of the contract, the arbitration clause. The factum of receipt of notice dated 17.09.2020 under Section 21 of the Arbitration Act, 1996, stated in the petition has not been denied by the respondent No. 1. The only contention made in the affidavitin-reply filed on behalf of the respondent No. 1 is with respect to period of limitation for filing an application. It is contended that as the demand was raised on 02.05.2019, the period of limitation would run from the said date and had expired on 01.05.2019. The notice invoking arbitration was, thus, beyond three years and the claims are barred by limitation as such.

[32] Taking note of the above facts of the case, it is evident that the respondent No. 1 had denied the claim of the petitioner for the first time by sending letter dated 13.11.2017 in response to the letter of the petitioner dated 02.05.2016, copy of which

appended at page '43' of the paper-book. The "right to apply" first arose on 13.07.2017, i.e. the starting point of limitation under Section 137 occurring to the third column of the Article, the first date when "right to apply accrues", in the facts of the instant case, is 13.07.2017. Taking note of the law laid down by the Apex Court in the case of **BSNL (supra)** and **B and T AG (Supra)**, it can be said that the time has begun to run on the aforesaid date as the petitioner was intimated of the categorical denial on the part of the respondent. As noted by the Apex Court in **B and T AG (Supra)**, the "right to apply" would accrue when differences between the parties to the agreement were evident, when the parties reached a breaking point, i.e. when a settlement with or without solution, is no longer possible. As held therein, the right to apply can be said to have accrued, "only on the date of last correspondence between the parties and the period of limitation commences from the date of last communication between the parties". Three principles as discerned by the Apex Court in **B and T AG (supra)**, as noted hereinabove, are to be applied in the facts of the present case to note that dispute arose when there was denial / repudiation of the claim of the petitioner by respondent No. 1 for the first time was communicated vide letter dated 13.11.2017. Subsequent repeated reminders / letters would not be taken into account to state that the cause of action would be of continuance nature and the claims of the parties had never attained finality. Once the time has begun to run on 13.07.2017, the cause of action, the "right to apply" accrue with the petitioner.

[33] The next question would be as to the limitation in filing arbitration application. In the instant case, the notice under Section 21 of the Act, 1996 was sent to the respondent No. 1 on 17.09.2020, which would barely two months beyond limitation period of three years as per Section 43 of the Act, 1996 read with Article 137 of the Limitation Act, 1963.

[34] The further question would be as to whether this Court at the pre-referral stage would invoke its machinery to decide the question as to when the cause of action had arisen or into the question of limitation, which is normally a mixed question of facts and law and lies within the domain of Arbitral Tribunal. In the considered opinion of this Court, this exercise cannot be entered into by this Court in view of clear position of law laid down hereinabove.

[35] As has been held in **Vidya Drolia (supra)**, in rare and exceptional cases when claims are ex-facie time barred and it is manifest that there is no subsisting disputes, the Court may refuse to make reference. The present is not one of those cases where it can be said that there exists no subsisting dispute or claim is ex-facie time barred. The delay of two months in sending the notice under Section 21 of the Act, 1996 to invoke the arbitration clause, would be required to be looked into by the Arbitrator to decide

the question as to when the cause of action had arisen and whether claims are time barred or prohibited.

[36] The issue of limitation which concerned "admissibility of the claim", must be decided by the Arbitral Tribunal, as held by the Apex Court in the case of **BSNL (supra)**. For the aforesaid, this Court is not convinced with the arguments of the learned counsel for the respondent No. 1 to reject the claim of the petitioner being ex-facie time barred or manifestly dead.

[37] The dispute / present Arbitration petition filed on 22.12.2020, is held to be arbitrable. It cannot be said that the dispute is non-arbitrable or ex-facie non-existent.

[38] As there was no response on the part of the respondent No. 1 to the notice dated 17.09.2020 and the parties have failed to reach at an agreement to refer the dispute to arbitration and at the name of the Arbitrator, I proceed to pass following :

ORDER

(i) Petition is allowed.

(ii) Mr. K.A. Puj, Former Judge, High Court of Gujarat, residing at : Bungalow No. 2, Neetibaug, Judges' Cooperative Housing Society Ltd., Behind Cinemax Theatre, Opp. High Court of Gujarat, S.G. Highway, Ghatlodia, Ahmedabad, is hereby appointed as the sole Arbitrator to resolve the disputes between the parties in accordance with the Arbitration Centre (Domestic and International), High Court of Gujarat Rules, 2021. Both Parties would also be governed by said Rules.

(iii) Registry to communicate this order to the sole Arbitrator forthwith by Speed Post.

(iv) Pending application/s, if any, stands consigned to records.