HIGH COURT OF JUDICATURE AT BOMBAY

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 207 OF 2008

Arjandas Teckchand Kashyap and Ors. … Applicants

Versus

Smt. Pooja Jaiprakash Pamnani and Ors. … Respondents

Dr. Milind Sathe, Sr. Advocate along with Mr. Chetan Kapadia along with Mr. S.K. Srivastva alongwith Ms. Simeen Shaikh i/by S.K. Srivastav & Co. for the applicants.

Mr. R.V. Govilkar alongwith Mr. B. Pawar for respondent no. 5.

Other respondents absent though served.

CORAM : R.D.DHANUKA J.
RESERVED ON : DEC 10, 2013
PRONOUNCED ON : DEC 20, 2013

ORAL JUDGMENT :

By this application filed under section 11(6) of the Arbitration & Conciliation Act, 1996 (for short "Arbitration Act") the applicant seeks appointment of an arbitrator.

2. Some of the facts relevant for the purpose of deciding this

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application are as under :

(a) By a deed of partnership dated 15th January, 1979, the applicants along with respondent nos. 4 and 5 and late Bhawabai Pamnani and late Jaiprakash Pamnani were carrying on business in partnership under the name and style of "M/s. Jeevan Development Corporation". The terms of the said partnership deed was varied by another Deed of partnership dated 22.08.1979 and was further modified by partnership deed dated 1st June, 1980. It is the case of the applicants that the dispute arose between the parties and accordingly the applicants vide letter dated 29th August, 2003 dissolved partnership firm and called upon the other partners/respondents to render the accounts of the partnership, settle the shares of each of the partner and to pay the outgoings of the society in respect of the flats in their possession and appointed Mr. Shailesh Shah, Advocate, as sole arbitrator. It is the case of the applicants that the said partnership deeds recorded an arbitration agreement and more particularly in clause 17 thereof, which reads thus :

> "17. Any dispute or differences in connection with the partnership shall be referred to the Sole Arbitration of one person mutually agreed upon and appointed by the partners hereto, all the parties hereto and the decision of the said Arbitrator shall be binding on all the parties hereto."

(b) On 5th November, 2003 the applicants filed arbitration petition

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bearing No. 266 of 2003 before the Chief Justice for appointment of arbitrator under clause 11(6) of the Arbitration & Conciliation Act, 1996. By an order dated 20th February, 2004, designate of the Chief Justice appointed Mr. Shailesh Shah as sole arbitrator. The respondents opposed appointment of the learned arbitrator then appointed on the ground that his appointment was not made by consent of the respondents. In view of the said objections by the respondents, Mr. Shailesh Shah, conveyed that it would not be possible for him to accept his appointment as arbitrator unless specific consent was obtained from the concerned parties.

(c) The applicants accordingly filed Arbitration Application No. 251 of 2004 before the Chief Justice for appointment of the another arbitrator. By an order dated 20th January, 2006, Justice A.B. Palkar former Judge of this court (as his Lordship then was) was appointed as sole arbitrator. It is stated that two arbitration meetings were held by Mr. Justice A.B. Palkar former Judge of this court. On 21/5/2008 Justice A.B. Palkar expired. The respondents did not appear before this court when said arbitration application No. 251 of 2006 was heard though served.

(d) On 4th June, 2008, the applicants filed this application for appointment of another arbitrator in view of the demise of Mr. Justice A.B.

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Palkar (retd). The respondents have not disputed the existence of the arbitration agreement.

3. Mr. Govilkar, learned counsel for the respondent no. 5 has raised preliminary objection and also addressed on merits such as :

(a) Under Rule 803E of the High Court Original Side Rules, the arbitration application under section 11(6) has to be placed on board for acceptance. Unless the application is accepted and notice is issued by the court to all the parties concerned, the matter cannot be heard finally. It is submitted that there is total non compliance of the Rule 803E read with clause 7 of the scheme framed by the Hon'ble Chief Justice under the provisions of the Arbitration & Conciliation Act, 1996.

(b) The application filed under section 11 by the applicant is hopelessly barred by law of limitation.

© There are serious allegations of fraud and misappropriation against applicants made by the respondent no. 5 in the sur-rejoinder filed by the respondent no. 5 and in view of such allegations, arbitrator can not be appointed and the dispute cannot be referred to arbitration and has to be tried by the Civil Court.

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4. Mr. Govilkar, learned counsel for respondent no. 5 in support of his submission that the procedure under Rule 803E of the High Court (Original Side) Rules is mandatory and noncompliance thereof shall result in dismissal of the arbitration application is concerned, the learned counsel placed reliance on the judgment delivered by the designate of the Hon'ble Chief Justice delivered on **7**th May, 2012 in **Notice of Motion No. 805 of 2011 in Arbitration Application No. 195 of 2010 in case of Brainvisa Technologies Pvt. Ltd. Versus Subhash Gaikwad (HUF)**. It is submitted that since no notice has been issued by the court, nor any of the respondent was informed of the first date on which the arbitration application was to appear for hearing before the learned Judge, the application filed under section 11(6) cannot be disposed of finally. Paragraphs 1 to 3 of the said judgment read thus :

> *"This Motion has been taken out for recalling an order dated 21 January 2011 passed by a Learned Single Judge, allowing an Application under Section 11 of the Arbitration and Conciliation Act, 1996. The Order dated 21 January 2011 records an undertaking that an affidavit of service would be filed within two weeks from the date of the order. The Affidavit of service was thereafter filed on 2 February 2011. From the affidavit, it appears that on 16 December 2010 the advocate for the Original Applicant under Section 11 served a copy of the Arbitration Application upon the Respondent. The Respondent has in the affidavit in support of the Motion accepted in para (2) that a copy of the notice dated 16 December 2010 was received together with the arbitration application but has stated that this was without any further details as to when the matter was to appear on Board. The Original Respondent filed his advocates' appearance on 28 January 2011. The Respondent has submitted that the Order dated 21 January 2011 was passed ex-parte since there was no*

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notice either from the Applicant or from this Court when the matter was likely to be taken up on Board.

Rule 803E of the Bombay High Court (Original Side) Rules provides as follows :-

*" **R.803E. Notice of Filling Application to persons likely to be affected.-** Upon any application by petition under the Act, the Judge in chambers shall, if he accepts the petition, direct notice thereof to be given to all persons mentioned in the petition and to such other persons as may seem to him to be likely to be affected by the proceedings, requiring all or any of such persons to show cause, within the time specified in the notice, why the relief sought in the petition should not be granted. "*

2. The Rule, contemplates that the Judge in Chambers shall direct notice of the petition to be given to the persons mentioned in the petition to require them to show cause within the time specified in the notice, why the relief sought in the petition should not be granted. In the present case no notice was issued by the Judge in Chambers as required by Rule 803E. It may also be noted that Clause (7) of the Appointment of the Arbitrators by the Chief Justice of Bombay High Court Scheme 1996 is also in similar terms and provides as follows :-

*"**7. Notice to affected persons.-** Subject to the provisions of paragraph 6, the Chief Justice or the person or the institution designated by him shall direct that a notice of the request be given to all the parties to the arbitration agreement and such other person or persons as may seem to him or is likely to be affected by such request to show cause, within the time specified in the notice, why the appointment of the arbitrator or the measure proposed to be taken should not be made or taken and such notice shall be accompanied by copies of all documents referred to in paragraph 2 or, as the case may be, by information or clarification, if any, sought under paragraph 5."*

3. In the present case it will appear that no notice was issued by the Court nor was the Respondent informed of the first date on which the arbitration application was to appear for hearing before the Learned Judge in the notice served by the Advocate. In these circumstances, the contention that there was no valid service when the Order was passed by the Learned Single Judge on 21 January 2011 would have to be accepted. Sufficient cause for condoning the delay of 15 days has also been made out. The Motion is accordingly made absolute in terms of prayer clauses (a) and (b)."

5. It is submitted by Mr. Govilkar that though respondent no. 5 had

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accepted the service as recorded by the learned designate Judge of the Chief Justice and the matter was placed for final hearing, respondent no. 5 was under the impression that the arbitration application must have been accepted and compliance of Rule 803E read with clause (7) of the scheme must have been made by the applicants. It is submitted that under this bona fide mistake on the part of respondent No. 5, respondent did not raise such plea before this court in the affidavit filed.

6. In so far as issue of limitation is concerned, Mr. Govilkar placed reliance on the letter dated 17th February, 1987 addressed by advocates for the applicants to the respondents calling upon the respondents to vacate flat on 6th and 7th Floor and room on the ground floor and parking spaces and to be sold by the partnership so that the partnership could be wound up and accounts be made up. In the said letter, it was stated that the applicants would have no other alternative but to file a suit for dissolution of the partnership and the court receiver appointed on all the assets of the partnership with powers to dispose of all the assets of the partnership. The learned counsel submits that the cause of action had thus arisen any time prior to 17th February, 1987 whereas the notice invoking arbitration agreement was issued by the applicants only on 29th August, 2003 i.e. much after three years from the date of commencement of cause of action and thus

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the application under section 11 filed by the applicants is barred by law of limitation under Article 137 of schedule to the Limitation Act, 1963. Since the arbitration notice was issued after three years from the date of cause of action, the application having been filed in respect of the dead claims, Chief Justice or his designate shall decide that issue and shall dismiss the arbitration application being barred under Article 137 of the Limitation Act. In support of this submission, Mr. Govilkar, learned counsel appearing for the respondents placed reliance on the judgment (1) in the case of **Adinath S.S. Karkhana Vs. Triveni Engineering & Industries Limited delivered by the then Chief Justice reported in 2008(2) Mh.L.J. 443 (2) judgment of the Supreme Court in the case of Asia Resorts Ltd. Vs. Usha Berco Ltd. AIR 2002 Supreme Court 55 and (3) judgment of the Supreme Court in the case of Union of India and anr. Vs. M/s. L.K. Ahuja, (1988) 3 SCC 76.** In support of his submission that in view of there being serious allegations of fraud made by the respondent no. 5 and thus such issues cannot be referred to arbitration, the learned counsel placed reliance on the judgment of the Supreme Court in the case of **N. Radhakrishnan Vs. Maestro Engineers & Ors. (2010) 1 SCC 72.**

7. Mr. Govilkar, learned counsel submits that since the Chief Justice or his designate has been empowered to record evidence on the issue whether

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the claims are barred by law of limitation or not under section 11(6) it presupposes that such application under section 11(6) of the Arbitration Act is before the Court and such proceedings are judicial proceedings. Mr. Govilkar made an attempt to distinguish the judgment of the Supreme Court in the case of SBP and company Vs. Patel Engineering Limited and the judgment delivered by Dr. D.Y. Chandrachud, the then designate Judge (now Chief Justice of Allahabad High Court) and submits that the said judgment of this court requires reconsideration. Mr. Govilkar reiterated his submission that Article 137 is applicable to application filed under section 11 and claims are barred by law of limitation. It is submitted that though other respondents are not appearing before this court for whatever reasons, respondent no. 5 is entitled to raise issue of non service of the proceedings and notice is mandatory according to the learned counsel under rule 803E of the High Court rules read with clause 7 of the scheme. It is submitted that the issue of fraud though raised in the sur-rejoinder, the designate Judge can consider such allegations and may refuse to appoint arbitrator. In so far as orders passed by the designate of Chief Justice, in earlier two arbitration applications are concerned, it is submitted that though the respondents have not appeared for whatever reasons, those orders passed by the designate of the Chief Justice were nullity as the arbitrators were appointed by those

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orders though both these applications were hopelessly barred by law of limitation. It is submitted that thus designate of Chief Justice in this proceedings cannot take cognizance of such orders which are nullity according to the learned counsel.

8. Mr. Govilkar placed reliance on paragraphs Nos. 2 and 4 of the judgment in the case of Adinath SSK Karkhana (supra) which read thus :

> "2. Disputes had arisen between the parties and the petitioner filed a suit being Civil Suit No. 666 of 1997 before the Court of Civil Judge, Senior Division, Pune for recovery of Rs. 4,33,98,558.76. In that suit the other party filed an application under Section 8 of the Act which was contested by the petitioner. Vide Order dated 30th December 2002 the learned Judge dealing with the suit allowed the application holding that there were disputes between the parties which were liable to be referred to arbitration in accordance with clause 19 of the agreement. A copy of the said order is annexed at Exh C to the petition. One Shri V.P.Rane, at the behest of the petitioner or otherwise, agreed to act as the arbitrator. On 15th May 2006 said Shri Rane claimed to have entered upon the reference and fixed hearing on 22nd July 2006. The respondents vide their letter dated 1st August 2006 replied through their counsel to the notice of the arbitrator stating therein that they had never agreed for appointment of Shri Rane as the sole arbitrator and they were not willing to continue the arbitration proceedings before the said arbitrator, terming it as a unilateral reference. It was further stated that Shri Rane had no authority to proceed with the proceedings. In fact the respondents again through their counsel on 21st August 2006 objected to the very jurisdiction of the said arbitrator and questioned him to clarify as to how he was acting as an arbitrator. The opposition to the jurisdiction as well as requiring the said arbitrator to disclose source of his appointment as the sole arbitrator was reiterated by the respondents vide their letter dated 30th August 2006. During this period the arbitrator had also informed the respondents that he was appointed as the arbitrator through order of the court. In the letter dated 15th May 2005 the arbitrator had stated as under:
>
> In the Special Civil Suit No. 666 of 1997 between the parties mentioned above, the undersigned has been appointed as an arbitrator.
>
> The arbitrator wishes to commence the arbitrator the arbitration proceedings in the matter.

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The parties are hereby directed to forward to the Arbitrator their terms of reference not later than 30th of June 2006.

The arbitrator has fixed the meeting to consider the terms of reference as also other related issues on 22nd July 2006 at the following address at 2.00 p.m.

Shri V.P.Rane

1076/24, Giriraj Housing Society

Opp. Dhahanukar Bungalow

Old Chaturshringi Road, Gokhale Road

Pune 411016

Tel No. 020 25656421, Mobile No. 9822979874 Receipt of this letter be acknowledged immediately

sd/- V.P.Rane Arbitrator.

ORDER

Inform this to legal adviser accordingly.

Even in his letter dated 14th August 2006 this concept was further clarified by the arbitrator. This according to the respondents is not factually correct.

4. Besides the above judgment, the Supreme Court in the case of Asia Resorts Ltd. v. Usha Breco Ltd. MANU/SC/0689/2001 : AIR2002SC55 , has held that where notice was served on 17th April, 1990 stating that the party would like to take legal action for recovery of its dues, the cause of action would be deemed to have arisen on that date. Reply to the notice was sent on 6th April, 1993. This did not amount to effective mutual consultation between the parties or acknowledgment. The claim petition under Section 20 of the old Act filed on 30th November, 1993 was held to be barred by time. There is no application filed in the present case on the strength of Article 137 of the Limitation Act which would apply to such petitions. The same could be filed within three years from the date of cause of action. There is no explanation on record before us as to why the petition has not been filed within the prescribed period of limitation. The Court had specifically passed an order on 30th December, 2002, putting the entire controversy that there was an existing and binding agreement between the parties and the disputes /claims were referable to arbitration in contemplation of clause 19 of the Agreement. This order, as already noticed, was never challenged by any of the parties to the lis and there could be no

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justification whatsoever for the petitioner to file the present petition beyond the period of three years, even if computed from that date. This would clearly show that the petition is barred by time and suffers from inordinate delay and laches on the part of the petitioner. The claims stated in the petition have also become barred by time as they have sought to be referred to arbitration after the lapse of more than 10 years."

9. Paragraph 15 and 18 of the judgment of Asia Resorts Ltd. Vs. Usha Berco Ltd. (supra) , read thus :

"15.There is not much controversy that the residuary article 137 of the Limitation Act applies so far as the period of limitation is concerned for an application under Section 20 of the Arbitration Act, 1940. The residuary article 181 of the Limitation Act, 1908 was replaced by Article 137 in the Limitation Act, 1963. Earlier, Article 181 was applicable only in respect of application to be filed under the Civil Procedure Code. This Article was replaced by Article 137 in the Limitation Act, 1963 in a modified form. By insertion of Article 137, it cast a wider net so as to include any application for which no period of limitation was provided else where in that division. The third division of the Limitation Act, 1963 deals with various applications to be filed under various special statutes. The definitions of 'application' and 'application' are also inserted in the Limitation Act, 1963. Therefore, it is clear that the intention of the legislature was to provide a residuary article prescribing period of limitation for filing petitions and applications under the various special laws. This Court in Kerala State Electricity Board vs. T.P.Kunhaliumma held that the Article 137 would apply to any petition or application filed under any Act to a civil court and it cannot be confined to applications contemplated by or under the Code of Civil Procedure. In Major (Retd.) Inder Singh Rekhi vs. Delhi Development Authority ; Union of India and Another vs . M/s. L.K. Ahuja and Co. MANU/SC/0544/1988 : [1988]3SCR402 ; Steel Authority of India Ltd. vs. J.C. Budharaja, Government and Mining Contractor MANU/SC/0542/1999 : AIR1999SC3275 ; and Union of India and another vs. M/s. Vijay Construction Co. , this Court held that the period of limitation for filing application under Section 20 of the Arbitration Act, 1940, is as prescribed under Article 137 of the Limitation Act.

18. The appellant herein has filed an application under Section 5 of the Limitation Act praying that the delay in filing the application under Section 20 of the Act be condoned. Section 5 of the Limitation Act says any appeal or any application, other than application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant

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satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. The applicant can show sufficient cause for not filing the application in time. It appears that this Court had no occasion to consider whether Section 5 of the Limitation Act, 1963 could be applied in the case of an application to be filed under Section 20 of the Arbitration Act, 1940. The Division Bench of the High Court of Delhi in Union of India and another vs. M/s. Vijay Construction Co. AIR 1981 Delhi 193 held that the benefit of Section 5 of the Limitation can be availed by the applicant for an application under Section 20 of the Arbitration Act. Going by the provision contained in Section 5 of the Act, we are also of the view that in an appropriate case the court can extend the benefit of the said Section."

10. Paragraph 8 of the judgment in Union of India Vs. L.K. Ahuja (supra) read thus :

"8. In view of the well-settled principles we are of the view that it will be entirely a wrong to mix-up the two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act and, secondly, whether the claim to be adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, if on admitted facts a claim is found at the time of making an Order under Section 20 of the Arbitration Act, to be barred by limitation. In order to be entitled to ask for a reference under Section 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable. In this case the claim for reference was made within three years commencing from April 16, 1976 and

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the application was filed on December 18, 1976. We are, therefore, of the view that the High Court was right in this case. See in this connection the observations of this Court in Major (Retd.) Inder Singh Rekhi v. D.D.A. MANU/SC/0271/1988 :"

11. Dr. Sathe, learned senior counsel for the applicants on the other hand dealt with the preliminary objections raised by the learned counsel for respondent No. 5 and also made submissions on the maintainability of this application and for appointment of the arbitrator.

12. In so far as the issue of applicability of Rule 803E read with clause 7 of the scheme framed by the Chief Justice of this court and the alleged non compliance thereof is concerned, it is submitted by the learned senior counsel that rule 803E does not apply to arbitration application filed under section 11 of the Arbitration Act, 1996. It is submitted that clause 7 of the scheme is applicable which does not contemplate that the arbitration application has to be placed on board for acceptance/admission. The learned senior counsel submits that in any event the matter had appeared before the Hon'ble the then Chief Justice on 12th September, 2008 when the order was passed for issuance of court notice to the respondents returnable on 10th October, 2008. Liberty was granted to the applicants to serve by hamdasta. It is submitted that pursuant to the said order passed by the then

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Chief Justice, notices were served from time to time upon all the respondents. During the pendency of this application, some of the respondents expired. Even one of the applicants expired. Amendments were carried out. Learned senior counsel placed reliance on the service report submitted by the Officer of this Court on 27th April, 2011 to the effect that after verifying the papers and proceedings, he had found that service was effected in the matter. Respondent nos. 1 to 3, 4 and 7 were served through paper publication as well as bailiff and the representatives of the applicants had affixed zerox copy of the arbitration application informing the next date of hearing i.e. 21st April, 2011 at the conspicuous places. In so far as respondent no. 5, 6(e), 8 to 11 are concerned, the packets were sent through courier service. As per paragraph 5 of the affidavit, service was complete. In so far as respondent nos. 6(a), 6(b) and 6(c) are concerned, it is submitted that the packets were sent through R.P.A.D., and acknowledgement was accepted. In respect of service on respondent no. 6(d), it is submitted that acknowledgement of registered packet was awaited and in so far as respondent no. 12 is concerned, packet was returned with remark unclaimed. My attention is invited to the order dated 29th June, 2012 passed by the then designate Judge taking cognizance of the affidavit of service dated 29th June, 2012 and restoring the Arbitration Application to file by allowing Notice of Motion filed

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by the applicants. By the said order, the applicants were directed to effect fresh service of the arbitration application on the respondents.

13. On 9th January, 2013, this matter appeared before the designate Judge of this court when respondent no. 5 along with his counsel were present in Court. On oral application made by the applicant's counsel for permission to effect service on the respondents other than respondent no. 5 is accepted by way of substituted service. The designate Judge accordingly granted liberty to the applicants to effect service on the respondents by substituted service by publication of notice or by all possible modes within four weeks from the date of the said order. It is made clear that if the respondents were not served, the application to stand dismissed without further reference to the court. The matter was directed to be placed on board for hearing on 13th February, 2013 alongwith other connected matters. By order dated 1st March, 2013, the designate Judge extended the returnable date for effecting substituted service in terms of order dated 9th June, 2013 till 5th April, 2013. When the said order was passed, respondent no. 5 was present in court and his appearance has been noted.

14. Dr. Sathe, the learned senior counsel placed reliance on three affidavits of service filed in this proceedings in support of his submission

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that all the respondents are duly served pursuant to the directions issued by the designate Judge as can be demonstrated from the affidavits of service which are filed in this proceedings. It is submitted that in any event, there is substantial compliance of the Rule 803E if it is applicable and also clause 7 of the scheme framed by the Hon'ble Chief Justice. It is submitted that since other respondents have not chosen to appear in this proceedings though served and no affidavit in reply has been filed, Respondent no. 5 thus cannot be allowed to raise any issue regarding service of the proceedings and notice as sought to be canvassed by the respondent no. 5.

15. As far as issue of limitation raised by respondent no. 5 is concerned, Dr. Sathe, learned senior counsel submits that even though at one stage, the applicants had called upon the respondents to vacate some of the properties and contended that the same ought to have been sold and had not taken any steps pursuant to the said letter, the applicants had finally issued notice dissolving the said firm on 29th August, 2003 and has invoked arbitration agreement simultaneously. The learned senior counsel placed reliance on Article 5 of the schedule to the Limitation Act which provides for the limitation of three years for filing suit in respect of the cause of action arisen on the dissolution of the firm. It is submitted that thus limitation would commence from the date when the said firm is dissolved. Limitation

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have stopped when the applicants issued notice for appointment of arbitrator i.e. on 29th August, 2003 was received by the respondent. Learned senior counsel submits that the application for appointment of arbitrator was filed on 5th November, 2003 itself. In view of the objection raised by the respondents, before the learned arbitrator by addressing letters, the then learned arbitrator refused to accept his appointment. Though respondents were served with notice and the papers and proceedings in respect of the arbitration application filed by the applicants (Arbitration Application No.254 of 2004), respondents chose not to appear. The designate Judge therefore, by an order dated 20th January, 2006 appointed a retired Judge of this Court who held two meetings. The learned arbitrator, however, expired on 21st May, 2008. On 4th June, 2008, present application is filed by the applicants for appointment of arbitrator. It is submitted that since Article 137 does not apply to arbitration application filed under section 11, there is no question of such application being barred by law of limitation. In any event, since the first application was filed in the year 2003 itself, after issuing notice under section 21, i.e. notice dated 29th August, 2003, said application was within time. This application filed in the year 2006, is for filling up the vacancy having arisen due to demise of Justice A.B. Palkar, former Judge of this court who was appointed as arbitrator by order dated 20th January, 2006.

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16. Learned senior counsel placed reliance on the judgment of the Supreme Court in the case of National Insurance Company Limited Vs. Boghara Polyfab Private Limited, (2009) 1 Supreme Court Cases 267 and in particular paragraph 19, 22 and 23. It is submitted that whether the claims made by the applicants are barred by law of limitation or not has to be decided by the arbitral tribunal. It is not mandatory for the Chief Justice or his designate to decide the issue as to whether the claims are barred by law of limitation or not. The relevant paragraphs of the judgment of the Supreme Court in the case of National Insurance company Limited (supra) read thus :

> "19. In *SBP & Co. v. MANU/SC/1787/2005 :Patel Engineering Ltd.* AIR2006SC450 , a seven Judge Bench of this Court considered the scope of Section 11 of the Act and held that the scheme of Section 11 of the Act required the Chief Justice or his designate to decide whether there is an arbitration agreement in terms of Section 7 of the Act before exercising his power under Section 11(6) of the Act and its implications. It was of the view that Sub-sections (4), (5) and (6) of Section 11 of the new Act, combined the power vested in the court under Sections 8 and 20 of the old Act (Arbitration Act, 1940). This Court held:
>
> It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. *He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection.* It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with

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the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. *For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary.* We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal.

47.(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. (emphasis supplied)

22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.* This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1 The issues (first category) which Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2 The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

(a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

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22.3 The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.

23. It is clear from the scheme of the Act as explained by this Court in *SBP & Co.,* that in regard to issues falling under the second category, if raised in any application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice of his Designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue."

17. Dr. Sathe also distinguished the judgment of the designate Judge of this court in the case of Brainvisa Technologies Pvt. Ltd. (supra) on the ground that Rule 803E do not apply to arbitration application filed under section 11 and in the alternative there was substantial compliance of the service of notice on the parties. Dr. Sathe, learned senior counsel distinguished the judgments of this court in the case of Adinath SSK Vs. Triveni Engineering (supra) on the ground that the issue involved before the Hon'ble the Chief Justice in that matter was whether the application filed under section 20 of the Arbitration Act, 1940 which application/suit was before court was barred by law of limitation or not and thus the judgment

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in that matter is clearly distinguishable on the facts of this case and are not applicable. Dr. Sathe also distinguished the judgment of the Supreme Court in the case of Asia Resorts Ltd. (supra) on the ground that the said judgment was dealing with application/suit under section 20 of the Arbitration Act, 1940 and the same is not applicable to this application filed under section 11(6) of the Arbitration & Conciliation Act, 1996. Dr. Sathe, distinguished the judgment of the Supreme Court in the case of Union of India Vs. L.K. Ahuja (supra) on the similar grounds. In so far as submission of Mr. Govilkar that there are allegations of fraud made in the affidavit filed by 5th respondent and thus the issue cannot be decided by the arbitrator is concerned, Dr. Sathe invited my attention to the paragraphs in the sur-rejoinder and submits that there are no such allegations of fraud as orally canvassed by the learned counsel for respondent no. 5. It is submitted that in any event all the pleadings of the parties relating to accounts would be considered by the arbitrator and cannot be considered by the learned designate of the Chief Justice in this proceedings. It is submitted that the judgment of the Supreme Court in the case of N. Radhakrishnan relied upon by the learned counsel is not applicable to the facts of this case at all.

18. Dr. Sathe placed reliance on the judgment of this court delivered on 26th August, 2010 in the case of M/s. Vashi Builders Pvt. Ltd. Vs. Green

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Blaze Coop. Hsg. Soc. Ltd in Arbitration Application No. 199 of 2007 in support of his submission that since the application under section 11(6) of the Arbitration & Conciliation Act is not before the court, provisions of Limitation Act would not be applicable to such application under section 11(6). Paragraphs 3 to 5 of the said judgment read thus :

> "3. The contention which has been urged on behalf of the Respondent cannot be accepted for more than one reason. From the judgment of the Supreme Court in SBP & Co. v. Patel Engineering Limited (2005) 8 SCC618 it is clear that though the power which is vested with the . Chief Justice under Section 11(6) has judicial characteristics, the Chief Justice is not for that purpose constituted as a Court when he exercises the power. In Patel Engineering the Supreme Court observed that the fact that instead of the Court, " the powers are conferred on the Chief Justice, has to be appreciated in the context of the statute". The Supreme Court observed that Parliament was conscious of the definition of the expression "Court" in Section 2(e) of the Arbitration and Conciliation Act, 1996 which is defined to mean the principal civil court of original jurisdiction in a district and to include the High Court in exercise of its ordinary original civil jurisdiction. Parliament, the Supreme Court held, did not want the power under Section 11(6) to be conferred upon the District Court or the High Court in the original jurisdiction and the intent was to confer power on the highest judicial authority in the State, or as the case may be, in the country.
>
> 4. These observations of the Supreme Court were construed by Mr. Justice B.N. Srikrishna in Rodemadan India Ltd. v. International Trade Expo Centre Ltd. (2006) 11 SCC 651. The submission which was urged before Mr. Justice B.N. Srikrishna, as a designate of the Chief Justice of India, was that as recourse had been taken by the Petitioner under Section 9 for obtaining relief by moving the Delhi High Court, the consequence was that by reason of Section 42 it could be only that Court which has jurisdiction upon the arbitral tribunal. While rejecting the submission, it was held that neither " the Chief Justice nor his designate under Section 11(6) is a "Court" as contemplated under the Act" and the bar of jurisdiction under Section 42 was only intended to apply to a Court as defined in Section 2(e).
>
> 5. Once it is held that the Chief Justice or his designate while exercising powers under Section 11(6) is not a Court, it is impossible to accede to the submission that the provisions of Article 137 of the Limitation Act would come into operation. Section 43 of the Arbitration and Conciliation Act also specifies that

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> the Limitation Act 1963 shall apply to arbitrations as it applies to proceedings in Court. In these circumstances, there is no merit in the defence which has been urged on behalf of the Respondent. In view of the death of the sole arbitrator it is necessary for this Court to appoint a new arbitrator, instead and in place of the arbitrator earlier appointed. Smt. Justice K.K. Baam is appointed as sole arbitrator to adjudicate upon the disputes and differences between the parties. The Application is accordingly disposed of."

19. Mr. Govilkar, learned counsel for the respondent sought to distinguish the judgment of the Supreme Court in the case of National Insurance company Limited (supra) on the ground that there is no bar in Chief Justice or his designate Judge deciding as to whether the claims are barred by law of limitation or not.

REASONS AND CONCLUSIONS :

20. Rule 803A and 803B provides that the proceedings otherwise provided under Rule 803C and 803K, all applications should be made by the petitioners and shall be placed on board for admission after prior notice to all parties concerned. A perusal of Rule 803 reveals that upon any application by petitioner under the Act, the Judge in Chambers shall, if he accepts the petition, direct notice thereof to be given to all persons mentioned in the petition and to such other persons as may seem to him to be likely affected by the proceedings, requiring all or any of such persons to show cause, within the time specified in the notice, why the relief sought in the petition should not be granted. In my view, Chapter XLIIIA would not apply to applications filed under section 11(6) of the Arbitration & Conciliation Act. The petitions

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which are referred in Chapter XLIIIA are proceedings before the court and not before the Chief Justice or his designate.

21. In my view, clause 7 of the scheme which is specifically framed by the Chief Justice under section 11 (6) of the Arbitration & Conciliation Act, 1996 would be applicable. The language of Rule 7 of the scheme framed by the Chef Justice clearly suggests that all the parties have to be served with the notice. I am not inclined to accept the submissions made by Mr. Govilkar learned counsel for the respondent no. 5 that the application under section 11(6) of the Arbitration Act ought to have been placed on board for admission or acceptance or ought to have been accepted by the Chief Justice or his designate and notice was mandatorily to be issued by the court and not by the parties.

22. No such objection has been raised by respondent no.5 in the affidavit in reply. In any event, a perusal of the orders passed by the Chief Justice or his designate, clearly indicates that the court had issued notice vide order dated 12th September, 2008 to the respondents and liberty was granted to the applicants to serve respondents by hamdusta. Notices have been served on the respondents. A perusal of the service report submitted by the Associate of this court, pursuant to the order passed by the Chief Justice on 21st April, 2011, clearly indicates that all the respondents have been served. On perusal

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of the order dated 9th January, 2013 passed by the designate Judge, it is clear that respondent no. 5 through his learned counsel had made a statement that respondent no. 5 has been served with the copy of the application. After recording statement made by respondent no. 5 through his learned counsel, this court directed the applicants to serve other respondents by way of substituted service and directed the office to place the matter on board for hearing along with other connected matters. A perusal of the roznama of this proceedings would clearly indicate that this matter had appeared on board for more than ten times for hearing when 5th respondent either in person or through his counsel had appeared and did not raise any such objection. At no point of time respondent no. 5 raised any objection as to why matter was on board for hearing or directed to be placed on board for hearing though the same was not accepted by the Judge in Chamber or that no notice was served by the Court. Respondent no. 5 has participated in the matter all through out without raising any objection orally or by raising such objection in the affidavit in reply. In my view such objections raised by the respondent no. 5 across the bar is made out of frustration, is baseless and untenable.

23. *On perusal of the affidavit of services dated 12th September, 2013 filed by the applicants, it is clear that the respondent nos. 3, 4, 5, 6a, 6b, 6c, 6d, 7 to 9 and 11 and 12 are served. On perusal of the affidavit of service dated*

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1st April, 2013, it is clear that the applicant had published notice in the newspaper "Business Standard, Hyderabad" in English Edition on 22nd March, 2013. Respondent nos. 1 to 4, 6a, 6e, 7 to 12 are accordingly served. On perusal of the affidavit of service dated 1st April, 2013 filed by the applicant it is clear that applicant had published notice in the newspaper "Gulf Today" on 23rd March, 2013 in Dubai. Respondent nos. 1 to 4 and 12 are thus duly served. Respondent No. 5 has already waived service. All the respondents are thus served. Except respondent no. 5, none other respondents have appeared in this proceedings nor any reply is filed.

24. On conjoint reading of the rules forming part of chapter XLIIIA and clause 7 of the scheme framed by the Hon'ble Chief Justice, I am of the view that such application filed under section 11(6) of the Arbitration Act are not required to be accepted and or admitted by the Chief Justice or his designate and there is no mandatory requirement of service of notice through court before hearing the matter. Some times Chief Justice or his designate passes such order for issuance of notice when it is found that the respondent is not served by the applicant by private service or respondent is avoiding service. Be that as it may, on perusal of the record I am of the view that there is compliance of issuance of notice by the applicants and matter has

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been rightly placed on board for hearing. There is no merit in the submission of Mr. Govilkar on this issue.

25. In so far as issue of limitation is concerned, the applicants had issued notice for dissolution of partnership and had invoked arbitration agreement on 29th August, 2003. On perusal of section 11(6) of the Arbitration Act, 1996, it is clear that the application has to be made before the Chief Justice for appointment of arbitrator, if the party fails to act as required under the procedure agreed upon by the parties, or before any person or institute designated by the Chief Justice to take necessary measures. In my view, the application under section 11(6) is not before the court. Reading of section 43 of the Arbitration Act, it is clear that Limitation Act, 1963 shall apply to arbitrations as it applies to the proceedings in court. Since the proceedings under section 11(6) is not before the court, article 137 of the Limitation Act, 1963 in my view is not applicable to this application filed under section 11(6) of the Act. This court in case of M/s. Vashi Builders Pvt. Ltd. (supra) after considering the judgment of the Supreme Court in the case of SBP Engineering (supra) and judgment of the Supreme court in the case of Rodamanan India Ltd. Versus International Trade Expo Centre Ltd. (2006) 11 SCC 651 has held that article 137 of the Limitation Act is not

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applicable to application filed under section 11(6) as the same is not before the court. I am respectfully bound by the judgment of the Supreme Court in the case of SBP Engineers, in the case of Rodemadan India Ltd. and judgment in the case of M/s. Vashi Builders Pvt. Ltd.

26. In so far as the issue whether claim made by the applicants are barred by law of limitation or not, reference to the judgment of the Supreme Court in the case of National Insurance Company Limited (supra) would be relevant. In paragraph 22 of the said judgment, the Supreme Court has categorized three types of issues which may arise in an application under section 11 of the Arbitration Act. It is held by the Supreme court that whether claim is dead (long barred) claim or alive claim, it is for the Chief Justice or his designate to choose whether to decide such issue or to leave them to the decision of the arbitral tribunal. Supreme Court in the case of Indian Oil Vs. SBP Engineering Ltd. AIR 2011 SC 987 has held that the designate Judge shall avoid the risks and dangers involved in deciding an issue relating to the tenability of the claim without necessary pleadings and documents, in a proceedings relating to the limited issue of appointing an arbitrator. It is held in that matter that the designate Judge committed a jurisdictional error in dismissing the application filed by the appellant under section 11 of the Act, on the ground that the claim for extra cost was barred by res judicata and by

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limitation. The Supreme Court has set aside the said judgment of the designate Judge and has held that it is open to the respondent to raise all contentions against the claim of the applicant including the contention of limitation, maintainability and res judicata, before the arbitrator. I am respectfully bound by the judgment of the Supreme Court in the case of National Insurance Company and in the case of Indian Oil Ltd. (supra). Paragraph 19 of the Judgment of the Indian Oil Ltd. (supra) reads thus :

> "19. The Designate should have avoided the risks and dangers involved in deciding an issue relating to the tenability of the claim without necessary pleadings and documents, in a proceeding relating to the limited issue of appointing an Arbitrator. It is clear that the Designate committed a jurisdictional error in dismissing the application filed by the Appellant under Section 11 of the Act, on the ground that the claim for extra cost was barred by res judicata and by limitation. Consideration of an application under Section 11 of the Act, does not extend to consideration of the merits of the claim or the chances of success of the claim."

27. In my view, issue of limitation is a mixed question of fact and law and merely on the basis of limited averments made in the application under section 11 for the purpose of appointment of arbitrator, Chief Justice or his designate cannot decide the plea of limitation and the same can be considered by the arbitral tribunal on merits after giving opportunity to both the parties to lead documentary as well as oral evidence, if necessary. I am

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thus not inclined to record any finding as to whether the claims of the applicant before the arbitral tribunal would be barred by law of limitation or not and such issue is kept open to be adjudicated upon by the arbitral tribunal.

28. On perusal of the judgment of Supreme Court in case of Union of India Vs. L.K. Ahuja (supra) and Asia Resorts Ltd. (supra) relied upon by Mr. Govilkar, learned counsel for respondent no. 5, on the issue of limitation, it is clear that these judgments courts were considering applications filed under section 20 of Arbitration Act, 1940, which were required to be filed before a court. In my view, article 137 of the limitation Act applies to application before the court. Since application under section 11(6) of the Arbitration Act is not before the court, these judgments which were dealing with the applications filed under section 20 of the Arbitration Act, 1940 are not applicable to the application filed under section 11(6) of the Arbitration & Conciliation Act, 1996 and reliance placed thereon is totally misplaced. In so far as judgment in case of Adinath Sahakari Sakhar Karkhana (supra) is concerned, though the said judgment was delivered on 18/10/2007, the Hon'ble then Chief Justice did not notice the judgment of Supreme Court in case of SBP & Co. Vs. Patel Engineering Ltd. (supra) and judgment of Mr. Justice B.N. Shrikrishna (then designate Judge of the Hon'ble

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Chief Justice of India) in Rodemadon India Ltd. (supra) delivered in 2006.

29. In my view there is no merit in the submission of Mr. Govilkar that earlier orders passed by the Chief Justice or his designate are nullity in view of the appointment of the earlier arbitrators having been made inspite of application under section 11(6) having been allegedly time barred or otherwise.

30. As far as issue of fraud alleged by the learned counsel appearing for the 5th respondent is concerned, on perusal of the sur-rejoinder, I am of the view that there are no allegations of fraud or forgery or even in the sur-rejoinder filed by respondent no. 5. Mr. Govilkar, is not able to point out how judgment of the Supreme Court in case of N. Radhakrishnan (supra) would apply to the facts of this case. The reliance placed by the learned counsel on the judgment of the Supreme Court in the case of N. Radhakrishanan is misplaced.

31. Since there is no dispute about the existence of arbitration agreement, and since earlier arbitrator appointed by the designate of Chief Justice has expired, vacancy having arisen is required to be filled by appointing another arbitrator.

32. Shri Justice Bhimrao Naik, Former Judge of this Court is appointed as sole arbitrator in place of erstwhile arbitrator who has expired.

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33. Arbitration Application is disposed of. There shall be no order as to costs.

(R.D.DHANUKA, J.)

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