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

Pronounced on: 07.10.2024

+ CS(OS) 2340/2008

M/S SAIPEM TRIUNE ENGINEERING PVT. LTD Plaintiff

Through: Mr. Kavin Gulati, Sr. Adv. with Mr.
Rony O. John, Mr. Piyush Swami and
Mr. Dushyant Sharma, Advs.

versus

INDIAN OIL PETRONAS PVT LTD Defendant

Through: Mr. Jayant Mehta, Sr. Adv. with Mr.
Indranil Ghosh, Ms. Sharmistha
Ghosh, Mr. Palzer Mohtan, Ms.
Yamini Mookherjee, Ms. Nikita, Ms.
Mrinal Chaudhry and Ms. Mehar
Bedi, Advs.

CORAM:
HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

I.A. 11505/2023 (filed by Plaintiff under Section 151 CPC seeking restoration of CS (OS) 2340/2008)

1. The present application has been filed by the plaintiff seeking restoration of suit being CS (OS) 2340/2008.
2. Sans the unnecessary details, the facts which are relevant for deciding the controversy in the present application are that the plaintiff had originally



filed the present suit on 06.11.2008 for recovery of Rs.1,79,92,366/- against the defendant in respect of its claims of unpaid dues and for damages suffered by the plaintiff on account of illegal termination of the contract and wrongful invocation of its bank guarantee by the defendant.

3. On 10.01.2011, this Court referred the disputes in the suit to arbitration by allowing the defendant's application [I.A. 15811/2008] filed under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act').

4. The order dated 10.01.2011 was challenged by the plaintiff before the Division Bench of this Court in FAO (OS) 113/2011 and same was dismissed on 01.03.2011 with a liberty to the plaintiff to raise the objection as to existence / maintainability / efficacy of the arbitration clause before the arbitral tribunal.

5. In the arbitration proceedings before the learned sole Arbitrator, the plaintiff filed an application under Section 16 of the Act challenging the jurisdiction of the tribunal to adjudicate the disputes between the parties. However, the said application was dismissed by the learned sole Arbitrator.

6. Thereafter, the learned sole Arbitrator concluded the arbitration proceedings and passed an award dated 29.07.2015 disallowing the claims of the plaintiff.

7. Aggrieved by the arbitral award dated 29.07.2015, the plaintiff challenged the same under Section 34 of the Act in OMP (COMM) 5/2016, *inter alia*, on the issue of non-arbitrability of the claims of the plaintiff against the defendant.

8. On 28.05.2018, this Court allowed the plaintiff's petition under Section 34 of the Act, *inter alia*, holding that the claims of the plaintiff



against the defendant were not arbitrable as the same are “*excepted matters*” which are excluded from the scope of the arbitration agreement between the parties.

9. On 27.08.2018, the defendant preferred an appeal [FAO (OS) (COMM) 195/2018] under Section 37 of the Act. It appears the before the Division Bench of this Court, the defendant for the first time conceded that the claims of the plaintiff against the defendant are not “notified claims”, therefore, the same were not arbitrable and remedy for the plaintiff lay elsewhere. Accordingly, *vide* order 01.08.2019, the Division Bench affirmed the order dated 28.05.2018 of the learned Single Judge. It was clarified that the arbitral award will not come in the way of the plaintiff seeking other remedies available in law as regards to its claims against the defendant. The order dated 01.08.2019 of the Hon’ble Division Bench has attained finality. The relevant part of order dated 01.08.2018 reads as under:

14. Having considered the above submissions, it appears to the Court that as far as Triune’s claims not being arbitrable are considered, the parties are ad idem. In other words, it is both the case of IPPL as well as that of Triune that the claims raised by Triune were not ‘notified claims’ in terms of clause 9.0.1.0 of the GCC and were not, therefore, arbitrable. If, in fact, they were not arbitrable clearly the remedy for Triune for such claims lay elsewhere. The learned Arbitrator was, therefore, in error in rejecting Triune’s claims on merits. He should have simply rejected them as not being maintainable since they were not arbitrable. To that extent, the learned Single Judge was right in observing that that rejection of Triune’s claims on merits by the learned Arbitrator was not warranted. That is the true purport of the conclusions in paras 55 and 60 of the impugned order.

15. Resultantly, the impugned order of the learned Single Judge cannot be understood as having allowed such claims of Triune.



What it purports to clarify is that the Award will not come in the way of the Triune seeking other remedies that are available to it in accordance with law as regards its claims against IPPL.

(emphasis supplied)

10. It is in this factual backdrop that the plaintiff has filed present application seeking restoration of the original suit CS (OS) 2340/2008 under Section 151 CPC.

11. It is the submission of Mr. Kavin Gulati, learned senior counsel appearing on behalf of the plaintiff that the present case does not fall in a category where the plaintiff is seeking invocation of this Court's power under Section 151 CPC to unsettle a *lis* that has already been decided but the endeavour of the plaintiff is to effectively bring back to its original position the *lis* between the parties which was contested before a wrong forum.

12. He submits that Section 8 of the Act only provides for reference of the disputes between the parties to arbitration and the same in no manner extinguishes the suit filed by the plaintiff. He adds that a reference under Section 8 is not a rejection of a plaint under Order VII Rule 11 of CPC or otherwise, thus, it does not bar adjudication of *lis* by the Court. He submits that the only remedy available to the plaintiff is the restoration of suit which was referred to arbitration under Section 8 of the Act.

13. He further submits that it is a settled principle of law that an act of the Court must not prejudice any party and if any prejudice has been caused, the same ought to be undone by the Court in the facts of that case. In the present case the learned Single Judge had referred the matter to arbitration on a *prima facie* view which was subsequently held to be incorrect by this Court on two occasions.



14. It is also the submission of Mr. Gulati that the present application has been filed within the period of limitation. Elaborating on his submission, he submits that since there is no specific Article under the Schedule to the Limitation Act, 1963 providing for period of limitation for filing an application of the present nature, the period of limitation prescribed in the residuary Article 137 will govern the period of limitation. He submits that the period of limitation prescribed under Article 137 is 03 years and the same would begin to run when the right to apply accrues.

15. Mr. Gulati further submits that the right accrued to the plaintiff to apply for restoration of the suit only on 01.08.2019 when the defendant for the first time conceded that the claims of the plaintiff being not notified claims are not arbitrable and the remedy of the plaintiff lies elsewhere. Accordingly, the Division Bench of this Court *vide* order dated 01.08.2019 passed in FAO (OS)(COMM) 195/2018 clarified that the Award will not come in the way of the plaintiff seeking other remedies that are available to it in accordance with law as regard its claims against the defendant.

16. He adds that the plaintiff is also entitled to the benefit of the directions passed by the Hon'ble Supreme Court *vide* order dated 10.01.2022 in *Suo Moto Writ Petition (C) No. 3/2020* ['*SMWP (C) 3/2020*'] wherein the Hon'ble Supreme Court in para 5 has clarified that period from 15.03.2020 till 20.08.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings. Therefore, the present application filed on 01.06.2023, is within the period of limitation.

17. *Per contra*, Mr. Jayant Mehta, learned senior counsel appearing on behalf of the defendant submits that the present application is hopelessly



barred by limitation, thus, the same should be dismissed. Though initially Mr. Mehta did contend that he will be making his submission as to the maintainability of plaintiff's application under the provisions of Section 151 CPC as well but eventually he confined his arguments only on the aspect of limitation.

18. Mr. Mehta submits that the purported right of the plaintiff to seek restoration of the suit emanates from the order dated 28.05.2018 whereby the petition filed by the plaintiff under Section 34 of the Act was allowed. He adds that if the starting point of limitation is reckoned from the date of said order, then the limitation period would expire on 29.05.2022 even after extending the benefit of exemption granted by the Hon'ble Supreme Court in *SMWP (C) 3/2020*.

19. Without prejudice to his foregoing submission, Mr. Mehta submits that even if the limitation period is calculated from the order dated 01.08.2019, whereby liberty was given to the plaintiff to seek other remedies, there is delay of 1367 days even after giving the benefit of the direction of the Hon'ble Supreme Court in *SMWP (C) 3/2020*.

20. Expanding on his submission, Mr. Mehta submits that para 5 of the Hon'ble Supreme Court order dated 10.01.2022 passed in *SMWP (C) 3/2020* provides for following three situations: -

A. Situation 1: Limitation Expires During COVID Period

Where the period of limitation expires during the COVID period. For this situation, the order provides that a period of 90 days shall be available beginning 01.03.2022 for instituting any proceeding;

B. Situation 2: Limitation Pending – Balance Period < 90 days



Where the period of limitation does not expire during the COVID period but the balance period of limitation as of 01.03.2022, is less than 90 days, then a period of 90 days shall be available beginning 01.03.2022 for instituting any proceeding; and

C. Situation 3: Limitation Pending- Balance Period > 90 days

Where the period of limitation does not expire during the COVID period and the balance period of limitation as of 01.03.2022, is more than 90 days, then the longer period shall apply.

21. He submits that the cause of action according to the plaintiff arose on 01.08.2019, therefore, as per Article 137 of the Schedule to the Limitation Act, 1963 the limitation period of 03 years would expire on 31.07.2022, which means, on 01.03.2022 a period longer than 90 days was available to the plaintiff (*as period of 90 days from 01.03.2022 would expire on 29.05.2022*), in terms of second part of paragraph 5(iii) [*i.e. situation no.3 above*]. Therefore, the application having been filed on 01.06.2022 is hopelessly barred by time.

22. He further submits that if paragraph 5(i) is read in the way the plaintiff is reading it or in other words, if the entire period from 15.03.2020 till 28.02.2022 is to be excluded for computing limitation, then it would render para 5(iii) of the order dated 10.01.2022 passed in **SMWP (C) 3/2020** as meaningless.

23. In rejoinder submissions, Mr. Gulati, submits that in terms of the para 5 of the order dated 10.01.2022 in **SMWP (C) 3/2020**, the period between 15.03.2020 till 28.02.2022 has to be excluded for the purpose of computing limitation and the balance period of limitation as on 15.03.2020



would become available with effect from 01.03.2022. If thus calculated, the limitation period of 03 years for the present application seeking restoration would end only on 17.07.2024. As the present application was filed on 01.06.2023, it is well within the period of limitation.

24. To buttress his contention, Mr. Gulati has placed reliance on the decision of three Judges Bench of the Hon'ble Supreme Court in ***Arif Azim Company Limited vs. Aptech Limited, 2024 (5) SCC 313***.

25. He submits that the submission made on behalf of the defendant that the limitation in the present case would start running from 28.05.2018 when the learned Single Judge allowed the plaintiff's petition under Section 34 of the Act is totally fallacious, inasmuch as, the plaintiff's right to apply for restoration of the suit accrued only on 01.08.2019 when the Division Bench of this Court clarified in the defendant's appeal under Section 37 of the Act that the plaintiff has a right to seek other remedies available in law.

26. He submits that it is a settled law that the statutory appeal has to be considered as continuation of the *lis* and an order becomes enforceable only when the *lis* is finally disposed of by a Court of Appeal. As an order came to be passed in an appeal under Section 37 of the Act only on 01.08.2019, therefore, the limitation for filing present application would start from the said date.

27. He, therefore, urges the Court that the present application seeking restoration of suit is well within the limitation period and the suit may be restored to its original number.

28. A short note was also filed by the defendant as sur-rejoinder wherein it has been submitted that the decision ***Arif Azim (supra)*** deals with the period of limitation for filing an application under section 11(6) of the Act



and the same is not applicable to the application of the present nature.

29. I have heard the learned Senior Counsel for the plaintiff/applicant, as well as, the learned Senior Counsel for the defendant/non-applicant and have perused the record.

30. The limited question which has arisen for consideration of this Court is as to whether the instant application is within the period of limitation.

31. The undisputed facts are that – (i) this Court *vide* order dated 10.01.2011 passed in the present suit had referred the disputes to arbitration by allowing defendant's application filed under Sections 5 and 8 of the Act; (ii) the learned Sole Arbitrator passed an Award dated 29.07.2015 disallowing the claims of the plaintiff; (iii) the plaintiff's petition under Section 34 of the Act against the said award was allowed by the learned Single Judge *vide* order dated 28.05.2018 holding that the claims against the defendant were not arbitrable; (iv) in an appeal preferred by the defendant under Section 37 of the Act, the defendant for the first time conceded that the claims of the plaintiff are not arbitrable, therefore, the remedy of the plaintiff lies elsewhere; Accordingly, the Division Bench *vide* order dated 01.08.2019 clarified that the Award will not come in the way of the plaintiff seeking other remedies that are available to it in accordance with law as regard its claims against the defendant.

32. There is no doubt nor it has been disputed by the defendant that the limitation for filing the present application will be governed by the residuary Article 137 of the Schedule to the Limitation Act, 1963 which prescribes a limitation period of 03 years from the date when the right to apply accrues.

33. However, one of the questions, incidental to the controversy of limitation, that has arisen is whether the limitation will run from 28.05.2018,



i.e. when the order was passed by the learned Single Judge under section 34 of the Act holding that the claims of the plaintiff against the defendant are not arbitrable or will it run from the order dated 01.08.2019 passed by the Hon'ble Division Bench in an appeal preferred by the defendant under Section 37 of the Act.

34. The statutory appeal under Section 37 of the Act is continuation of the *lis* under section 34 of the Act, thus, when an appeal was preferred by the defendant against the order dated 28.05.2018 of the learned Single Judge, the question as regards the arbitrability of the plaintiff's claims against the defendant was rendered *res sub judice* and did not attain finality. It attained finality in an appeal preferred by the defendant under Section 37 of the Act when the defendant conceded that the claims of the plaintiff are not arbitrable which led the Division Bench to dispose of the appeal *vide* order dated 01.08.2019 clarifying that the award rendered by the learned Sole Arbitrator will not come in the way of the plaintiff seeking other remedies.

35. Thus, it leaves no manner of doubt that there was no occasion for the plaintiff to file the present application after the order dated 28.05.2018 was passed by the learned Single Judge in a petition under Section 34 of the Act when the appeal preferred by the defendant under Section 37 of the Act was still pending and the subject matter of the *lis* was *res sub judice*. In other words, any application seeking restoration of suit filed prior to the *lis* attaining finality on 01.08.2019 would have been premature, as the dispute concerning the claims of the plaintiff against the defendant as well as arbitrability thereof was still a subject matter of an appeal under Section 37 of the Act. Accordingly, it is held that the limitation period of 03 years would run from 01.08.2019, when appeal under Section 37 stood disposed



of with a clarification that the remedy of the plaintiff's claim lies elsewhere.

36. Next, it is to be examined whether the present application is within the period of limitation of three years starting from 01.08.2019. To appreciate the rival contentions of the learned Senior Counsel for the parties on the aspect of whether the period between 15.03.2020 to 28.02.2022 is to be excluded for the purpose of calculating the limitation period in the present case, apposite would it be to refer to the following directions of the Hon'ble Supreme Court given in its order dated 10.01.2022 in **SMWP (C) 3/2020** to enable the litigants to tide over the legal crisis of limitation period having been lost during the pandemic period:

"5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:

*I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that **the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.***

II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply."

(emphasis supplied)



37. In *Prakash Corporates vs. Dee Vee Projects Limited*, (2022) 5 SCC 112, the Hon'ble Supreme clarified that when the period is excluded, as a necessary consequence, it results in enlargement of time, over and above the period prescribed. It was further observed that exclusion of period as directed by the Hon'ble Supreme Court in *SMWP No. 3 of 2020* will to apply to the suits as well as to the written statements with equal force. The relevant part of the observations reads as under:

*“28. As regards the operation and effect of the orders passed by this Court in SMWP No. 3 of 2020, noticeable it is that even though in the initial order dated 23-3-2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 : (2021) 3 SCC (Cri) 801], this Court provided that the period of limitation in all the proceedings, irrespective of that prescribed under general or special laws, whether condonable or not, shall stand extended w.e.f. 15-3-2020 but, while concluding the matter on 23-9-2021 [Cognizance for Extension of Limitation, In re, (2021) 18 SCC 250 : 2021 SCC OnLine SC 947], this Court specifically provided for exclusion of the period from 15-3-2020 till 2-10-2021. A look at the scheme of the Limitation Act, 1963 makes it clear that while extension of prescribed period in relation to an appeal or certain applications has been envisaged under Section 5, the exclusion of time has been provided in the provisions like Sections 12 to 15 thereof. **When a particular period is to be excluded in relation to any suit or proceeding, essentially the reason is that such a period is accepted by law to be the one not referable to any indolence on the part of the litigant, but being relatable to either the force of circumstances or other requirements of law (like that of mandatory two months' notice for a suit against the Government [Vide Section 15 of the Limitation Act, 1963]). The excluded period, as a necessary consequence, results in enlargement of time, over and above the period prescribed.***

28.1. Having regard to the purpose for which this Court had exercised the plenary powers under Article 142 of the Constitution of India and issued necessary orders from time to time in *SMWP No. 3 of 2020*, we are clearly of the view that the period envisaged finally in



the order dated 23-9-2021 [Cognizance for Extension of Limitation, In re, (2021) 18 SCC 250 : 2021 SCC OnLine SC 947] is required to be excluded in computing the period of limitation even for filing the written statement and even in cases where the delay is otherwise not condonable. It gets perforce reiterated that the orders in SMWP No. 3 of 2020 were of extraordinary measures in extraordinary circumstances and their operation cannot be curtailed with reference to the ordinary operation of law.

28.2. In other words, the orders passed by this Court on 23-3-2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 : (2021) 3 SCC (Cri) 801] , 6-5-2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 9 : (2021) 3 SCC (Cri) 799] , 10-7-2020 [Cognizance for Extension of Limitation, In re, (2020) 9 SCC 468] , 27-4-2021 [Cognizance for Extension of Limitation, In re, (2021) 17 SCC 231 : 2021 SCC OnLine SC 373] and 23-9-2021 [Cognizance for Extension of Limitation, In re, (2021) 18 SCC 250 : 2021 SCC OnLine SC 947] in SMWP No. 3 of 2020 leave nothing to doubt that special and extraordinary measures were provided by this Court for advancing the cause of justice in the wake of challenges thrown by the pandemic; and their applicability cannot be denied in relation to the period prescribed for filing the written statement. It would be unrealistic and illogical to assume that while this Court has provided for exclusion of period for institution of the suit and therefore, a suit otherwise filed beyond limitation (if the limitation had expired between 15-3-2020 to 2-10-2021) could still be filed within 90 days from 3-10-2021 but the period for filing written statement, if expired during that period, has to operate against the defendant.”

(emphasis supplied)

38. Carrying the above enunciation further, it was expounded in *Arif Azim (supra)*, that as a result of directions given in *SMWP No. 3 of 2020*, the period from 15.03.2020 to 28.02.2022 will have to be excluded for the computation of limitation and the balance period of limitation as available on 15.03.2020 would become available from 01.03.2022. The relevant paras



83, 84 and 87 of the said decision reads thus:

83. *The petitioner completed the course sometime in April and a letter to this effect was issued on 30-7-2017 by EoI, Kabul. Allegedly, ICCR made payment to the respondent on 3-10-2017. However, the right of the petitioner to raise the claim could only be said to have accrued after the petitioner made a positive assertion in March 2018 which was denied by the respondent vide email dated 28-3-2018. Another reminder through email was given by the petitioner on 29-12-2018, however, mere giving reminders and sending of letters would not extend the cause of action any further from 28-3-2018 on which date the rights of the petitioner could be said to have been crystallised.*

84. *Thus, in ordinary circumstances, the limitation period available to the petitioner for raising a claim would have come to an end after an expiry of three years, that is, on 27-3-2021. However, in March 2020, the entire world was taken under the grip of the deadly Covid-19 Pandemic bringing everyday life and commercial activity to a complete halt across the globe. Taking cognizance of this unfortunate turn of events, this Court vide order dated 23-3-2020 passed in Cognizance for Extension of Limitation, In re [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 : (2021) 3 SCC (Cri) 801] directed the period commencing from 15-3-2020 to be excluded for the purposes of computation of limitation. The said extension of limitation was extended from time to time by this Court in view of the continuing pandemic. As a result, the period from 15-3-2020 to 28-2-2022 was finally determined to be excluded for the computation of limitation. It was provided that the balance period of limitation as available on 15-3-2020 would become available from 1-3-2022.*

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87. *The effect of the above referred order of this Court in the facts of the present case is that the balance limitation left on 15-3-2020 would become available w.e.f. 1-3-2022. The balance period of limitation remaining on 15-3-2020 can be calculated by computing the number of days between 15-3-2020 and 27-3-2021, which is the day when the limitation period would have come to*



an end under ordinary circumstances. The balance period thus comes to 1 year 13 days. This period of 1 year 13 days becomes available to the petitioner from 1-3-2022, thereby meaning that the limitation period available to the petitioner for invoking arbitration proceedings would have come to an end on 13-3-2023.

(emphasis supplied)

39. Clearly, in the context of the present case, since the limitation under the ordinary circumstances would have expired on 31.07.2022 i.e. beyond the period of exclusion, the entire period from 15.03.2020 to 28.02.2022 will have to be excluded altogether for computing the period of limitation. In other words, the limitation would cease to run from 15.03.2020 to 28.02.2022 or the period between the said two cut-off dates will be additionally available over and above the prescribed period of three years.

40. Thus computed, the period of limitation that lapsed from 01.08.2019 till 15.03.2020 would be 07 months and 14 days. The balance period of limitation remaining on 15.03.2020 comes to 02 years, 04 months and 16 days. This period of 02 years, 04 months and 16 days becomes available to the plaintiff from 01.03.2022, which means that the limitation period will expire on 17.07.2024 whereas the present application for restoration was filed on 01.06.2023. Therefore, the present application has been filed well within the period of limitation.

41. The submission made in the note that the decision in *Arif Azim (supra)* deals specifically with the arbitration and thus, has no applicability in the facts of the present case, is misconceived. The directions given by the Hon'ble Supreme Court in *SMWP (C) 3/2020* and subsequently explained in *Prakash Corporates (supra)* and *Arif Azim (supra)* are applicable across the board to the limitation periods prescribed under any general or special laws



in respect of all judicial or quasi-judicial proceedings.

42. In view of the above, the application of the plaintiff is allowed and the suit is restored to its original number.

43. The application stands disposed of.

I.A. 11506/2023 (under Section 151CPC seeking condonation of delay in filing I.A. 11505/2023 by the plaintiff)

44. This application has been filed by the plaintiff seeking condonation of delay in filing restoration application i.e. I.A. 11505/2023.

45. As this Court has held that the application (I.A. 11505/2023) seeking restoration of suit is within the period of limitation, therefore, the present application has been rendered infructuous and is disposed of as such.

CS(OS) 2340/2008 & I.A. 11508/2023

46. Re-notify the suit, as well as, I.A. 11508/2023 on 17.01.2025.

VIKAS MAHAJAN, J

OCTOBER 07, 2024

N.S. ASWAL/dss