

A M/S GEO MILLER & CO. PVT. LTD.
v.
CHAIRMAN, RAJASTHAN VIDYUT UTPADAN NIGAM LTD.
(Civil Appeal No. 967 of 2010)
B SEPTEMBER 03, 2019
[N. V. RAMANA, MOHAN M. SHANTANAGOUDAR
AND AJAY RASTOGI, JJ.]

Arbitration:

C *Arbitration proceedings – Determination as regards
applicability of Arbitration Acts viz. Arbitration Act, 1940 or
Arbitration and Conciliation Act, 1996 – Held: For the purpose
of deciding as to which of the Acts is applicable, on conjoint
reading of ss.21 and 85(2)(a) of 1996 Act, the date of
D commencement of arbitration proceedings shall be the date on
which notice was served on the other party requesting appointment
of arbitrator – If the date of notice was prior to 25.1.1996 (i.e.
the date on which 1996 Act came into force) 1940 Act would apply
and if the date of notice was on 25.1.1996 or after that, 1996
would apply – Arbitration and Conciliation Act, 1996 – ss.21 and
E 85(2)(a) – Arbitration Act, 1940.*

Arbitration and Conciliation Act, 1996:

*s.43(3) – Limitation – Limitation period for reference of
dispute to arbitration or for seeking appointment of an arbitrator
before a Court is three years from the date on which course of
F action or the claim which is sought to be arbitrated, first arises –
On certain sets of facts and circumstances, the period during which
the parties were bonafide negotiating towards an amicable
settlement may be excluded for the purpose of computing the
period of limitation – However, in such cases, entire negotiation
G history must be specifically pleaded and placed on record – In
commercial disputes, failure to respond to the claim has to be
treated as denial of claim giving rise to dispute and hence cause
of action for reference to arbitration – Mere correspondence
subsequent to this date of cause of action would not extend the
time of limitation – In the facts of the present case, application for
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reference of the dispute to the Arbitrator is barred by limitation – Rather, appellant company's case has certain element of mala fide as it has remained silent on specific actions taken to recover the dues during certain period – Under s.114(g) of Evidence Act, the Court can presume that evidence which would be and was not produced, would, if produced be unfavourable to the person who withholds it – Appellant's own fault in sleeping over his right for 14 years will not constitute a case of 'undue hardship' justifying extension of time u/s.43(3) – Limitation Act, 1963 – First Schedule, Art.137 – Limitation.

Dismissing the appeals, the Court

HELD: 1.1 The date of commencement of arbitration proceedings for the purpose of deciding which Act (Arbitration Act 1940 or Arbitration and Conciliation Act, 1996) applies, upon a conjoint reading of Sections 21 and Section 85(2)(a) of the 1996 Act, shall be regarded as the date on which notice was served to the other party requesting appointment of an arbitrator. [Para 6] [1117-B-C]

Milkfood Ltd. v. GMC Ice Cream (P) Ltd. (2004) 7 SCC 288 : [2004] 3 SCR 854 ; Shetty's Constructions Co.Pvt. Ltd. v. Konkan Railway Construction and Another (1998) 5 SCC 599 – relied on.

1.2 Though strictly speaking the 1996 Act came into force from 22.8.1996, for all practical purposes it is deemed to have been effective from 25.1.1996, which is when the Arbitration and Conciliation Ordinance, 1996 came into force. Hence if the date of notice was prior to 25.1.1996, the 1940 Act will apply. If the date of notice was on or after 25.1.1996, the 1996 Act will apply to the arbitral proceedings though the arbitration clause contemplated proceedings under the 1940 Act. In the present case, since notice was served to the respondent in 2002, the provisions of the 1996 Act will be deemed to apply to the present Arbitration Applications filed by the appellant. [Para 6] [1117-D-E-G]

Fuerst Day Lawson Ltd v. Jindal Exports Ltd. (2001) 6 SCC 356 : [2001] 3 SCR 479 – relied on.

A **2.1 By virtue of Article 137 of the First Schedule to the Limitation Act, 1963 the limitation period for reference of a dispute to arbitration or for seeking appointment of an arbitrator before a Court under the 1940 Act as well as the 1996 Act is three years from the date on which the cause of action or the claim which is sought to be arbitrated first arises. [Para 7] [118-**

B **C-D]**

State of Orissa and Another v. Damodar Das, (1996)
2 SCC 216 : [1995] 6 Suppl. SCR 800 ; *Grasim Industries Limited v. State of Kerala* (2018) 14 SCC
265 – referred to.

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2.2 In the present case, the appellant’s cause of action in respect of Arbitration Applications, relating to the work orders dated 7.10.1979 and 4.4.1980 arose on 8.2.1983, which is when the final bill handed over to the respondent became due. Mere correspondence of the appellant by way of writing letters/ reminders to the respondent subsequent to this date would not extend the time of limitation. Hence the maximum period during which this Court could have allowed the appellant’s application for appointment of an arbitrator is 3 years from the date on which cause of action arose i.e. 8.2.1986. Similarly, with respect to Arbitration Application relating to the work order dated 3.5.1985, final bill was handed over and became due on 10.8.1989. Hence the limitation period ended on 10.8.1992. Since the appellant served notice for appointment of arbitrator in 2002, and requested the appointment of an arbitrator before a Court only by the end of 2003, his claim is clearly barred by limitation. [Para 8] [1120-C-F]

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2.3 On a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. The Court upon careful consideration of such history must find out what was the ‘breaking point’ at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated

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referral of the dispute for arbitration. This ‘breaking point’ would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party’s primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim. [Para 10] [1122-C-F]

2.4 Moreover, in a commercial dispute, while mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant’s claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. It does not lie to the applicant to plead that waited for an unreasonably long period to refer the dispute to arbitration merely on account of the respondent’s failure to settle their claim and because they were writing representations and reminders to the respondent in the meanwhile. [Para 10] [1122-G-H]

2.5 In the present case, the appellant company vaguely stated before this Court that it was involved in ‘negotiation’ with the respondents in the 14 years preceding the application dated 4.10.1997 before the Settlement Committee. However it did not place on record any evidence to show when it had first made a representation to the respondent in respect of the outstanding amounts, and what was the history of their negotiation with the respondents such that it was only in 1997 that they thought of approaching the Settlement Committee. Further, they have not brought anything on record to show that they were required to proceed before the Settlement Committee before requesting the appointment of an arbitrator. The arbitration clause does not stipulate any such requirement. [Para 11] [1123-B-C]

2.6 The appellant company’s case has a certain element of *mala fide* in so far as it has made detailed submissions in respect of its communications with the respondents subsequent to 4.10.1997, but has remained conspicuously silent on the

A specific actions taken to recover the payments due prior to that date. Under Section 114(g) of the Evidence Act, 1872 this Court can presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. Hence, in the absence of specific pleadings and evidence placed on record by the appellant with respect to the parties' negotiation history, this Court cannot accept the appellant's contention that it was only after the respondent's letter dated 18.12.1999 that the appellant could have contemplated arbitration in relation to the outstanding amounts. Even if the time spent proceeding before the Settlement Committee is included, the limitation period, at the latest, would have started running from 4.10.1997 which is when the appellant made a representation to the Settlement Committee and the Committee failed to respond to the same. [Para 11] [1123-D-G]

D 2.7 The appellant's own default in sleeping over his right for 14 years will not constitute a case of 'undue hardship' justifying extension of time under Section 43(3) of the 1996 Act or show 'sufficient cause' for condonation of delay under Section 5 of the Limitation Act. The appellant should have approached the Court for appointment of an arbitrator under Section 8(2) of the 1940 Act within the appropriate limitation period. The entire dispute seems concocted so as to pursue a monetary claim against the respondents, taking advantage of the provisions of the 1996 Act. [Para 11] [1124-B-C]

F *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta* (1993) 4 SCC 338 : [1993] 3 SCR 361—relied on.

G *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority* (1988) 2 SCC 338 : [1988] 3 SCR 351 ; *Hari Shankar Singhania and Others v. Gaur Hari Singhania and Others* (2006) 4 SCC 658 : [2006] 3 SCR 726 ; *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.*, (2007) 4 SCC 599 : [2007] 4 SCR 279 ; *Sunder Kukreja and Others v. Mohan Lal Kukreja and Anr.* (2009) 4 SCC 585 : [2009] 4 SCR 1163 — distinguished.

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M/S GEO MILLER & CO. PVT. LTD. v. CHAIRMAN,
RAJASTHAN VIDYUT UTPADAN NIGAM LTD.

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Union of India v. Momin Construction Company
(1997) 9 SCC 97 – referred to.

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O.P. Malhotra on The Law and Practice of Arbitration,
Justice Indu Malhotra ed., 3rd. edn, 2014 at page
1915) – referred to.

Case Law Reference

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[2004] 3 SCR 854	relied on	Para 6
(1998) 5 SCC 599	relied on	Para 6
[2001] 3 SCR 479	relied on	Para 6
[1995] 6 Suppl. SCR 800	referred to	Para 7
[1993] 3 SCR 361	relied on	Para 7
(2018) 14 SCC 265	relied on	Para 8
[2007] 4 SCR 279	distinguished	Para 9
[1988] 3 SCR 351	distinguished	Para 9
[2009] 4 SCR 1163	distinguished	Para 9
(1997) 9 SCC 97	referred to	Para 9
[2006] 3 SCR 726	distinguished	Para 10

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 967
of 2010.

With

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Civil Appeal Nos. 968, 969 of 2010.

From the Judgment and Order dated 25.01.2007 of the High
Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in S.B.
Arbitration Application No. 25 of 2003.

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S. D. Singh, Mrs. Bharti Tyagi, Mrs. Shweta Sinha, Jitender
Singh, Mrs. Meenu Singh, Ram Kripal Singh, Vishwajit Singh, Advs.
for the Appellant.

Sushil Kumar Jain, Sr. Adv., Ms. Christi Jain, Ms. Ankita Gupta,
Harshit Khanduja, Ms. Pratibha Jain, Advs. for the Respondent.

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A The Judgment of the Court was delivered by

MOHAN M. SHANTANAGOUDAR, J.

B 1. The appeals arise out of the common judgement dated 25.1.2007 of the High Court of Rajasthan at Jaipur Bench dismissing the three Arbitration Applications Nos. 25/2003, 27/2003 and 28/2003 ('Arbitration Applications') filed by the appellant under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act') seeking appointment of an arbitrator for adjudication of the disputes between the common appellant and the respondent in these appeals.

C 2. The facts giving rise to these appeals are as follows: The respondent had floated tenders for execution of work on a water treatment plant. Three work orders dated 7.10.1979, 4.4.1980 and 3.5.1985 were assigned in favour of the appellant. The three Notice Inviting Tender ('NIT') documents in respect of these work orders constituted the terms and conditions of the three separate contracts between the parties. The three contracts had a common arbitration clause as follows (relevant part):

E "i. If at any time any question/dispute/difference whatsoever arises between the purchaser and the supplier, upon or in relation to the contract, either party may forthwith give to the other once question(s), disputes or difference and the same shall be referred to the Chairman, Rajasthan State Electricity Board, Jaipur or any person appointed by him for the purpose (hereinafter referred to as Arbitrator). Such a reference to the arbitrator/arbitrators shall be deemed to be a submission to the Arbitrator within the meaning of the Indian Arbitration Act, 1940 and statutory modifications thereof."

G 3. The appellant's case is that the respondent failed to make the payments due to them under the three contracts. Till 1997, the appellant was involved in discussions with the respondents in respect of the outstanding payments and the respondent kept delaying their decision on the same. On 4.10.1997 the appellant approached the Settlement Committee constituted by the respondent Board for release of the outstanding payment. It is the appellant's case that they were required to have pursued the matter with the Settlement Committee prior to initiating arbitration. However the Settlement Committee also failed to respond to their representations.

The respondent vide internal communications dated 20.11.1997 acknowledged that the matter was pending consideration with them. Thereafter by letters dated 17/18.12.1999 the respondent replied to the appellant partly allowing one claim to the extent of Rs. 1,34,359.12 and requesting details of bills/invoices of certain other claims for verification. The appellant on 6.1.2000 replied stating that the bills had already been processed for payment and sent photocopies of the bills submitted earlier to the respondents.

On 5.10.2002 and 10.10.2002 the appellant sent a final communication to the respondent requesting payment of all the outstanding amounts. When the payment was still not made, the appellant sent a communication dated 22.11.2002 to the respondent requesting appointment of an arbitrator for adjudication of disputes relating to payment, as provided under the arbitration clause. However the respondent did not appoint an arbitrator within the period of 30 days as stipulated under the agreement between the parties. Hence the appellant has filed the aforementioned Arbitration Applications for appointment of an arbitrator. Per contra, the respondent contends that as per the appellant's own admission, the final bills for the work orders were raised in 1983. Hence since the request for arbitration was invoked only in 2002, the appellant's claim is barred by limitation.

4. The High Court in the impugned judgement accepted the respondent's argument. The Court found that the appellant had raised the final bill on 8.2.1983, but had not stated any explanation for why it failed to take any steps for immediately referring the dispute in 1983 to the Chairman, Rajasthan State Electricity Board, as provided under the arbitration clause, but instead requested appointment of arbitrator as late as in 2002. Further, that the appellant could not be allowed to make such a request under the 1996 Act given that the contracts provided that the arbitrator was to be appointed under The Arbitration Act, 1940 ('1940 Act'). This all reflected that the appellant had filed the Arbitration Applications merely as a gamble for pursuing a monetary claim against the respondent, without the existence of any bonafide dispute. Thus the High Court in the impugned judgement held that the appellant had failed to make out any case of hardship or injustice justifying condonation of delay in filing the applications under Section 43(3) of the 1996 Act, and the Arbitration Applications were hopelessly barred by limitation. Hence this appeal.

- A 5. The limited issue which arises for our consideration is therefore, whether the Arbitration Applications, on the facts of this case, are barred by limitation?

Learned counsel for the appellant vehemently contended that the cause of action arose not in 1983 or 1989, but by the letters dated
B 17/18.12.1999 in which the respondents repudiated the appellant's claims. The period prior to 18.12.1999 during which the parties were negotiating and corresponding with each other could not be counted for the purpose of computing the limitation period. It was due to the respondent's delay in responding to the representations sent by the appellant that delay arose
C in filing the Arbitration Applications. Hence the Arbitration Applications are not barred by limitation. In support of his contention, he relied upon the decisions of this Court in *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority*, (1988) 2 SCC 338; *Hari Shankar Singhania and Others v. Gaur Hari Singhania and Others*, (2006) 4 SCC 658;
D *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.*, (2007) 4 SCC 599 and *Sunder Kukreja and Others v. Mohan Lal Kukreja and Anr.*, (2009) 4 SCC 585.

6. Before deciding the issue of limitation, we must first consider whether it is the 1940 Act or the 1996 Act which applies to the
E Arbitration Applications. Section 85 of the 1996 Act provides as follows:

“**85. Repeal and savings.**-(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

- F (2) Notwithstanding such repeal,-

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;
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- (b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.” (emphasis supplied)
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Section 21 of the 1996 Act provides:

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

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It is settled law that the date of commencement of arbitration proceedings for the purpose of deciding which Act applies, upon a conjoint reading of Sections 21 and Section 85(2)(a) of the 1996 Act, shall be regarded as the date on which notice was served to the other party requesting appointment of an arbitrator (See *Milkfood Ltd. v. GMC Ice Cream (P) Ltd.*, (2004) 7 SCC 288; *Shetty's Constructions Co. Pvt. Ltd. v. Konkan Railway Construction and Another*, (1998) 5 SCC 599).

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Though strictly speaking the 1996 Act came into force from 22.8.1996, for all practical purposes it is deemed to have been effective from 25.1.1996, which is when the Arbitration and Conciliation Ordinance, 1996 came into force. Hence if the date of notice was prior to 25.1.1996, the 1940 Act will apply. If the date of notice was on or after 25.1.1996, the 1996 Act will apply to the arbitral proceedings though the arbitration clause contemplated proceedings under the 1940 Act (See *Fuerst Day Lawson Ltd v. Jindal Exports Ltd.*, (2001) 6 SCC 356; *O.P. Malhotra on The Law and Practice of Arbitration*, Justice Indu Malhotra ed., 3rd edn, 2014 at page 1915). In *Milkfood Ltd* (supra) as well, the arbitration agreement was governed by the provisions of the 1940 Act. The appellant sent a notice to the respondent for appointment of an arbitrator on 14.9.1995. Hence this Court held that the 1940 Act would apply.

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In the present case, since notice was served to the respondent in 2002, the provisions of the 1996 Act will be deemed to apply to the present Arbitration Applications filed by the appellant. However, it remains to be examined separately whether the aforesaid Applications have been filed within the statutory limitation period.

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7. Section 43 of the 1996 Act (relevant part) provides as follows:

43. Limitations.-(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court...

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- A (3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper...”
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- C Section 43(1) and (3) of the 1996 Act is in *pari materia* with Section 37(1) and (4) of the 1940 Act. It is well-settled that by virtue of Article 137 of the First Schedule to the Limitation Act, 1963 the limitation period for reference of a dispute to arbitration or for seeking appointment of an arbitrator before a Court under the 1940 Act (See *State of Orissa and Another v. Damodar Das*, (1996) 2 SCC 216)
- D as well as the 1996 Act (See *Grasim Industries Limited v. State of Kerala*, (2018) 14 SCC 265) is three years from the date on which the cause of action or the claim which is sought to be arbitrated first arises.

- E In *Damodar Das* (supra), this Court observed, relying upon *Russell on Arbitration* by Anthony Walton (19th Edn.) at pages 4-5 and an earlier decision of a two-Judge bench in *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta*, (1993) 4 SCC 338, that the period of limitation for an application for appointment of arbitrator under Sections 8 and 20 of the 1940 Act commences on the date on which the “cause of arbitration” accrued, i.e. 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.
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- G We also find the decision in *Panchu Gopal Bose* (supra) relevant for the purpose of this case. This was a case similar to the present set of facts, where the petitioner sent bills to the respondent in 1979, but payment was not made. After an interval of a decade, he sent a notice to the respondent in 1989 for reference to arbitration. This Court in *Panchu Gopal Bose* observed that in mercantile references of this kind, it is implied that the arbitrator must decide the dispute according to the existing law of contract, and every defence which would have been open to the parties in a court of law, such as the plea
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of limitation, would be open to the parties for the arbitrator's decision as well. Otherwise, as this Court observed: A

“8...a claim for breach of contract containing a reference clause could be brought at any time, it might be 20 or 30 years after the cause of action had arisen, although the legislature has prescribed a limit of three years for the enforcement of such a claim in any application that might be made to the law courts...” B

This Court further held as follows:

“11. Therefore, the period of limitation for the commencement of 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 civil 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.” C D

12. In *Russell on Arbitration*,...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.’ ” (emphasis supplied) E

Therefore in *Panchu Gopal Bose* this Court held that the claim is “hopelessly barred” by limitation as the petitioner by his own conduct had slept over his right for more than 10 years. F

8. Undoubtedly, a different scheme has been evolved under the 1996 Act. However we find that the same principles continue to apply with respect to the applicability of the law of limitation to an application under Section 11(6) of the 1996 Act as laid down in the decisions dealing with judicial appointment of an arbitrator under Sections 8 and 20 of the 1940 Act. G

Our finding is supported by the decision of a three-Judge Bench of this Court in *Grasim Industries* (supra). In *Grasim Industries*, similar to the present case, the arbitration agreement provided for reference to be made under the 1940 Act. However the appellant raised H

A their claim in 2002, attracting the application of the 1996 Act. This Court was therefore faced with the issue of whether an application for appointment of an arbitrator under the 1996 Act would be barred by limitation in respect of the appellant's claim. This Court found that, in view of Section 28 of the Indian Contract Act, 1872, the parties in the arbitration agreement could not stipulate a restricted period for raising a claim. However, the limitation period for invocation of arbitration would be three years from the date of the cause of action under Article 137 of the Limitation Act, 1963. However in the facts of that case, this Court found that certain claims had arisen within the three year limitation period and hence, could be allowed.

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C Applying the aforementioned principles to the present case, we find ourselves in agreement with the finding of the High Court that the appellant's cause of action in respect of Arbitration Applications Nos. 25/2003 and 27/2003, relating to the work orders dated 7.10.1979 and 4.4.1980 arose on 8.2.1983, which is when the final bill handed over to the respondent became due. Mere correspondence of the appellant by way of writing letters/reminders to the respondent subsequent to this date would not extend the time of limitation. Hence the maximum period during which this Court could have allowed the appellant's application for appointment of an arbitrator is 3 years from the date on which cause of action arose i.e. 8.2.1986. Similarly, with respect to Arbitration Application Nos. 28/2003 relating to the work order dated 3.5.1985, the respondent has stated that final bill was handed over and became due on 10.8.1989. This has not been disputed by the appellant. Hence the limitation period ended on 10.8.1992.

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F Since the appellant served notice for appointment of arbitrator in 2002, and requested the appointment of an arbitrator before a Court only by the end of 2003, his claim is clearly barred by limitation.

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H 9. The decisions relied upon by the appellant are inapplicable to the present facts and circumstances. At the outset, we observe that the decision in *Sunder Kukreja* (supra) is on a different set of facts. In that decision, the question before this Court was whether the arbitration clause in a partnership deed would continue to subsist in light of a subsequent retirement deed which the appellant denied executing, and whether the arbitrator appointed by the Court could examine the genuineness of the said retirement deed. Hence it is not relevant to the issue of limitation.

Turning to the other decisions, it is true that in **Major (Retd.) Inder Singh Rekhi** (supra), this Court observed that the existence of a dispute is essential for appointment of an arbitrator. A dispute arises when a claim is asserted by one party and denied by the other. The term 'dispute' entails a positive element and mere inaction to pay does not lead to the inference that dispute exists. In that case, since the respondent failed to finalise the bills due to the applicant, this Court held that cause of action would be treated as arising not from the date on which the payment became due, but on the date when the applicant first wrote to the respondent requesting finalisation of the bills. However, the Court also expressly observed that '*a party cannot postpone the accrual of cause of action by writing reminders or sending reminders.*'

In the present case, the appellant has not disputed the High Court's finding that the appellant itself had handed over the final bill to the respondent on 8.2.1983. Hence, the holding in **Major (Retd.) Inder Singh Rekhi** (supra) will not apply, as in that case, the applicant's claim was delayed on account of the respondent's failure to finalize the bills. Therefore the right to apply in the present case accrued from the date on which the final bill was raised (See **Union of India v. Momin Construction Company**, (1997) 9 SCC 97).

10. In **Hari Shankar Singhania** (supra), the dispute to be referred to arbitration was regarding division of assets amongst partners of a dissolved family partnership firm. The appellants specifically placed letters on the record showing that the parties were trying to reach an amicable settlement prior to the stage where adjudication of the dispute became inevitable. This Court observed that the stage of adjudication by way of arbitration comes when settlement with or without conciliation becomes impossible. Hence this Court held that the limitation period would not run so long as the parties were in dialogue. In that sense, when the settlement talks were taking place, the period of limitation would commence from the date of the last communication between the parties.

It is relevant to note that the findings in **Hari Shankar Singhania** were made in the specific context of a family settlement. This Court specifically observed that such a settlement is to be treated differently from a formal commercial settlement, and that efforts should be made to promote family settlements without the obstruction of

- A technicalities of limitation, etc. Hence this Court was not dealing with a mercantile dispute such as in the present case.

- B In *Shree Ram Mills Ltd* (supra), this Court found that the parties were continuously at loggerheads over joint development of certain land. They had entered into a Memorandum of Understanding to settle their dispute, however the respondent cancelled this Memorandum; hence the dispute was referred to arbitration under Section 11(6) of the 1996 Act. This Court, upon considering the complete history of negotiation between the parties which was placed before it, on the facts of that case, concluded that the claim would not be barred by limitation as there was a continuing cause of action between the parties.

- D Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. The Court upon careful consideration of such history must find out what was the 'breaking point' at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This 'breaking point' would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim.

- G Moreover, in a commercial dispute, while mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. It does not lie to the applicant to plead that waited for an unreasonably long period to refer the dispute to arbitration merely on account of the respondent's failure to settle their claim and because they were writing representations and reminders to the respondent in the meanwhile.

11. We are of the considered opinion that the decisions in *Hari Shankar Singhania* and *Shree Ram Mills Ltd.* (supra) will not be applicable to the appellant's case as in these cases the entire negotiation history of the parties had been made available to this Court. In the present case, the appellant company vaguely stated before this Court that it was involved in 'negotiation' with the respondents in the 14 years preceding the application dated 4.10.1997 before the Settlement Committee. However it did not place on record any evidence to show when it had first made a representation to the respondent in respect of the outstanding amounts, and what was the history of their negotiation with the respondents such that it was only in 1997 that they thought of approaching the Settlement Committee. Further, they have not brought anything on record to show that they were required to proceed before the Settlement Committee before requesting the appointment of an arbitrator. The arbitration clause does not stipulate any such requirement.

We therefore find that the appellant company's case has a certain element of *mala fide* in so far as it has made detailed submissions in respect of its communications with the respondents subsequent to 4.10.1997, but has remained conspicuously silent on the specific actions taken to recover the payments due prior to that date. Under Section 114(g) of the Indian Evidence Act, 1872 this Court can presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

Hence, in the absence of specific pleadings and evidence placed on record by the appellant with respect to the parties' negotiation history, this Court cannot accept the appellant's contention that it was only after the respondent's letter dated 18.12.1999 that the appellant could have contemplated arbitration in relation to the outstanding amounts. Even if we were to include the time spent proceeding before the Settlement Committee, the limitation period, at the latest, would have started running from 4.10.1997 which is when the appellant made a representation to the Settlement Committee and the Committee failed to respond to the same.

It is further relevant to note that even the respondent's letter dated 18.12.1999 does not completely repudiate the appellant's claims but requests the submission of certain documents for verification. Hence it was not so radical a departure from the prevailing situation at that

- A time so as to give a finding that the appellant could not have contemplated arbitration prior to the aforesaid letter.

We also find it pertinent to add that the appellant's own default in sleeping over his right for 14 years will not constitute a case of 'undue hardship' justifying extension of time under Section 43(3) of the 1996

- B Act or show 'sufficient cause' for condonation of delay under Section 5 of the Limitation Act. The appellant should have approached the Court for appointment of an arbitrator under Section 8(2) of the 1940 Act within the appropriate limitation period. We agree with the High Court's observation that the entire dispute seems concocted so as to pursue a monetary claim against the respondents, taking advantage of the provisions of the 1996 Act.
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12. Hence the appeals are dismissed and the impugned judgement and order is confirmed, in the above terms.

Kalpana K. Tripathy

Appeals dismissed.