

(2007) 07 AP CK 0021

In the Andhra Pradesh High Court

Case No : Arbitration Application No. 56 of 2006

IVRCL Infrastructures and Projects Ltd.

APPELLANT

Vs

Bhanu Construction Company Ltd.

RESPONDENT

Date of Decision : 17-07-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(5), 11(6), 21, 43
Limitation Act, 1963 — Article 137, 5, 10, 15, 2
Partnership Act, 1932 — Section 39, 40, 42, 7

Citation : (2007) 07 AP CK 0021

Hon'ble Judges : Ramesh Ranganathan, J

Bench : Single Bench

Advocate : S. Niranjan Reddy, for the Appellant; L. Venkateshwar Rao, for the Respondent

Judgement

Ramesh Ranganathan, J.—This application is filed under Sub-sections (5) and (6) of Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of a sole arbitrator to adjudicate the claims and disputes between the applicant and the respondent.

2. The applicant, a public limited company incorporated under the Companies Act, 1956 and having its registered office at Hyderabad, is engaged in the business of construction, infrastructure development and other allied business.

3. The respondent is a company engaged in the business of designing, fabrication, erection, installation of electricity and transmission towers and relayed works.

4. The Andhra Pradesh Transmission Corporation Limited, (hereinafter referred to as APTRANSCO), invited tenders for assigning works relating to fabrication, supply and erection of 400 K.V. transmission lines from Visakhapatnam to Khammam. The applicant and the respondent entered into a joint-venture agreement dated 18.5.2000 for execution of these works. The joint-venture agreement was subjected to modification on 27.5.2000 whereby profits accrued

were to be shared in the ratio of 40% to the applicant and 60% to the respondent. APTRANSCO awarded a part of the work, for supply and erection of a total length of 92.246 Km stretch, in two separate orders dated 21.11.2000 for an aggregate value of Rs. 13,04,62,684/-. Both the applicant and the respondent formed a partnership in the name of "Bhanu IVRCL Associates" and a partnership deed was executed on 14.12.2000. The said partnership firm was registered with the Registrar of firms on 26.06.2001.

5. Applicant would allege that the respondent had committed several defaults in execution of the contract thereby committing breach of the terms and conditions of the joint-venture agreement/partnership deed and, in order to keep up its reputation and good will, it had undertaken and executed the work to the satisfaction of APTRANSCO. However, on account of the wrong specifications, designs and material supplied by the respondent, in addition to other breaches, the joint venture/partnership sustained huge losses. Applicant would claim that, material worth Rs. 1,21,07,980-70 ps supplied towards execution of the contract has not been accounted for by the respondent till date, that the joint venture/partnership had sustained a loss of Rs. 4,56,89,086/- and that, as per the agreement, the respondent was liable to share 60% of the loss amounting to Rs. 2,74,13,452/-. Applicant would contend that it was making rigorous efforts for realizing various amounts due from APTRANSCO, that the respondent did not cooperate as it was the applicant which had invested enormous funds for execution of the contract, and that, as per the audited accounts, the respondent was due and payable a total sum of Rs. 3,95,21,370-70, representing material supplied by the applicant worth Rs. 1,21,07,918-00 and 60% of the loss incurred of Rs. 2,74,13,452.

6. The applicant invoked the arbitration clause and, vide letter dated 15.7.2006, proposed the name of Sri D. Surya Rao, retired Judicial Member, Central Administrative Tribunal as the Arbitrator to adjudicate the dispute. The respondent in its reply thereto, vide letter dated 18.08.2006, denied liability and, while not accepting the suggestion of the applicant with regards nomination of the sole arbitrator, informed that it would nominate the sole arbitrator.

7. Applicant would submit that, as there was no consensus on the proposed arbitrator, it was constrained to invoke the jurisdiction of this Court praying for nomination of a sole arbitrator and that the cause of action arose in Hyderabad as the entire transaction, between the applicant and the respondent, occurred at Hyderabad.

8. In its counter affidavit, the respondent submits that it is engaged in the specialized business of designing, fabrication, erection and installation of electricity transmission towers and related work thereof, that its expertise in the said field is well recognized and that a joint-venture agreement dated 18.5.2000 was entered into between the applicant and the respondents. While denying the allegation, that the jointventure agreement provided for sharing of profits and losses in the ratio of 60:40, respondent states that APTRANSCO had awarded a

part of the total work of construction of transmission lines for a length of 92.246 K.M in the name of the respondent, that the gross value of the work was Rs. 13,04,62,684/- and that both the petitioner and the respondent had executed a partnership deed dated 14.12.2000 which was registered with the Registrar of Firms. Reference is made to various provisions of the partnership deed to contend that, contrary to the terms thereof, the petitioner, taking advantage of the fact that it was financing execution of the project, had totally sidelined the respondent even before the project took off and had got a major part of the project executed by sub-contracting the work to third parties thereby violating the letter and spirit of the partnership deed and the joint-venture agreement. While affirming that Clause 17 of the joint-venture agreement provided for referring disputes and differences arising out of the execution of the work and distribution of profits and losses to arbitration, under the Arbitration and Conciliation Act, 1996, respondent denies that it was unable to execute the contract/execute the work or that it had committed default in execution thereof and would submit that they were sidelined by the applicant and, therefore, the question of their not cooperating with the applicant did not arise. Respondent would allege that, though the partnership deed provided for equal rights and responsibilities, the applicant had usurped all their rights, that the claim of the applicant of having sustained huge losses was fictitious besides being utterly false, that from day one, the applicant had total control over the affairs of the partnership firm and any loss, allegedly sustained, could be attributed only to mismanagement by the applicant. Respondent would deny the allegation that the applicant had supplied them material worth Rs. 1,21,07,980-70 and state that it had executed the work allotted to it fully accounting for the material supplied. Respondent would contend that there was no whisper of any such material having been supplied till the notice dated 15.7.2006 was issued by the applicant, that similarly the loss of Rs. 4,56,89,086/- allegedly suffered by the partnership firm was never referred to by the applicant at any point of time prior to the said notice, that the applicant was in total charge of the financial operations of the partnership firm and, having failed to furnish accounts to the respondent, in spite of their specific request, it could not, at this belated stage, raise the claim, allege losses and call upon the respondent to bear 60% thereof. Respondent would state that the losses, if any, was directly attributable to the applicant's mismanagement alone, that neither the joint-venture agreement nor the partnership deed provides for sharing of losses by the respondent and all that the joint-venture agreement provided was that the respondent would be entitled for 60% of the net profits on execution of the project. Respondent would contend that the applicant never revealed any accounts much less the true accounts of the partnership to the respondent and, as such, the applicant's claim that the respondent had to bear 60% of the losses was but a figment of its imagination.

9. Respondent would allege that the entire false claim set up by the applicant was only an exercise to deny the respondent its due share in the net profits of the partnership firm. While denying knowledge, of the amount realized by the

applicant from APTRANSCO, respondent would submit that the applicant had never accounted for the same, that it was not aware of the monies, if any, receivable by the partnership from APTRANSCO, that the applicant's claim of having got the firm accounts audited was not within its knowledge, that no amount was due and payable by the respondent to the applicant, much less, the alleged sum of Rs. 3,95,21,370-70 as claimed by them either on account of material supplied or alleged losses suffered, that the applicant had also issued legal notice dated 15.7.2006 to evade sharing the profits generated out of the joint-venture with the respondent by making false and baseless allegations, that, except for making bare allegations, the applicant did not deem it fit to substantiate any of them and that, under the circumstances, the respondent deemed it fit and proper to get a proper reply notice dated 18.8.2006 issued to the applicant denying various allegations as false and baseless, that in its reply notice the respondent had also made it clear that it was not agreeable to the appointment of an arbitrator chosen by the applicant as no such right was bestowed upon them under the joint-venture agreement. Respondent would contend that the dispute and claim of the applicant, for Rs. 3,95,21,370-70 towards supply of material, and the alleged loss suffered by it, was barred by limitation and, as such, could not be referred to arbitration.

10. In its reply affidavit, the applicant states that the sharing of profits clause in the joint-venture agreement clearly implied that profits and losses had to be shared in the ratio of 60:40, that Clauses 8 and 10 of the joint-venture agreement clearly specify that the applicant would bear all the expenses and would be incharge of the financial aspects of the project and that the respondent had committed several defaults and had left the project in the midst of execution thereby leaving no other option to the applicant but to complete the project in accordance with Clause 11 of the joint-venture agreement. Applicant would deny that it had side-lined the respondent and to have completed the work or that the respondent had fully accounted for the work allotted to it.

11. Applicant would contend that, though the work was executed on 23.7.2002, settlement of accounts and payment of money due was not yet finalized with APTRANSCO. According to the applicant there arose disputes with regards excise duty payable, that the matter was carried in appeal to the Central Excise Tribunal, that the appeal was ordered recently in favour of the applicant, it was only after audit of the accounts for the year 2005-2006 that the applicant could ascertain the extent of loss incurred by the joint-venture on account of the defaults committed by the respondent and that it was not open to the respondent to contend that there was no whisper about the loss as they were well aware of the proceedings and settlement with APTRANSCO. Applicant would contend that, under Clause 12 of the agreement, accounts of the joint-venture were always available for inspection and that the respondent was, therefore, precluded from contending that the applicant had not furnished accounts or that it was not aware of the settlement of accounts with APTRANSCO. On the question of limitation, applicant would submit that, while execution of work was

completed, settlement of accounts was not yet completed and the limitation period would begin only after settlement of accounts and only from the date on which the cause of action arose i.e., when the right to claim money crystallized. According to the appellant, as the issue pertaining to central excise was outstanding, A.P. TRANSCO did not make payment to the applicant till October, 2005 and, only thereafter, could the cause of action be said to have arisen for the applicant to ascertain the loss/damage suffered for it to make a specific claim against the respondent and that invocation of the arbitration clause was well within limitation.

12. Sri S. Niranjan Reddy, learned Counsel for the applicant, would place before this Court a copy of the certificate issued by the Chief Engineer, APTRANSCO dated 23.7.2002 to the effect that the joint-venture had executed the Vizag - Kathipudi section of Vizag - Khammam 400 KV D/C line and that the line was commissioned on 10.5.2002. Learned Counsel would submit that as the issue, pertaining to central excise, was pending and, as APTRANSCO did not make payment to the applicant till October, 2005, it was only thereafter did the cause of action arise for the applicant to ascertain the loss/damage for it to make a specific claim against the respondent and since the application was filed before this Court on 31.8.2006, less than a year after payments were made by APTRANSCO in October, 2005, it was well within limitation. While admitting that the defect liability period of one year also expired on 10.5.2003, learned Counsel would, nonetheless, contend that this Court would only decide whether the claim was a dead one or was a long barred claim sought to be resurrected and since, in the present case, there was a genuine dispute on the question whether or not the claim was barred by limitation, it could not be said that either the claim was a dead one or that it was a long barred claim which was sought to be resurrected.

13. Learned Counsel would submit that, in any event, since the question of limitation was a mixed question of fact and law it would necessitate evidence being let in and that this Court would not, in proceedings under Sections 11(5) and (6) of the Arbitration and Conciliation Act, 1996, examine these aspects since these were all matters to be decided by the sole Arbitrator to be appointed by this Court. Learned Counsel would submit that, even if it were to be assumed that the partnership stood automatically dissolved, the joint-venture agreement enabled the dispute relating to recovery of the amounts due, pursuant to the determination of profits and losses, to be referred to arbitration.

14. Learned Counsel would rely on SBP & Co v. Patel Engineering Ltd. (2005) 8 SCC 618 and Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, . Sri L. Venkateswara Rao, learned Counsel for the respondent, on the other hand, would refer to Clause 6, of both the joint-venture agreement and the partnership deed, to submit that, since the certificate dated 23.07.2002, placed before this Court by the applicant, would itself reveal that the work was executed, and the line commissioned, on 10.5.2002 and, since the defect liability period of one year also expired by 10.5.2003, the partnership/joint- venture stood automatically

dissolved by that date. Learned Counsel would fairly submit that, while it was not their case that the arbitration clause automatically ceased to operate on dissolution of the joint venture/partnership, the claims were, nonetheless, barred by limitation. Learned Counsel would refer to Article 5 of Part I of the Schedule to the Limitation Act to contend that, since the dispute raised by the applicant relates to share of the profits/losses of a dissolved partnership firm, the period of limitation is three years from the date of dissolution, and as both the joint-venture and the partnership stood dissolved immediately after the defect liability period i.e., 10.5.2003, the application for appointment of an arbitrator ought to have been filed on or before 10.5.2006 and, since the application has admittedly been filed more than three months thereafter on 31.08.2006, the applicant's claim is barred by limitation. Learned Counsel would submit that, in the present case, the arbitral proceedings cannot be said to have commenced prior to the notice dated 15.7.2006, whereby the applicant had requested the respondent to give its consent to the appointment of a sole arbitrator, even before which date the claim was barred by limitation. Learned Counsel would place reliance on *Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd.*, in this regard. Learned Counsel would submit that there is no live issue and that, once the claim is held to be barred by limitation, nothing survives for adjudication necessitating reference of the dispute for resolution by a sole arbitrator.

15. Section 43(1) of the Arbitration and Conciliation Act, 1996 stipulates that the Limitation Act, 1963 (Act 30/63) shall apply to arbitration as it applies to proceedings in Court. Section 43(2) provides that, for the purpose of Section 43 and the Limitation Act 1963, an arbitration shall be deemed to have commenced on the date referred to in Section 21. Section 21 relates to commencement of arbitral proceedings and, thereunder, unless otherwise agreed to by the parties, arbitral proceedings in respect of a particular dispute shall commence from the date on which a request for that dispute to be referred to arbitration is received by the respondent. Since the applicant had requested the respondent to refer the dispute to arbitration for the first time in its notice dated 15.7.2006, which was despatched by registered post on 17.7.2006, (the date of receipt of the said notice by the respondent not being clear), arbitral proceedings cannot, in any event, be said to have commenced prior to 17.7.2006. Section 2(j) of the Limitation Act, 1963, defines "period of limitation" to mean the period of limitation prescribed for any suit by the schedule and "prescribed period" to mean the period of limitation computed in accordance with the provisions of the Limitation Act. u/s 3(1), subject to the provisions contained in Sections 4 - 24, every suit instituted after the prescribed period shall be dismissed although limitation has not been set up as a defence. The schedule to the Limitation Act prescribes the period of limitation. The first division of the schedule relates to suits and Part I thereof pertains to suits relating to accounts. Article - 5 thereunder, which relates to suits for accounts and sharing of the profits of a dissolved partnership, prescribes the period of limitation as three years and the time from which the period begins to run as the date of dissolution of the

partnership.

16. Clause (6) of the joint-venture agreement dated 18.5.2000 is in parimateria with Clause (6) of the Partnership Deed dated 14.12.2000. Both these clauses reads as under:

Clause (6) of the Joint-venture Agreement:

That this Joint-venture shall remain in force and shall not be dissolved without the consent of either parties until the completion of project and defects liability period incorporated in the contract of agreement or any extensions thereby.

Clause (6) of the Partnership Deed:

That this partnership shall remain in force and shall not be dissolved without the consent of either parties until the completion of project and defects liability period incorporated in the contract agreement or any extensions thereof.

17. On the applicant's own showing the Vizag - Kathipudi section of the Vizag-Khammam 400 KV D/C line was commissioned on 10.5.2002 and the defect liability period of one year expired on 10.5.2003. If the partnership were held to have been dissolved on the expiry of the defect liability period of one year on 10.05.2003 then, in view of Section 21 read with Section 43 of the Arbitration and Conciliation Act, 1996, the claim made by the applicant would be barred by limitation as the arbitral proceedings were not commenced within three years thereof i.e., on or before 09.05.2006. If, on the other hand, Clause (6) of the joint venture/partnership were to be construed as providing only for a contingency where the partnership is sought to be dissolved prior to, and not after, completion of the project, the defect liability period or any extensions thereby, then there is no other clause specifically providing for the dissolution of the joint venture/partnership.

18. Section 7 of the Indian Partnership Act, 1932, relates to partnership at will and thereunder, where no provision is made by the contract between the partners for the duration of their partnership, or for its termination, the partnership is a "partnership at will". Section 7 contemplates two exceptions to a partnership at will. The first one is where there is a provision made in the partnership deed for the duration of the partnership and the second where there is a provision in the contract for determination of the partnership. In either of these cases, the partnership is not at will. Duration of a partnership may be express or may, in given circumstances, be implied. M.O.H. Uduman and others Vs. M.O.H. Aslum, . Chapter VI of the Indian Partnership Act relates to dissolution of a firm and u/s 39 dissolution of a partnership between all the partners of a firm is called "dissolution of a firm". Section 40 relates to dissolution by agreement and, thereunder, a firm may be dissolved with the consent of all the partners or in accordance with the contract between the partners. u/s 42(a), subject to the contract between the partners, a firm is dissolved, if it is constituted for a fixed term, by the expiry of that term. u/s

43(1), where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the partners of his intention to dissolve the partnership. Sub-section (1) of Section 43 does not say what will be the date from which the firm will be deemed to be dissolved. For ascertaining that, Sub-section (2) has to be referred. This provision contemplates the mentioning of a date from which the firm would stand dissolved, *Banarsi Das Vs. Seth Kanshi Ram and Others*, or, if no date is mentioned, from the date of communication of the notice. There is nothing on record to show that any such notice was given by the respondent to the applicant of its intention to dissolve the partnership.

19. The question which would arise for consideration is whether the partnership between the applicant and the respondent is a partnership at will u/s 7 or is a partnership constituted for a fixed term. If it is held to be a partnership at will, then, in the absence of a notice of the intention to dissolve the firm being communicated, by one partner to the other, the firm continues to exist. If, on the other hand, it is held to have been constituted for a fixed term, then, the firm must be held to have been dissolved with effect from the expiry of the term. Either of the two constructions, placed on Clause (6) of the joint-venture agreement/partnership deed, is possible. In *Uduman*⁵, the Supreme Court observed:

...It is settled canon of construction that a contract of partnership must be read as a whole and the intention of the parties must be gathered from the language used in the contract by adopting harmonious construction of all the clauses contained therein. The cardinal principle is to ascertain the intention of the parties to the contract through the words they have used, which are key to open the mind of the makers. It is seldom that any technical or pedantic rule of construction can be brought to bear on their construction. The guiding rule really is to ascertain the natural and ordinary sensible meaning to the language through which the parties have expressed themselves, unless the meaning leads to absurdity....

20. Should the Chief Justice's designate, while exercising jurisdiction u/s 11(5) and (6), take upon itself the task of reading the contract of partnership as a whole, gathering the intention of the parties from the language used therein, and in adjudicating which of the two possible construction of Clause (6) deserves acceptance? Or should the matter should be left for examination in arbitral proceedings, more so, as the respondent, in its reply notice dated 18.8.2006, had reserved its right to appoint the sole arbitrator and had informed the applicant that details thereof would be communicated within 15 days?

21. In *Patel Engineering Ltd.*'s case (2005) 8 SCC 618, the Supreme Court held:

...Going by the above test it is seen that at least in the matter of deciding his own jurisdiction and in the matter of deciding on the existence of an arbitration agreement, the Chief Justice when confronted with two points of view presented by the rival parties, is called upon to decide between them and the decision

vitality affects the rights of the parties in that, either the claim for appointing an Arbitral Tribunal leading to an award is denied to a party or the claim to have an arbitration proceeding set in motion for entertaining a claim is facilitated by the Chief Justice. In this context, it is not possible to say that the Chief Justice is merely exercising an administrative function when called upon to appoint an arbitrator and that he need not even issue notice to the opposite side before appointing an arbitrator.

It is fundamental to our procedural jurisprudence, that the right of no person shall be affected without he being heard. This necessarily imposes an obligation on the Chief Justice to issue notice to the opposite party when he is moved u/s 11 of the Act. The notice to the opposite party cannot be considered to be merely an intimation to that party of the filing of the arbitration application and the passing of an administrative order appointing an arbitrator or an Arbitral Tribunal. It is really the giving of an opportunity of being heard. There have been cases where claims for appointment of an arbitrator based on an arbitration agreement are made ten or twenty years after the period of the contract has come to an end. There have been cases where the appointment of an arbitrator has been sought, after the parties had settled the accounts and the party concerned had certified that he had no further claims against the other contracting party. In other words, there have been occasions when dead claims are sought to be resurrected. There have been cases where assertions are made of the existence of arbitration agreements when, in fact, such existence is strongly disputed by the other side who appears on issuance of notice.

Controversies are also raised as to whether the claim that is sought to be put forward comes within the purview of the arbitration clause concerned at all. The Chief Justice has necessarily to apply his mind to these aspects before coming to a conclusion one way or the other and before proceeding to appoint an arbitrator or declining to appoint an arbitrator. Obviously, this is an adjudicatory process. An opportunity of hearing to both parties is a must....

...It is necessary to define what exactly the Chief Justice, approached with an application u/s 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 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 u/s 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....

22. In *Shree Ram Mills Ltd.* (2007) 4 SCC 599, the Supreme Court, following its earlier judgment in *Patel Engineering Ltd.* (2005) 8 SCC 618, observed:

...We shall take up the last contention raised by the appellant regarding the scope of the order passed by the Chief Justice or his designated Judge. It was contended that since the designated Judge has already given findings regarding the existence of live claim as also the limitation, it would be for this Court to test the correctness of the findings. As against this it was argued by the respondent that such issues regarding the live claim as also the limitation are decided by the Chief Justice or his designate not finally but for the purpose of making appointment of the arbitrators u/s 11(6) of the Act. In our opinion what the Chief Justice or his designate does is to put the arbitration proceedings in motion by appointing an arbitrator and it is for that purpose that the finding is given in respect of the existence of the arbitration clause, the territorial jurisdiction, live issue and the limitation.

It cannot be disputed that unless there is a finding given on these issues, there would be no question of proceeding with the arbitration.

...Insofar as the issues regarding territorial jurisdiction and the existence of the arbitration agreement are concerned, the Chief Justice or his designate has to decide those issues because otherwise the arbitration can never proceed. Thus, the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the court for appointment of the arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining this if the parties have recorded their satisfaction regarding the final claims, there will be no question of any issue remaining. It is in this sense that the Chief Justice has to examine as to whether there remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that *prima facie* the issue has not become dead by the lapse of time

or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation....

...According to Shri Salve, learned Counsel appearing on behalf of the appellants the clock had started ticking against the respondents in relation to the agreement dated 27.4.1994 and they could have had only three years period for filing a suit as per Article 137 of the Limitation Act and as such the claim made with reference to that agreement cannot be arbitrable now in the year 2005.

We do not agree. It is for this reason alone that we have given the complete history of the negotiations in between the parties. The things do not seem to have settled even by 19.1.2005 but that would be for the Arbitral Tribunal to decide. We only observe, at this stage, that the claim of the respondent cannot be said to have become dead firstly because of the settlement or because of lapse of limitation. What is the effect of MoU dated 19.1.2005 was the respondent justified in repudiating the said MoU and what is the effect of repudiation thereof on the earlier agreement dated 27.4.1994 would be for the Arbitral Tribunal to decide. In *Groupe Chimique Tunisien SA Vs. Southern Petrochemicals Industries Corpn. Ltd.*, this Court had clearly held in para 10 that the Arbitral Tribunal can also go into the question of limitation for the claims in between the parties. We have discussed this subject only to hold that since the issue in between the parties is still alive, there would be no question of stifling the arbitration proceedings by holding that the issue has become dead by limitation. We leave the question of limitation also upon the Arbitral Tribunal to decide.

In view of the foregoing discussion we are of the clear opinion that the learned designated Judge was right in appointing the arbitrator u/s 11(6) of the Act....

23. Under Sub-sections (5) & (6) of Section 11, of the Arbitration and Conciliation Act, the Chief Justice's designate has firstly to decide his own jurisdiction, i.e., whether the applicant had approached the proper High Court. He then has to decide whether there is an arbitration agreement and whether the applicant is a party to such an agreement. He has also to examine whether the claim is a dead one or is a long barred claim which is sought to be resurrected, whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving final payment without objection and whether the dispute between the parties is still in issue, i.e., whether there remains anything to be decided between the parties in respect of the agreement.

24. The Chief Justice's designate, in deciding the issue regarding live claims and limitation, records his finding only to put the arbitral proceedings in motion. He would, ordinarily, record his prima facie satisfaction on whether such an issue exists, whether the issue remains alive and whether the claim is barred by limitation. On this issue, he is required to keep in mind that limitation is always a mixed question of fact and law. The satisfaction recorded by the Chief Justice's designate is only to the limited extent whether the issue has become dead due to long lapse of time or whether the party has slept over its rights beyond the time permitted by law to agitate the issues covered by the agreement. However, if there is a valid dispute even on the question of limitation, it is appropriate that the Chief Justice's designate merely records his satisfaction that there exists such a dispute and leaves it for the decision of the arbitral tribunal. As held by the Supreme Court, in *Groupe Chimique Tunisien SA Vs. Southern Petrochemicals Industries Corpn. Ltd.*, and *Shree Ram Mills*" case (2007) 4 SCC 599, the arbitrator can also go into the question of limitation of the claims raised and the dispute existing between the parties.

25. In the case on hand it cannot be said that the claim is long barred and is one which is sought to be resurrected. As there exists a valid dispute on the issue, whether or not the claim of the applicant is barred by limitation, it is appropriate that the question of limitation is also left for the decision of the arbitral tribunal. Needless to state that the Learned Arbitrator shall decide issues relating to the claims/counter claims of parties, whether the joint venture/partnership has been dissolved and, if so, from when?, whether the losses which the partnership is said to have suffered can be apportioned to the respondent under the terms of the partnership deed/joint-venture agreement, whether the claim of the applicant, regarding supply of material and the losses suffered by the joint venture/partnership, are barred by limitation, etc, uninfluenced by any observations made in this order, for the conclusions recorded herein are only prima facie to put the arbitral proceedings in motion.

26. Accordingly, the arbitration application is allowed. Sri Justice M. Venkateswara Reddy, a former Judge of this Court is appointed as the Arbitrator for adjudication of the disputes between the parties. The learned Arbitrator is at liberty to fix his fee. However, initially the applicant is directed to deposit a sum of Rs. 75,000/-(Rupees seventy five thousand only), in advance with the Arbitrator, which is to be adjusted towards the fee to be fixed by the learned Arbitrator. No costs.