COURT'S REFUSAL TO REFER PARTIES TO ARBITRATION IN DISPUTES INVOLVING 'TIME-BARRED' CLAIMS: ANALYSING THE BSNL VS. NORTEL DECISION

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Abstract

Supreme Court of India in its judgment in BSNL Vs. Nortel, has held that judicial authorities have discretion to refuse referring parties to arbitration under Section 11 of the (amended) Arbitration and Conciliation Act, 1996, if it is found that the claims raised by the applicant party are ex facie 'time-barred'. The judgment has likewise cautioned that the scope of judicial interference in such circumstances is limited, requiring a court to refer the matter to the arbitral tribunal, whenever it cannot make an ex facie determination of a claim being 'time-barred'. In this article, I explore the implications of this judgment in detail, highlighting its impact on the Indian arbitration regime, mentioning the earlier precedents not considered by it, and analysing how it impacts the scope of judicial interference in applications for referring parties to arbitration where claims raised by the applicant party are opposed on grounds of being 'time-barred'.

Keywords: Arbitration, Claim, Judicial Intervention, Judicial Interference, Time-Barred

1. Introduction

In India, the legislative policy of limited judicial intervention has been a guiding principle for its arbitration regime. Indian judicial authorities have cautiously exercised restricted judicial interference, when considering an application by a party for reference to arbitration under Section 11 of the (Indian) Arbitration and Conciliation Act 1996[1] (*hereinafter* the Act), where the opposing party challenges the claim as being 'time-barred'. Recently, a Division-Bench of the Supreme Court of India in *Bharat Sanchar Nigam*

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[1] Arbitration and Conciliation Act, 1996, § 11.

Ltd Vs. Nortel Networks India Pvt. Ltd. (*hereinafter* BSNL Vs. Nortel), *unanimously* settled the question on whether a court may refuse to make reference to arbitration under Section 11 of the Act, when the claims are *ex facie* 'time-barred'.[2] The court speaking through Indu Malhotra, J. rendered the judgment in a case arising out of an order by the Kerala High Court to refer the parties to arbitration, under Section 11 of the Act. In its decision, which arrives when the amendments made to Section 11 of the Act by the Arbitration and Conciliation (Amendment) Act, 2015 (*hereinafter* 2015 amendment)[3] are *in force*, the Supreme Court of India held that challenges to arbitration on ground of claims being 'time-barred' or 'dead claim' are a valid reason for judicial authorities to refuse to refer parties to arbitration. Concomitantly, it conclusively determined the period of limitation applicable in Indian law for filing an application under Section 11 as three years,[4] although this separate holding shall not relevant for the present discussion. Finally, the Court clarified few misconceptions arising out of its earlier Full Bench decision in *Vidya Drolia Vs. Durga Trading Corporation* (*hereinafter* Drolia).[5]

There are two circumstances where a court can refer the parties to arbitration under the Act. First, Section 8 of the Act refers to the power of courts to refer a dispute to arbitration, where one of the party places a request for reference before the court and it is found that a 'prima facie' valid arbitration agreement exists. Second, Section 11(6) of the Act empowers the Supreme Court of India and various High Courts in India to appoint an arbitrator for the parties in an international commercial arbitration or domestic dispute, respectively, where an arbitrator or arbitrators cannot be mutually appointed by the parties themselves.[6] These provisions have been subject to substantial changes by amendments introduced through the 2015 amendment, which shall be considered later.

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[2] *Bharat Sanchar Nigam Ltd v. Nortel Networks India Pvt. Ltd.*, 2021 SCC OnLine SC 2017 (*hereinafter* BSNL Vs. Nortel).

[3] The Arbitration and Conciliation (Amendment) Act 2015, § 6.

[4] For a discussion on the separate holding on period of limitation for filing an application under Section 11 of the Act in India, *see* Paridhi Galundia*, BSNL v. Nortel: Supreme Court on Limitation Period for Section 11 Applications and Refusal of Ex-facie Time Barred Claims*, Koinos, March 26, 2021, available at: https://indianarbitrationlaw.com/2021/03/26/bsnl-v-nortel-supreme-court-on-limitation-for-section-11-applications-and-refusal-of-ex-facie-time-barred-claims/ (Last Visited on August 2, 2021).

[5] *Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1 (*hereinafter* Drolia).

[6] Abhijeet Shrivastava and Anujay Shrivastava, *Court's Refusal to Appoint Arbitrators: An 'Appeal' to Create Appeal Mechanisms*, IndiaCorpLaw, April 18, 2021, available at: https://indiacorplaw.in/2021/04/courts-refusal-to-appoint-arbitrators-an-appeal-to-create-appeal-mechanisms.html (Last Visited on August 2, 2021) (*hereinafter* Shrivastava and Shrivastava).

This article analyses the Supreme Court of India's decision in *BSNL Vs. Nortel*, with reference to its specific holding on whether a court can refuse to refer parties to arbitration where a claim is *ex facie* time-barred and if it is manifest that there is no subsisting dispute. The first segment, considers the factual background which gave rise to the present dispute between Bharat Sanchar Nigam Limited (*hereinafter* BSNL) and M/s Nortel Networks India Pvt Ltd (*hereinafter* Nortel), as well as the contentions raised by both BSNL and Nortel before the Court. Moving forward, in the second segment, it considers the legislative history of Section 11 of the Act, *including* statutory amendments to the Act and various judicial precedents considered by the Court in its *BSNL Vs. Nortel* decision. Subsequently, in the third segment, it considers and analyses the *ratio decidendi* emerging out of *BSNL Vs. Nortel*. The fifth segment considers earlier judicial precedents not discussed by the Court in *BSNL Vs. Nortel*, and answers what exactly is the impact of these judgments in light of *Drolia* and *BSNL Vs. Nortel*. I, *inter alia*, clarify that an earlier precedent laid down by Supreme Court of India in *Wexford Financial Inc Panama Vs. Bharat Heavy Electricals Limited* (*hereinafter* Wexford)[7], which took a stand contrary to *BSNL Vs. Nortel*, is *per incuriam*. At the same juncture, I briefly discuss the benefits and harms of adopting a non-interventionist approach that the precedent in *Wexford* batted-for. Finally, on the basis of the presented analysis, I shall conclude this article by highlighting the implications of the *BSNL Vs. Nortel* decision, and call for a legislative amendment to create a provision for appealing a court's refusal to refer parties to arbitration under Section 11.

2. Background

2.1 Facts of the *BSNL Vs. Nortel* dispute

BSNL issued a tender notification inviting bids for completing various tasks relating to expansion of its GSM based cellular mobile network in various Indian States. Nortel was awarded the purchase order for the foregoing tender process by BSNL. On completion of works by Nortel, BSNL withheld an amount of INR 997,093,031/- (approximately £96,23,812.31) towards liquidated damages and other levies. Subsequently, Nortel raised a claim for payment of the above-mentioned amount. BSNL rejected Nortel's claim. This forms the crux of Nortel's claims against BSNL.

After five and a half years, Nortel invoked the arbitration clause in the agreement and requested for appointing an independent arbitrator. In response to Nortel's notice invoking arbitration proceedings, BSNL

[7] *Wexford Financial Inc Panama v. Bharat Heavy Electricals Limited*, (2016) 8 SCC 267 (*hereinafter* Wexford).

responded by stating that the dispute had already been closed five and a half years ago when it had rejected Nortel's claim. Due to this reason, the notice invoking arbitration was time-barred under Section 11 of the Act. Therefore, BSNL contended that the request for appointment of an arbitrator cannot be entertained.

Subsequently, Nortel filed an application under Section 11 of the Act before Kerala High Court, requesting for appointment of an independent arbitrator who shall resolve the disputes between both Nortel and BSNL. BSNL contested Nortel's prayer for reference to arbitration. Ultimately, the High Court while exercising its jurisdiction under Section 11, referred the disputes between both the parties to arbitration. Dissatisfied with the High Court's decision, BSNL challenged the High Court order in a review petition which was dismissed by the High Court. Eventually, BSNL approached the Supreme Court of India *via* a special leave application to challenge both the High Court orders, i.e. the order to refer parties to arbitration under Section 11 and the review order dismissing BSNL's challenge to the foregoing order by the High Court's review bench.[8] The contentions raised by both the parties before the Supreme Court shall be discussed in the following sub-segment.

2.2 Contentions of BSNL and Nortel before the Supreme Court of India

BSNL contended that the cause of action for invoking arbitration arose when it rejected Nortel's claim five and a half years ago. It argued that Nortel had slept over its alleged rights throughout the period between BSNL's rejection of its claim and the notice of arbitration sent by Nortel. Importantly, Nortel did not take any action whatsoever between this period. Therefore, BSNL stated that the notice invoking arbitration was legally stale, non-arbitrable and unenforceable. Consequently, it submitted that the High Court's order to refer parties to arbitration under Section 11 application had erroneously proceeded on the premise of "mere existence" of a valid arbitration agreement. The High Court failed to consider whether the arbitration agreement was 'inextricably connected' with the existence of a 'live' dispute. Moreover, BSNL contended that while questions of limitation are ordinarily to be decided by a tribunal, in cases where the invocation of arbitration agreement is *ex facie* time-barred, the court must mandatorily reject the Section 11 application. BSNL further contended that as Section 11(6A) of the Act (inserted by the 2015 amendment) uses the phrase "*examination of the existence of an arbitration*", the power conferred

[8] *See BSNL Vs. Nortel*, *supra* note 2, ^2.

by the court is not a 'formal exercise', but requires a "*certain degree of examination before making the reference*."[9]

Contrarily, Nortel contended that post the 2015 amendment to Section 11 of the Act, the scope of enquiry at the pre-reference stage is limited and further restricted only to examining the 'existence' of an arbitration agreement under Sub-section 6A of Section 11. Moreover, in view of the doctrine of *kompetenz-kompetenz*[10], the arbitral tribunal could examine the objection with respect to the claims being time-barred. Nortel further contended that the distinction between limitation for filing an application under Section 11 and that of underlying claims does not survive after the 2015 amendment, as the role of judicial authorities is restricted to only examining the 'existence' of arbitration agreement between the parties. Furthermore, it contended that the limitation period starts at the expiry of thirty days from the date of issuing 'notice of arbitration' instead of BSNL's rejection of its claim for payment of the amount for completion of the tender work. Consequently, it argued that the High Court was correct in both limiting the enquiry to the existence of the arbitration agreement at the pre-reference stage and referring the dispute to arbitration.[11]

3. Legislative History: Section 11 of the Indian Arbitration and Conciliation Act, 1996

Before answering the question pertaining to whether a court can refuse a reference to arbitration where claims are *ex facie* time-barred, the Supreme Court of India in *BSNL Vs. Nortel* considered the scope of Section 11 of the Act, in light of legislative amendments and various judicial precedents. In this segment, the scope of Section 11 under different legislative regimes has been analysed in three sub-segments.

First, sub-segment 3.1 analyses the scope of Section 11 prior to the 2015 amendment. Second, sub-segment 3.2 analyses the scope of Section 11 under post-2015 amendment regime and considers case-laws which have considered or been pronounced after the amended Section 11 was adopted. Lastly, sub-segment 3.3 considers the significance of the Arbitration and Conciliation (Amendment) Act, 2019 (*hereinafter* 2019 amendment)[12] vis-à-vis Section 11. Each of these segments also considers the discussion of legislative history of Section 11 by the Court in *BSNL Vs. Nortel*.

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[9] *See id*., ^4.
[10] *See generally* Margaret L. Moses, The Principles and Practice of International Commercial Arbitration 91, Cambridge University Press (2nd ed., 2012) (explaining the doctrine of *kompetence-kompetenz* under international commercial arbitration).
[11] *See BSNL Vs. Nortel*, *supra* note 2, ^5.
[12] The Arbitration and Conciliation (Amendment) Act 2019, § 3.

3.1 Position of law prior to the 2015 amendment

The Supreme Court of India in *BSNL Vs. Nortel* recorded that as per Section 11 of the Act in the pre-2015 amendment regime, the legislative scheme provided that whenever two or more parties mutually agreed on a procedure for appointment of arbitrator, the appointment had to be made in accordance with the procedure contemplated in the arbitration agreement. The Court appears to acknowledge that the legislative scheme has always emphasized on party autonomy. Absent a procedure in the arbitration agreement or failure of parties to mutually agree upon an arbitrator, the original provision in Section 11 empowered appropriate judicial authorities to appoint arbitrations on request of a party.[13] For a Section 11 application in an international commercial arbitration, the Chief Justice of India or any person/institution designated by them would make the appointment. On the other hand, appointments in domestic arbitrations were done by the Chief Justice of a High Court or any person/institution designated by them.

The Supreme Court of India then mentioned its precedents in the Seven Judge Constitution Bench decision of *SBP & Co. Vs. Patel Engineering and Anr.* (*hereinafter* Patel Engineering)[14], as well as the Division Bench decisions in *National Insurance Co. Ltd. Vs. Boghara Polyfab (P.) Ltd.*[15] and *Union of India & Ors. Vs. Master Construction Co.*[16], which were rendered during the pre-2015 amendment regime. The principle expounded from these decisions was that a court could evaluate both whether a claim was a 'live claim' or a 'dead claim' and whether a 'long-barred' (i.e. time-barred) claim was sought to be resurrected by a party. On the basis of this evaluation, should the dispute *prima facie* appear to be lacking in credibility (i.e. the dispute concerned a 'dead claim' or a 'time-barred' claim), a court could choose to not refer the matter to arbitration while adjudicating a Section 11 application for appointment of arbitrators. Thus, the scope of judicial interference in deciding a Section 11 application was judicially enlarged by various precedents and was a settled-principle prior to the 2015 amendment.

3.2 Position of law under the 2015 amendment

In 2015, the Indian Parliament enacted the 2015 amendment to the Act, which brought drastic changes to the Indian arbitration regime, with an aim

[13] *See BSNL Vs. Nortel*, *supra* note 2, ^19.
[14] *See SBP & Co. v. Patel Engineering and Anr*, (2005) 8 SCC 618, ^39 (*hereinafter* Patel Engineering).
[15] *National Insurance Co. Ltd. v. Boghara Polyfab (P.) Ltd.*, (2009) 1 SCC 267.
[16] *Union of India & Ors. v. Master Construction Co.*, (2011) 12 SCC 349.

to make India investor friendly[17], promote arbitration and limit judicial intervention.[18] Amongst other provisions, Section 11 of the Act was also subject to four notable modifications.

First, wherever the appropriate judicial authority for appointing arbitrators provided under the original Section 11 of the Act was mentioned as the "Chief Justice of India" or "Chief Justice of the High Court" or any person or institution designated by them, the phrases "Supreme Court" (for international commercial arbitrations) and "High Court" (domestic arbitrations), respectively, were substituted in order to reduce the workload of a Chief Justice (of a High Court) or Chief Justice of India's benches. Both the superior courts (Supreme Court and High Courts) could still delegate this power to an institution or person designated by them. This was a beneficial modification as Chief Justices of various High Courts and the Chief Justice of India are occupied with heavy administrative work and may not necessarily be the best suited judge to deal with matters requiring extensive subject-matter expertise in arbitration. Second, importantly, Sub-section (6A) was inserted, which curtailed the jurisdiction of judicial authorities to confine their scope of examination only to 'existence' of an 'arbitration agreement' while dealing with Section 11 applications.[19] Subsequent judicial pronouncements by the Supreme Court of India have qualified the phrase "arbitration agreement" to mean a 'valid' arbitration agreement.[20] Third, Sub-section (6B) was inserted which provided that the designation of any person or institution by the appropriate courts would not amount to a delegation of 'judicial power'.[21] The implication of this modification was highlighted by the Supreme Court in *BSNL Vs. Nortel* in context of the 2019 amendment (which shall be considered in sub-segment 3.3). Fourth, a new Sub-section 13 mandates that judicial authorities or any person/institution designated by the judicial authorities for purposes of Section 11, shall deal with applications for appointment of arbitrators as expeditiously as possible. Notably, Sub-section 13 also states that courts should endeavour to dispose of the matter "*within sixty-days from the date of service of notice on the opposite party*".[22]

[17] Lalitaksh Joshi, *Arbitration Act: Progressive Response to Regressive Amendment*, Bar & Bench, December 2, 2019, available at: https://www.barandbench.com/columns/arbitration-act-progressive-response-to-regressive-amendment (Last Visited on August 2, 2021).
[18] Maneck Mulla and Akshita Bhargava, *India: Arbitration In India – The Way Forward*, Mondaq, April 26, 2018, available at: https://www.mondaq.com/india/arbitration-dispute-resolution/696044/arbitration-in-india-the-way-forward (Last Visited on August 2, 2021).
[19] Arbitration and Conciliation Act, 1996, § 11(6A).
[20] Shrivastava and Shrivastava, *supra* note 6.
[21] Arbitration and Conciliation Act, 1996, § 11(6B).
[22] Arbitration and Conciliation Act, 1996, § 11(13).

The Supreme Court of India in *BSNL Vs. Nortel* considered the scope of judicial interference under Section 11 of the Act (as modified by the 2015 amendment). It took the view that should the existence of an arbitration agreement be not in dispute, all other issues would be left for the arbitral tribunal to decide. Moreover, it iterated that the earlier precedents on scope of Section 11 under the pre-2015 amendment regime in *Patel Engineering* and cases following it, which enlarged the scope of judicial interference, stood legislatively overruled.[23] The Court recalled its precedent in *Duro Felguera SA Vs. Gangavaram Port Ltd*. (*hereinafter* Felguera)[24], where the new Sub-section (6A) came for consideration. The Court in *Felguera* observed that the new legislative policy was to minimize judicial intervention at the appointment stage. Without mincing any words, the Court in *Felguera* had held that "*all the courts are required to examine is whether an arbitration agreement is in existence – nothing more, nothing less*".[25] This position of law was subsequently affirmed by a Full Bench decision of the Supreme Court of India in *Mayavati Trading Company Private Ltd Vs. Pradyut Dev Burman* (*hereinafter* Mayavati)[26], which held that the scope of power under Sub-section (6A) to Section 11 had to be construed narrowly and explicitly followed *Felguera*. Later, the Court in *BSNL Vs. Nortel* referred to an earlier Division Bench decision in *Uttarakhand Purv Sainik Kalyan Nigam Vs. Northern Coal Field Limited* (*hereinafter* NCFL), which in turn relied on the Law Commission of India's 246th Report. The Court in *NCFL* had recorded that in the recommended amendments to Section 11 of the Act (prior to adoption of the 2015 amendment), the scope of judicial intervention was intended to be restricted to situations where "*a judicial authority finds that the arbitration agreement does not exist or is null or void*".[27] Thus, the view taken by the Supreme Court of India on the general scope of Section 11 in *BSNL Vs. Nortel* was well-grounded on precedential support.

3.3 Significance of the 2019 amendment

Finally, the Supreme Court of India in *BSNL Vs. Nortel* considered impact of the 2019 amendment to Section 11. Amongst other things, the 2019 amendment sought to 'delete' the new provision in Sub-section (6A) of Section 11. Through other modifications, it was sought to empower the

[23] *See BSNL Vs. Nortel*, *supra* note 2, ^23.
[24] *See Duro Felguera SA v. Gangavaram Port Ltd*., (2017) 9 SCC 729, ^48, ^59 (*hereinafter* Felguera).
[25] *See id*., ^59.
[26] *See Mayavati Trading Company Private Ltd. v. Pradyut Dev Burman*, (2019) 8 SCC 714, ^10 (*hereinafter* Mayavati).
[27] *Uttarakhand Purv Sainik Kalyan Nigam v. Northern Coal Field Limited*, (2020) 2 SCC 455, ^7.6 (*hereinafter* NCFL).

arbitral institutions designated by the appropriate judicial authority (i.e., the Supreme Court of India or High Courts) to exercise the default power to appoint arbitrators. However, the bench in *BSNL Vs. Nortel* recorded that the provision in the 2019 amendment which omitted Section 11(6A) was amongst the provisions that has not been notified by the Parliament yet. Due to this reason, the bench observed that Section 11(6A) continues to be a part of the Act[28], a view which is shared by Indian practitioners.[29] At the same juncture, the bench highlighted an anomaly that arises from the effects of the 2019 amendment being fully enacted. Notably, Section (6B) has not been omitted by the 2019 amendment. Consequently, the bench in *BSNL Vs. Nortel* recorded that the effect created by retention of Section (6B) is that "*it would not be open for the person or institution designated by the Court to exercise any judicial power, and adjudicate on any issue, including the validity of the agreement or the arbitrability of disputes*".[30] This means that should the provision in 2019 amendment notifying omission of Section (6A) be adopted, along with modifications to the Act empowering arbitral institutions to exercise the default power in Section 11, they will still lack the requisite authority to make binding orders on parties requiring them to be a part of the arbitration proceedings.[31] Thus, even if the 2019 amendment is fully adopted, parties would be still required to approach courts to enforce arbitration proceedings, resulting both in redundancy of the amendment to Section 11 and introduction of undesired vagueness to the existing arbitration regime.

As the 2019 amendment was partly-adopted to the Act without removal of Section (6A), the 2015 amendment and judicial precedents that interpreted the amended provision in Section 11 continued to govern the arbitration landscape in India. Subsequently, the landmark decision by a Full Bench of the Supreme Court of India in *Drolia* drastically changed the scope of judicial interference in India's arbitration landscape.[32] The majority opinion in *Drolia* was rendered by Sanjiv Khanna, J. (for himself and Krishna Murari, J.), while N.V. Ramana, J. wrote the concurring opinion. Importantly, *Drolia* harmonized the provisions in Section 8 and Section 11(6A) of the Act. Subsequent to the 2015 amendment, the standard of review applicable to a request for reference to arbitration in Section 8 was legislatively modified to a "prima facie" review. Under this standard, a court had the duty to mandatorily refer a dispute to arbitration, when it is "prima

[28] *See BSNL Vs. Nortel*, *supra* note 2, ^27.
[29] Amit George, *Has Section 11(6A) been deleted from the Arbitration Act?*, Bar & Bench, March 10, 2021, available at: https://www.barandbench.com/columns/policy-columns/has-section-116a-been-deleted-from-the-arbitration-act (Last Visited on August 2, 2021).
[30] *See BSNL Vs. Nortel*, *supra* note 2, ^29.
[31] Id.
[32] Drolia, *supra* note 5.

facie" found that a valid agreement exists.[33] While the text of Section 11(6A) did not by itself prescribe a *prima facie* review standard, the Supreme Court of India in *Drolia* read this standard into Section 11(6A). Consequently, Section 11 applications no longer require courts to make a full-fledged hearing (including any need for examination of materials advanced by parties). Moving forward, while adjudicating Section 11 applications for reference to arbitration, a court needs to only examine whether *prima facie* a 'valid' arbitration agreement exists.[34] The majority decision of the Court speaking through Khanna, J. in *Drolia* records that the court's review is only for the reason of weeding out "*manifestly ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes*".[35] As summarized by Ramana, J. in his concurring opinion in the *Drolia* decision, a court in its *prima facie* review under Section 11(6A) must sequentially find out:

a. whether the arbitration agreement is in writing;
b. whether the agreement was contained in letters, telecommunication or other acceptable modes of communication;
c. whether "core contractual ingredients" were fulfilled vis-à-vis the arbitration agreement; and
d. whether the subject-matter in the dispute is 'arbitrable'.[36]

Elsewhere, I have jointly considered the reading of *prima facie* review standard into Section 11 of the Act by the Supreme Court of India's decision in *Drolia* as heeding the Indian Parliament's actual intent, despite its ostensible departure from the text of Section 11(6A).[37] Notably, the Court in both *Drolia*[38] and *BSNL Vs. Nortel*[39], followed the holding of its Full Bench decision in *Mayavati,* reiterating that the Seven Judge Bench decision in *Patel Engineering* and precedents that followed it prior to adoption of the 2015 amendment stood legislatively overruled.

4. Analysis

After examining the legislative history of Section 11, the Supreme Court of India in *BSNL Vs. Nortel*, briefly considered the concept of 'limitation'. The Court recorded that questions of limitation are ordinarily within the domain of the arbitral tribunal to decide, as they are normally a mixed question of

[33] Shrivastava and Shrivastava, *supra* note 6.
[34] *See* Drolia, *supra* note 5, ^92 (Khanna, J.).
[35] *See id.*, ^87 (Khanna, J.).
[36] *See id.*, ^244.5 (Ramana, J.).
[37] Shrivastava and Shrivastava, *supra* note 6.
[38] *See* Drolia, *supra* note 5, ^144 (Khanna, J.).
[39] *See BSNL Vs. Nortel*, *supra* note 2, ^34.

fact and law.[40] It then went on to distinguish jurisdictional issues and admissibility issues to shed light on the nature of concept of limitation. The Court recorded that a 'jurisdictional issue' pertains to the power and authority of an arbitrator to hear and decide a case (including objections to the arbitrator's competence). Such issues would also cover examination of the validity of the arbitration agreement.[41] On the other hand, an 'admissibility issue' pertains to the procedural requirements and nature of the claim or circumstances connected therewith. Further, the Court recorded that "*an admissibility issue is not a challenge to the jurisdiction of the arbitrator to decide the claim*."[42] It considered a mandatory requirement for mediation before commencement of arbitration by parties, as well as a challenge to a claim or part of a claim being time-barred as some illustrative examples of admissibility issues. Such challenges are not directed towards the jurisdiction of an arbitral tribunal to decide the claims by itself.[43]

Moving forward, the Court recorded that the issue of limitation "*goes to the maintainability or admissibility of the claim, which is to be decided by the arbitral tribunal*." Consequently, a challenge on the ground of a claim being 'time-barred' pertains only to admissibility of that claim.[44] Subsequently, the Court considered the Singapore Court of Appeal's decisions in *Swisbourgh Diamond Mines (Pty) Ltd. & Ors. Vs. Kingdom of Lesotho* (*hereinafter* Lesotho)[45] and *BBA & Ors. Vs. BAZ & Anr.* (*hereinafter* BBA 2020).[46] The Singapore Court of Appeal in *Lesotho* decision had importantly distinguished the concepts of jurisdiction and admissibility. Applying the concepts as elucidated in its *Lesotho* decision, the Singapore Court of Appeal in *BBA 2020* held that challenges based on 'statutory time bars' classify as admissibility issue. In order to reach this conclusion, the Singapore Court of Appeal in *BBA 2020*, had affirmed and relied on the "tribunal versus claim" test (*hereinafter* TVC test), which was adopted by the Supreme Court of India in *BSNL Vs. Nortel*. The TVC test is applied for purposes of distinguishing whether an issue goes towards jurisdiction or admissibility. Under the TVC test, a court has to ascertain whether the objection is targeted at the "tribunal" (i.e., when the claim should not be arbitrated due to a defect in arbitration or lack of consent), or at the "claim" itself (i.e., when the claim itself is defective and should not be raised at

[40] *See id.,* ^30.
[41] Id.
[42] *See id.,* ^31.
[43] Id.
[44] *See id.,* ^32.
[45] *See Swisbourgh Diamond Mines (Pty) Ltd. & Ors. v. Kingdom of Lesotho*, [2019] 1 SLR 263 ^207-208 (Singapore Court of Appeal) (*hereinafter* Lesotho).
[46] *BBA & Ors. v. BAZ & Anr.*, [2020] SGCA 53 (Singapore Court of Appeal).

all).[47] Adopting the TVC test, the Supreme Court of India in *BSNL Vs. Nortel* held that a plea of statutory time bar goes towards admissibility, since it attacks the claim itself. In such a circumstance, there is no consequence of whether or not the applicable statute of limitations is classified as "substantive" (i.e., extinguishing the claim) or "procedural" (i.e. barring the remedy) within the understanding of private international law.[48] Consequently, the Court held that the arbitral tribunals must decide the issue of limitation (which concerns admissibility of the claim) either as a preliminary issue or at the final stage (after evidence is led by the parties).[49]

Moving forward, the Supreme Court of India in *BSNL Vs. Nortel* considered its recent precedents to answer the main question on whether a court may refuse to make reference to arbitration if the claims are *ex facie* time-barred. The Court placed strong reliance on its Full Bench decision in *Drolia*. Recalling the holdings in *Drolia* on weeding out *ex facie* 'non-existent and invalid arbitration agreements' or 'non-arbitrable disputes', the Court held that the *prima facie* review at the reference stage in Section 11 is to "*cut the deadwood, where dismissal is bare faced and pellucid, and where on the facts and law, the litigation must stop at the first stage*" [emphasis mine].[50] Moreover, the Court held that judicial authorities while exercising jurisdiction under Section 11 as a judicial forum are capable of exercising the *prima facie* test expounded by *Drolia* and other precedents to screen and remove any *ex facie* meritless, frivolous and dishonest litigation. At the same juncture, it cautioned that exercise of limited jurisdiction by judicial authorities would ensure "*expeditious and efficient disposal at the referral stage*".[51] Further, placing reliance upon *Drolia*, it held that a Court while dealing with Section 11 application can interfere with the arbitration process *only* when it is manifest that the claims are *ex facie* 'time-barred' claims or dead claims, or alternatively, when there is no subsisting dispute.[52]

Notably, the Supreme Court of India in *Drolia* had held that the 'restricted' and 'limited' review is to both check and protect parties from "*being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood*".[53] In *Drolia*, it was observed that by entering into a limited review, the Court would not be usurping the jurisdiction of the Arbitral Tribunal. On the contrary, it would be upholding integrity and efficacy of

[47] *See BSNL Vs. Nortel*, *supra* note 2, ^34.
[48] Id.
[49] *See id.,* ^35.
[50] *See id.,* ^36.
[51] *See id.,* ^36-37.
[52] *See id.,* ^36.
[53] *See* Drolia, *supra* note 5, ^144, ^154.4 (Khanna, J.).

arbitration as an alternative dispute resolution mechanism.[54] It also held that when the Court is not able to determine the existence of a valid arbitration agreement in its *prima facie* review, it should refer the matter to the arbitral tribunal for resolution.[55] This position laid down by *Drolia* was affirmed and further clarified in *BSNL Vs. Nortel*, with the Supreme Court of India affirming that *Drolia* does not resurrect the earlier position in *Patel Engineering*, which had significantly enlarged the scope of judicial interference in Section 11. Moreover, it was held that *Drolia* is in consonance with the law laid down in the post-2015 amendment precedents in *Felguera* and *Mayavati*.[56]

Consequently, the current position of law or *ratio decidendi* which emerges from a combined reading of *Drolia* and *BSNL Vs. Nortel*, is that judicial authorities can refuse to refer parties to arbitration under Section 11, if the claims are *ex facie* found to be 'time-barred' or dead. This scope of interference is to be exercised very restrictively, meaning that wherever there is even a slightest doubt in mind of a judicial authority about the claims being time-barred, it should always refer the dispute to arbitration and leave it to be decided by the arbitral tribunal as either a preliminary issue or at the final stage after parties have been heard. Applying this *ratio decidendi*, the Court in *BSNL Vs. Nortel* ultimately accepted BSNL's submissions and held that Nortel's claims were indeed *ex facie* 'time-barred'. Consequently, the Court overruled the High Court orders, holding that the disputes between BSNL and Nortel cannot be referred to arbitration.

5. Earlier Precedents not considered in *BSNL Vs. Nortel* Case

It is pertinent to mention that the Supreme Court of India in both *Drolia* and *BSNL Vs. Nortel* did not consider an earlier precedent in its Division Bench decision in *EMM ENN Associates Vs. Commander* (*hereinafter* EMM ENN)[57], which it could have benefitted from. In *EMM ENN*, the Court had held that a judicial authority may choose to hold a claim as a 'dead claim' and refuse to refer the parties to arbitration, only where a claim is, *first*, 'evidently' and 'patently' long time-barred claim [1.], and *second*, there is no need for detailed consideration of evidence [2.]. The law laid down earlier in *EMM ENN* is in consonance with the law laid down in both *Drolia* and *BSNL Vs. Nortel* as all three decisions propound a near-similar highly restrictive standard of judicial interference while deciding Section 11 applications for reference to arbitration. However, as *Drolia* is a Full Bench

[54] *See id*., ^154.4 (Khanna, J.).
[55] *See id.*, ^244.4 (Ramana, J.).
[56] *See BSNL Vs. Nortel*, *supra* note 2, ^37.
[57] *See EMM ENN Associates v. Commander*, (2016) 13 SCC 61, ^21.

decision, individuals should heed to the holdings and terms as stated by *Drolia* and later as further clarified in *BSNL Vs. Nortel*.

Interestingly, the Court also failed to consider another decision in *Wexford*, where it was held that a question of whether a claim is 'time-barred' can only be raised before the arbitrator.[58] Importantly, this is a completely opposite stance to the law declared in *BSNL Vs. Nortel*. However, there are three reasons on why the Court's decision in *Wexford* is *per incuriam* and its holding does not hold water today. First, the Court in *Wexford* did not provide substantive reasons for why it reached the above-mentioned conclusion. Second, importantly, it failed to discuss the earlier precedent in *EMM ENN*, which had clearly laid down the standard of judicial interference in Section 11 when a judicial authority is dealing with challenges of claims being 'time-barred'. Since the bench in *EMM ENN* was of 'co-ordinate' or 'equal strength' to the bench in *Wexford*, the subsequent bench's decision in *Wexford* which took an opposite stand to *EMM ENN* violated the principles of judicial discipline as laid down by Supreme Court of India in its Constitution Bench decision in *Central Board of Dawoodi Bohra v. State of Maharashtra* (*hereinafter* Bohra). As per the principles laid down in *Bohra*, a bench having lesser or equal strength than another bench which has pronounced an earlier precedent has to either follow the law laid down by that precedent or refer its findings to the Chief Justice of India for constituting a larger bench, should it have equal bench strength and disagree with the earlier precedent laid down by a different bench.[59] Third, in light of the subsequent judicial pronouncement by a Full Bench (i.e. a larger bench) in *Drolia* which took a contrary stand to the holding reached by the Division Bench in *Wexford*, the *Wexford* decision stands *impliedly overruled*. Consequently, the law laid down by the Supreme Court of India in *Drolia* as clarified later by the bench in *BSNL Vs. Nortel* is the current governing law and *Wexford* decision holds no precedential value.

Although the *Wexford* decision suffers from inherent fallacies and did not substantively provide reasons for why it reached its conclusion on the legal position which was adopted by the Court, it may indeed be possible that future legislative amendments or judicial precedents could follow a non-interventionist approach and completely leave it to arbitral tribunals to decide whether a particular dispute brought before it is 'time-barred', and consequently, should be dismissed on that ground. Such an approach would be arbitration-friendly and would cement India as a pro-enforcement regime, although it would risk forcing parties to make expenditure of money, time and other resources on unnecessary arbitrations. Consequently, it may pose

[58] *See* Wexford, *supra* note 7, ^9.
[59] *Central Board of Dawoodi Bohra v. State of Maharashtra*, (2005) 2 SCC 673.

a risk in the form of negatively impacting the balance of pros and cons by having arbitration as a dispute resolution mechanism in the mind of parties. Yet, one could only observe the consequences and impact of taking the *Wexford* approach had it been the current governing position. As the common idiom attributed to various individuals goes, "*even a stopped clock is correct twice a day*"[60], which could mirror the unknown possibilities that a non-interventionist approach taken in *Wexford* have potential to bring. Perhaps, it is time for the Law Commission of India and Indian Parliament to consider the possibility of the non-interventionist approach that *Wexford* batted-for, albeit without providing substantive reasons for choosing this route.

6. Concluding Remarks

Through its decision in *BSNL Vs. Nortel*, the Supreme Court of India has made it crystal clear that parties who have entered into an arbitration agreement should not sleep over their statutory rights when a dispute arises, else recourse to the remedy of arbitration could be lost and the only option left would be to approach the courts. Even while approaching a court, a party whose claims are challenged as being 'time-barred' is unlikely to receive any relief from a court, unless it also files for an application for condonation of delay under the (Indian) Limitation Act, 1963[61], and the Court in its discretion finds satisfactory reasons or events which justify extension of limitation for cases pertaining to breach of contract. Thus, wherever parties fail to mutually decide on an arbitrator or arbitral tribunal for deciding the disputes between them, the party who is on the receiving end of an alleged or actual breach of contractual stipulations should immediately approach the courts under Section 11 for referring parties to arbitration.

It has also been made clear that courts can exercise a restrictive jurisdiction under Section 11 to refuse to refer parties to arbitration in cases where a claim is *ex facie* time-barred. This results in eliminating frivolous litigation where an applicant party may try to force another party to submit to arbitration by hoping to obtain a favourable court order, even while knowing that the remedy is now statutorily time-barred and the likelihood of obtaining a favourable order is almost next to impossible. A party might even file a Section 11 application as a tactic to prolong litigation, utilising it as an excuse to call for negotiations or settlement. Therefore, through

[60] Various Authors, *Even a Stopped Clock Is Right Twice a Day'*, Quote Investigator, September 2, 2016, available at: https://quoteinvestigator.com/2016/09/02/stopped-clock/ (Last Visited on August 2, 2021).
[61] Limitation Act, 1963.

restrictive judicial intervention, unnecessary expenditure of time and money by parties in arbitration or unnecessary litigation would be avoided.

The Supreme Court of India in *BSNL Vs. Nortel* has cautioned that a court's scope of interference to refuse referral to arbitration is very limited and that where an *ex facie* review is not able to conclusively decide on admissibility issues such as claims being time-barred, it should always refer the matter to the arbitral tribunal. This caution gains further importance from the fact that a court's refusal to refer parties to arbitration under the amended Section 11 is currently not appealable under the Act.[62] Consequently, there is an imminent need for a legislative amendment to the Act, which allows parties to appeal a court's refusal to refer parties to arbitration under Section 11.[63] Otherwise, the only option left to an applicant party would be to file a special leave petition before the Supreme Court under Article 136 of the Indian Constitution.[64] While considering a special leave petition, the Supreme Court of India only admits applications that in its discretion are considered to satisfy a high threshold for admission[65], which offers not only reduced probabilities of a relief on appeal, but also difficulty for applicant parties to appeal refusal to refer the parties to arbitration under Section 11. Hence, it is my hope that the Indian Parliament considers creation of an appeal provision for this circumstance to address this persisting concern.

Recently, the Supreme Court of India in its Division-Bench decisions in *Secunderabad Cantonment Board Vs. B Ramachandraiah & Sons*[66] and *Sanjiv Prakash Vs. Seema Kukreja*[67] has followed the ratio laid down by *BSNL Vs. Nortel* on scope of judicial interference in Section 11. Moreover, the recently enacted Arbitration & Conciliation (Amendment) Act 2021[68], has not subjected Section 11 or Section 11(6A) of the Act to any modifications, indicating a legislative intent to continue with the position of law on scope of judicial interference in Section 11 as laid down by various judicial precedents. Consequently, the position of law laid down in *BSNL Vs. Nortel* on court's refusal to refer parties to arbitration where claims are *ex facie* 'time-barred', is now a well-settled position in India for the time-being.

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[62] *See Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engineering Pvt. Ltd.*, 2021 SCC OnLine SC 190, ^23.
[63] Shrivastava and Shrivastava, *supra* note 6.
[64] The Constitution of India, 1950, art 136.
[65] *See generally Mathai (alias Joby) v. George and Anr.*, (2010) 4 SCC 358, ^23-24 (laying principles governing admission of Special Leave Petitions under Article 136 of the Indian Constitution).
[66] *See Secunderabad Cantonment Board v. B Ramachandraiah & Sons*, 2021 SCC OnLine SC 219, ^16-20.
[67] *See Sanjiv Prakash v. Seema Kukreja*, 2021 SCC OnLine SC 282, ^40.
[68] The Arbitration and Conciliation (Amendment) Act, 2021.