CASE NO.:
Appeal (civil) 1523 of 2007

PETITIONER:
M/s.Shree Ram Mills Ltd

RESPONDENT:
M/s.Utility Premises (P) Ltd

DATE OF JUDGMENT: 21/03/2007

BENCH:
H.K. Sema & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T
(Arising out of SLP (C) No.15656 of 2006)

V.S. SIRPURKAR, J.

1. Leave granted.
2. An order under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called as "the Act" for short) appointing Arbitrators, passed by the Designate Judge of the Bombay High Court is questioned in this appeal at the instance of Shree Ram Mills Ltd. (hereinafter called "the petitioner").
3. The said order is assailed mainly on two grounds, firstly, that there was no live issue in existence in between the parties and the learned Judge erred in holding that there was a live issue in between the parties and secondly that the claim had become barred by limitation between the parties. As against this the respondents M/s.Utility Premises (P) Ltd., supported the order and pointed out that in pursuance of the order passed not only had the Arbitrator been appointed but they had also chosen the third Arbitrator to preside over the Arbitral Tribunal and the Arbitral Tribunal had commenced its proceedings. Presently the proceedings before the Arbitral Tribunal are stayed.
4. It has, therefore, to be decided as to whether the order passed under Section 11(6) of the Act appointing the Arbitrators is good order in law particularly in the wake of the above two objections.
5. Following undisputed facts would have to be borne in mind before approaching the questions raised.
6. The appellant is a company incorporated under the Companies Act, 1956, so also the respondent. The appellant company became a sick industrial unit sometime in the year 1987 under the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "the SICA"). It was ordered to be wound up in the year 1994 and on approaching the Board For Industrial and Financial Reconstruction (BIFR) a rehabilitation scheme was worked out whereby IDBI was appointed as an operating agency under the scheme. The Asset Sale Committee approved the sale of 1.20 lakh sq.ft. FSI owned by the appellant company to the respondent for a total sale consideration of Rs.21.60 crores and accordingly an agreement came to be executed in between the parties on 27.4.1994. This was a Joint Development Agreement between the parties in respect of the land owned by the appellant. By Clause 1 of the agreement, the area mentioned for development was between 86,000 sq.ft to 1.20 lakh sq.ft. Clause 15 of the said agreement provides that the land owner, the appellant herein, shall not create any encumbrance or third party rights. By Clause 19 the appellant had undertaken to add additional FSI. By Clause 22 the period was fixed for utilization of the full FSI covered under the agreement. Clause 24 was the Arbitration Clause to resolve the disputes, if any, between

the parties. The property covered was described in the Third Schedule of the said agreement which mentions 1.20 lakh sq.ft. FSI.

7. After this agreement a second agreement came to be executed in between the parties on 18.7.1994. This was necessitated because the appellant herein could make available only 86,725 sq.ft. FSI. Under this second agreement it was agreed to by the appellant herein that the further land admeasuring 2500 sq.mtrs. would be allowed to be developed by the respondent. The said 2500 sq.mtrs. land was reserved by Bombay Municipal Corporation for Municipal Primary School and playground. However, the appellant herein undertook to shift the said reservation to some other property of the appellant at the cost of the respondent. There was an arbitration clause vide Clause No.10 in this agreement also.

8. On 9.11.1994 there was a Tripartite Agreement between the appellant and respondent herein along with one Bhupendra Capital and Finance Limited whereby 50% of the appellant's entire interest under the Agreement dated 27.4.1994 and 18.7.1994 was agreed to be transferred.

9. On 22.6.1996 the agreement dated 18.7.1994 was cancelled by mutual consent as the parties were unable to agree on the cost of shifting the reservation which was agreed to in the agreement dated 18.7.1994. It was, therefore, agreed vide clause 5 that the respondent and the third party brought in, i.e., Bhupendra Capital and Finance Ltd., would have no right or claim in respect of the said property belonging to the appellant and more particularly described in the First Schedule, save and except, the 86725 sq.ft. FSI.

10. On 28.6.1996 the respondent herein entered into an Assignment Agreement with Ansal Housing and Construction to build flats on the area with FSI of 86725 sq.ft.

11. On 4.5.2001 the respondent herein had filed a petition under Section 9 of the Act seeking injunction and appointment of Receiver in respect of 2500 sq.mtrs. of land. However, that was dismissed by the High Court on the ground that the area was covered under the agreement dated 18.7.1994 and it was cancelled by an agreement dated 22.6.1996 and, therefore, the application was not maintainable. The appeal against this order also failed vide order dated 3.6.2002.

12. On 12.9.2001 respondent and one Santosh Singh Bagla who was the Promoter of the respondent company, filed application before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) contending therein that the promoters of the petitioner company were guilty of misfeasance and hence those acts were liable to be inquired into. It was secondly prayed that the Board of Directors of the appellant company should be superseded. It was thirdly prayed that the injunction be issued restraining the appellant from selling or transferring the lands. This application was dismissed by AAIFR leaving the parties to get the disputes adjudicated before an appropriate forum. It is to be noted here that a specific statement was made before the AAIFR by the respondent herein that the sale of 1.20 lakh sq.ft. was not the subject matter of the application as the separate proceedings were being contemplated before the appropriate forum.

13. On 11.6.2002 the respondent served a notice invoking the arbitration clause under agreements dated 27.4.1994 and 18.7.1994 on the ground that the petitioner had denied its liability to transfer the FSI beyond 86725 sq.ft. though it was bound to make available FSI of 1.20 lakh sq.ft. to the respondents.

14. The respondent and Shri Santosh Singh Bagla filed a writ petition in the Delhi High Court on 26.7.2004 whereby they challenged the order passed by the AAIFR dated 12.9.2001. Though the respondents had, in their appeal before AAIFR, claimed that the sale of 1.20 lakh sq.ft. of FSI was not the subject matter of that application, it was all the same prayed before the High Court in the writ petition that the appellant should be restrained from transferring the additional FSI left with them. Thereupon an undertaking was given by the counsel for the appellant that the appellant would not sell

the property which was covered in the agreement dated 27.4.1994.

15. On 6.8.2004 the appellant agreed to mortgage the property covered by the agreement dated 27.4.1994 in favour of IL&FS for Rs.50 crores.

16. On 15.10.2004 the appellant company was released from SICA as it became viable.

17. At this juncture on 19.1.2005 a Memorandum of Understanding (MoU) was signed between the parties to settle all disputes between them which naturally included the issue regarding the transfer of 1.20 lakh sq.ft. of FSI. The respondent under the same agreed to accept 1.20 crores out of which a payment of Rs.10 lakhs was already made by the appellant to the respondent. The appellant also agreed to execute the necessary conveyance deed as per agreement dated 27.4.1994 and 22.6.1996 thereby seeking to confine the claim of the respondent to 86725 sq.ft. of FSI.

18. This MoU was cancelled by the respondent on 8.3.2005 and the respondent returned the amount of Rs.10 lakhs.

19. The respondent invoked the Arbitration Clause under the Agreements dated 27.4.1994 and 18.7.1994 by a notice dated 24.5.2005. The said notice was replied to by the appellant vide its reply dated 21.6.2005 denying its liability and as a result an Arbitration Petition under Section 11(6) of the Act was filed on 1.7.2005 for appointing Shri S.C. Agarwal as the Sole Arbitrator. It is this application which was disposed of by the learned Judge on 11.8.2006 which is the subject matter of the present proceedings before us at the instance of the appellant.

20. As has been stated earlier, the learned Senior Counsel Shri Salve basically raised two points, they being (i) that there was no live issue left in between the parties and controversy had become dead; and (ii) that the claim, if any, of the respondent had become barred by limitation. In support of his arguments the learned counsel painstakingly took us through the whole record.

21. Shortly stated the argument of the learned counsel is that there is no live issue remaining between the parties particularly in respect of 1.20 lakh sq.ft. of FSI. Learned counsel points out firstly that the subject of 1.20 lakh sq.ft. of FSI being made available under the agreement dated 27.4.1994 was finally given a decent burial by the parties by the MoU dated 19.1.2005 whereunder the respondent had specifically agreed to restrict his claim only to 86725 sq.ft. of FSI covered under the agreement dated 27.4.1994. He points out that in pursuance of that MoU not only did the respondent accept the draft of Rs.10 lakhs out of the total agreed amount of Rs.1.20 crores but also proceeded to encash the same. Learned counsel points out that on a second thought the respondent proceeded to cancel the said agreement and thereupon proceeded to serve an arbitration notice on 24.5.2005. Learned counsel, therefore, points out that firstly it cannot be said that respondents had any right under the agreement dated 27.4.1994 left with it and if at all there were any such rights, they were crystallized vide the MoU dated 19.1.2005 wherein it had specifically agreed to give up the rest of the claim barring the claim of 86725 sq.ft. FSI and the appellant would have no qualms about the claim of 86725 sq.ft. FSI and it would always be prepared to convey the same in terms of the agreement dated 27.4.1994. Learned counsel argues that having a second thought regarding the MoU dated 19.1.2005 the respondent cannot be allowed to wriggle out of its liabilities and fall back upon the agreement dated 27.4.1994 which had become an antiquated agreement. If at all it has any rights, those rights would be in terms of the MoU dated 19.1.2005. It is, therefore, pointed out that there is no live issue left between the parties, more particularly in respect of 1.20 lakh sq.ft. FSI out of which 86725 sq.ft. FSI has already been given in possession of the respondent.

22. Learned counsel further argues that even if there are any rights left, the claim of the respondent has become hopelessly barred by time. Learned counsel contends that the Arbitral Tribunal would now

have to go back to the agreement dated 27.4.1994 and interpret the same to decide the rights between the parties which is not possible under the law of limitation. The learned counsel suggests a simple test that a suit for specific performance of the agreement dated 27.4.1994 would obviously be time barred and, therefore, the respondent cannot have an arbitration as regards that agreement.

23. Learned counsel lastly states that while passing the order under Section 11(6) of the Act, the issues regarding the limitation and the jurisdiction could be left open to be decided by the Arbitral Tribunal, however, since the learned Designated Judge has decided those issues, there will be no question of the Arbitral Tribunal deciding these questions and it is, therefore, that the appellant is required to challenge the order under Section 11(6) of the Act.

24. Shri Venugopal, the learned Senior Counsel appearing on behalf of the respondent, however, pointed out that the controversy regarding the liability of the appellant to make available 1.20 lakh sq.ft. of FSI was never dead as otherwise there was no question of the respondent executing the MoU as late as on 19.1.2005. He points out that the appellant had given an undertaking in respect of that property before the Delhi High Court in a writ petition which writ petition is still pending before the Delhi High Court and the appellant is facing contempt proceedings on account of the breach of the undertaking. Learned counsel further points out that firstly there was no necessity on the part of the appellant to extend the agreement dated 27.4.1994 by agreeing to handover the rest of the FSI beyond 86725 sq.ft. by an agreement dated 18.7.1994. It was only on account of the fact that the appellant also felt bound by the agreement dated 27.4.1994 to transfer 1.20 lakh sq.ft. FSI under the agreement dated 27.4.1994 for which he had received full consideration of Rs.21.60 crores. Learned counsel was at pains to point out further that in fact it was an admitted position that the appellant got approximately Rs.4 crores more as the respondent had paid a sum of Rs.25 crores approximately on behalf of the appellant company which was its financial liability. Learned counsel points out that issue regarding 1.20 lakh sq.ft. FSI was never closed and was always alive between the parties which prompted the parties ultimately to execute the MoU dated 19.1.2005. Learned counsel then points out that the respondent had cancelled the MoU later on realizing that the entire property stood mortgaged by the appellant on 6.8.2004 which also included the land measuring 4848.10 sq.ft. which was the subject matter of the agreement dated 27.4.1994. He, therefore, points out that the parties were continuously negotiating in respect of the liability on the part of the appellant to transfer 1.20 lakh sq.ft. FSI and there was no resolution of that issue. Learned counsel points out that the moment the MoU was cancelled, the parties reverted back to their rights under the agreement dated 27.4.1994 and, therefore, it cannot be said that the claim of the respondent stood satisfied.

25. Learned counsel further points out that since liabilities under the agreement dated 27.4.1994 were constantly being negotiated and re-negotiated in so many proceedings, it cannot be said that firstly the issue between the parties was dead and secondly the application under Section 11(6) was barred by time. Learned counsel in that behalf relied on the reported decision of this Court in Hari Shankar Singhania & Ors. Vs. Gaur Hari Singhania & Ors. [(2006) 4 SCC 658]. It was lastly suggested by the learned counsel that the issue as to whether there was any live issue or not and the issue of limitation could be decided by the Arbitral Tribunal under Section 16 of the Act and it cannot be said that those issues were finally decided by the learned Judge while passing the order under Section 11(6) of the Act. He points out that it is only for the purpose of appointing the Arbitrator that the learned Designated Judge has referred the live issue and the issue of limitation.

26. On these rival contentions it has to be seen as to whether the learned Judge was right in passing the order.

27. We shall take up the last contention raised by the appellant regarding the scope of the order passed by the Chief Justice or his Designate Judge. It was contended that since the Designate 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 under Section 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. Shri Salve as well as Shri Venugopal invited our attention to the observations made in para 39 in SBP & CO. vs. Patel Engineering Ltd. & Anr. [(2005) 8 SCC 618] which are as under:

"It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

A glance on this para would suggest the scope of order under Section 11 to be passed by the Chief Justice or his Designate. In so far 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 financial 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 their 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 their 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.

28. Applying these principles to the present case, it will be seen that the Designate Judge has clearly recorded his satisfaction that the parties had not concluded their claims. We must, at this stage, note that after the first agreement which clearly covers the issue regarding 1,20,000 sq.ft. of FSI, the said issue kept haunting the parties time and again. We have already referred to the agreements and their cancellations. The first agreement was on 27.4.1994 which is the basic agreement. The parties then entered into a second agreement dated 18.7.1994 which was necessitated on account of the fact that then the appellant could make available only 86725 sq.ft. of FSI. It was under this agreement that the appellant agreed that the further land measuring 2500 sq.mtrs. would be allowed to be developed by the respondents which land was reserved by Bombay Municipal Corporation for Municipal Primary School and playground. By that agreement, the appellant undertook to shift the said reservation to some other property. This agreement was followed by a Tripartite Agreement dated 9.11.1994 where a third party, namely, Bhupendra Capital & Finance Limited joined. On 22.6.1996 the agreement dated 18.7.1994 was cancelled by the mutual consent as the parties were unable to agree regarding the cost of shifting the reservation further, thereby the third party, namely, Bhupendra Capital & Finance Limited was excluded. If the things had remained at this stage, there was no question of the issue regarding the 1,20,000 sq.ft. of FSI remaining alive. However, it is clear from the developments thereafter that this issue remained burning in between the parties which is evident from the fact that the respondents moved an application under Section 9 of the Act on 4.5.2001 in respect of 2500 sq.mtrs. of land obviously to safeguard their interest regarding the 1,20,000 sq.ft. of FSI. It is obvious that this FSI was linked with the aforementioned land measuring 2500 sq.mtrs.. Though the respondents failed in their attempt to get an injunction under Section 9 of the Act, they did not leave the things at that and brought in the such issue firstly by serving the notice dated 11.6.2002 invoking the arbitration clause and secondly by including this issue in their writ petition filed before the Delhi High Court wherein the appellants were made to give an undertaking that they will not sell the property which was covered under the agreement dated 27.4.1994 which obviously included the 1,20,000 sq.ft. of FSI. Now this undertaking is still continuing. It is not for us to go into the correctness or otherwise of the order passed by the Delhi High Court regarding the undertaking because that is not

the question pending before us, however, it only shows that the parties had not closed the question regarding 1,20,000 sq.ft. of FSI. As if all this was not sufficient, lastly the parties agreed on 19.1.2005 for a MoU where this precise question came up. There, it seems the respondent had agreed to leave their claim regarding the 1,20,000 sq.ft. of FSI. It, however, seems that the respondent wriggled out of the MoU and cancelled it and chose to serve the arbitration notice for appointment of the arbitrators.

29. Learned counsel Shri Salve points out that this was not possible as the respondent could not wriggle out of the commitment made in the MoU and could not have unilaterally cancelled the MoU as the respondent had accepted to give up their claim for a consideration of Rs.1.20 crores and had accepted part payment of Rs.10 lakhs out of the same. We must state here that it will not be for us to decide as to whether the respondents were within their rights to repudiate the MoU and serve the notice of arbitration. What would be the rights of the parties on account of entering into a MoU dated 19.1.2005 would not be for us to decide sitting in this jurisdiction. We have only to adjudge as to whether the parties were still at loggerheads as regards the present issue. The very necessity felt on their part for a MoU would suggest that the issue was not closed. Shri Salve argues that the respondents could not be allowed now to revert back on the agreement dated 27.4.1994 once it had chosen to close the issue by entering into the MoU dated 19.1.2005. Learned Senior Counsel sought our finding on that. We have already clarified that it will not be for us to give that finding. In our opinion the very fact that the parties chose to create the MoU dated 19.1.2005 suggests that the order regarding 1,20,000 sq.ft. of FSI was never closed or atleast was never treated to have closed and in that sense it was still a live issue. Learned counsel Shri Savle relied upon the decision in Nathani Steels Ltd. vs. Associated Constructions [(1995) Supp. (3) SCC 324]. Our attention was drawn particularly to contents of paragraph 3 which are as under:

"\005once there is a full and final settlement in respect any particular dispute or difference in relation to a matter covered under the Arbitration clause in the contract and that dispute or difference is finally settled by and between the parties, such a dispute or difference does not remain to be an arbitrable dispute and the Arbitration clause cannot be invoked even though for certain other matters, the contract may be in subsistence. Once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or difference is amicably settled by way of a final settlement by and between the parties, unless that settlement set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the arbitration clause. If this is permitted the sanctity of contract, the settlement also being a contract would be wholly lost and it would be open to one party to take the benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside"

Though the observations at the first blush appear to be in favour of the appellants, on the closer look they are not so. This was a case where in a contract the parties had amicably settled their disputes and the parties also did not dispute that the they have arrived at such a settlement. It is under those circumstances that the observations were made. However, we do not think that the facts in the present case suggest that there was a full and final settlement in between the parties in respect of the issue regarding 1,20,000 sq.ft. of FSI and that a MoU was signed wherein the respondent and Bhupendra

Capital & Finance Limited who was the party to the third agreement, acknowledged that they were left with rights limited to 86,725 sq.ft. of FSI. It must be seen that there is no reference whatsoever to any consideration as regards the 1,20,000 sq.ft. of FSI, much less to the figure of Rs.1.20 crores in this MoU. As to what would be the effect of this MoU on the rights of the respondent herein would not be for us to go into but it is certain that the issue had not been settled completely. In Nathani's case (supra) the issue was admittedly settled and that was not disputed by the parties thereto. Here the parties and more particularly the respondents are seriously disputing that the issue regarding 1,20,000 sq.ft. of FSI was finally settled in between the parties. It would be only for the Arbitral Tribunal to decide the effect of the respondent having signed the MoU. We have pointed out earlier that this MoU cannot be said to be in the nature of a contract. In Nathani's case the settlement was viewed as a contract and it was, therefore, reiterated that if the parties are allowed to wriggle out of their obligation from the contract, no sanctity would be left to the settlement which are in the nature of a contract. It is for this reason that, in our opinion, the decision in Nathani's case is not applicable to the present facts. We also reiterate at this juncture that the cloud on 2500 sq.mtrs. of land which is inexplicably connected with the FSI of 1,20,000 sq.ft. created by the undertaking given before the Delhi High Court still remains looming large and remained so even on the date of the MoU. It is for this reason also that we are of the clear opinion that there was no final settlement of the issue regarding 1,20,000 sq.ft. of FSI even by the MoU dated 19.1.2005. If that was so, it is clear that there was live issue in between the parties and the parties were at loggerheads on that issue.

30. Once we have come to the conclusion that the learned Designate Judge was right in holding that there was a live issue, the question of limitation automatically gets resolved. This Court in Hari Shanker Singhania's case (supra) held that till such time as the settlement talks are going on directly or by way of correspondence no issue arises and with the result the clock of limitation does not start ticking. This Court observed:

"Where a settlement with or without conciliation is not possible, then comes the stage of adjudication by way of arbitration. Article 137 as construed in this sense, then as long as parties are in dialogue and even the differences would have surfaced it cannot be asserted that a limitation under Article 137 has commenced. Such an interpretation will compel the parties to resort to litigation/ arbitration even where there is serious hope of the parties themselves resolving the issues. The learned Judges of the High Court, in our view have erred in dismissing the appellants' appeal and affirming the findings of the learned Single Judge to the effect that the application made by the appellants under Section 20 of the Act, 1940 asking for a reference was beyond time under Article 137 of the Limitation Act\005.. As already noticed, the correspondence between the parties in fact, bears out that every attempt was being made to comply with and carry out the reciprocal obligations spelt out in the agreement between the parties.

These observations would clearly suggest that where the negotiations were still on, there would be no question of starting of the limitation period.

31. 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. [(2006) 5 SCC 275] 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.

32. In view of the foregoing discussion we are of the clear opinion that the learned Designate Judge was right in appointing the Arbitrator under Section 11(6) of the Act, We, therefore, proceed to dismiss the Civil Appeal with no order as to costs.

JUDIS