

**If preliminary issue (of claim being time barred) is decided on the basis of demurrer, the finding would remain a preliminary finding and cannot be foreclosed in trial; objection as to limitation is fundamental and substantive (Bombay High Court)**

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**Bhavik Bhimjiyani v. Urban Infrastructure Real Estate Fund and others**

**Court:** Bombay High Court | **Case Number:** CARBP 1260 of 2019 | **Citation:** 2019 SCC OnLine Bom 5104 | **Bench:** Ujjal Bhuyan J | **Date:** 04 December 2019

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A plea that the claimant's claim was barred by limitation was raised decided on the basis of demurrer. The arbitrator informed the parties that the statement of facts made in the statement of claim or in the evidence or on documents annexed to the statement of claim could not be contested later.

The arbitrator concluded the claims were within limitation and issued an interim award, foreclosing that issue from being raised in the trial later. He relied on the plain reading of the averments the claim (since the decision was on a demurrer) but noted that the result could have been different if full evidence had been led.

The interim award was challenged on the ground that the claim was time-barred; Section 3(1) of the Limitation Act, 1963 casts a duty upon a court/tribunal to dismiss a time-barred application even where limitation is not set up as a defence; the arbitrator's finding and foreclosing the issue is in contravention with the fundamental policy of Indian law, thereby in conflict with the public policy of India.

The court: –

- (a) Firstly, noted the various dictionary meanings of 'demurrer' and remarked that it has been defined to mean a pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer. In most jurisdictions such a pleading is now termed as a motion to dismiss.
- (b) Then, it referred to a decision of the Calcutta High Court, *Angelo Brothers Limited (In Liquidation) v. Bennett, Coleman and Co. Ltd.*, [2017] 203 Company Case 180 (Cal.)<sup>1</sup> and said it was "in respectful agreement with the above proposition of law as propounded by the Calcutta High Court." In *Angelo*, a single-judge bench examined precedent on demurrer vis-a-vis Order VII Rule 11 of the Code of Civil Procedure, 1908<sup>2</sup> and had held that when used in connection with an application seeking dismissal of a petition on a preliminary or maintainability point,

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<sup>1</sup> Decided on 16 May 2017; Aniruddha Bose J.

<sup>2</sup> 11. Rejection of plaint— The plaint shall be rejected in the following cases:-

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law.

“demurrer” would not imply automatic admission of facts contained in the plaint or petition whose dismissal is sought for by the opposing party.

- (c) Then concluded that being a preliminary issue decided on demurrer, the finding of the arbitrator would remain a preliminary finding subject to the evidence that may be tendered.
- (d) Lastly, it held that considering Section 3(1) of the Limitation Act, 1963, objection as to limitation is quite fundamental and substantive objection which goes to the root of the claim. Limitation being a mixed question of fact and law, a preliminary finding made on demurrer would not preclude a final determination of the question later.

On these reasons the interim award was modified to the extent that the limitation- issue would not be foreclosed.

[**Note:** The court does not specifically address as to how the issue impacts the “fundamental policy of Indian law.”]