

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+

4th February, 2010

Arb.P.No. 253/2009

SHRI SATENDER KUMAR ...Petitioner

Through: Mr. Ranjit Kumar, Advocate

VERSUS

MUNICIPAL CORPORATION OF DELHI & ANR. Respondents

Through: Ms. Divya Kapur, Advocate

Arb.P.No. 254/2009

SHRI SATENDER KUMAR ...Petitioner

Through: Mr. Ranjit Kumar, Advocate

VERSUS

MUNICIPAL CORPORATION OF DELHI Respondent

Through: Ms. Divya Kapur, Advocate.

Arb.P.NO. 345/2008

SHRI OM PARKASH ...Petitioner

Through: Mr. B.M.Sehgal, Advocate

VERSUS

GOVT. OF NCT OF DELHI & ANR. Respondents

Through: Ms. Avnish Ahlawat with Ms. Latika Chaudhary, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

Arb. P. Nos. 253/2009 & 254/2009

1. Whether time barred claims or claims which are barred by limitation, can be said to be live claims, which can be referred to arbitration, is the issue which calls for decision in the present cases. It is not disputed by either of the parties that the period of limitation for filing of a petition is three years from when the cause of action arises. The moot question however is, when can the cause of action be said to have arisen for the purpose of limitation to have commenced. Since the facts of the two cases are more or less similar, reference is being made only to the facts of the Arb. P. No.253/09 for the purpose of discussion.

2. The two Articles of the Limitation Act 1963 which are relevant in this regard are Articles 18 and 137 and the said Articles read as under:-

18.For the price of work done by the Plaintiff for the defendant at his request, where no time has been fixed for payment.

Three years When the work is done.

137.Any other application for which No period of limitation is provided

Three years When the right to apply

elsewhere in this division

accrues.

3. Accruing of cause of action, necessarily will vary with the facts of each case. What I mean to say, is that, disputes arise under various facts and circumstances and various types of contracts. A cause of action may accrue in one type of contract, such as sale of goods, on a particular date whereas in another type of contract which is a contract for construction work, the cause of action may accrue on a different date and so on. It is thus trite that arising of cause of action is necessarily to be linked with the peculiar facts and circumstances of each case. I make this preliminary statement because the observations in this judgment are in the context of a contract of construction work which was entered into between the parties.

4. The petitioner was awarded by the respondent the work of improvement of drain and road by pdg. C.C.pavement from H.No. F-94 to F-208 in Samaspur Road Pandev Nagar in AC-38/69 Sh-S Zone. This work was awarded to the petitioner vide Work Order No.37 dated 5.11.2004. The stipulated date of completion of the work was three months, with the commencement date for beginning of the three months period being the 11th day after placing of the Work Order. It is an admitted fact in this case, that the work in question was completed within the contractually stipulated period i.e. by 14.2.05.

5. At this stage, to understand and decide the controversy with regard to limitation, it is necessary to reproduce certain agreed terms/conditions/clauses in the contract between the parties. These relevant clauses are Clause-6, Clause-7, Clause-8, Clause-9 and Clause-25. These Clauses are reproduced hereunder:-

“CLAUSE-6

Measurement of Work Done

Engineer-in-Charge shall, except as otherwise provided ascertain and determine by measurement the value in accordance with the contract of work done.

All measurement of all items having financial value shall be entered in Measurement Book and/or level field book so that a complete record is obtained of all performed under the contract.

All measurements and level shall be taken jointly by the Engineer-in-Charge or his authorised representative and by the contractor or his authorised representative from time to time during the progress of the work and such measurements shall be signed and dated by the Engineer-in-Charge and the contractor or their representatives in token of their acceptance. If the contractor objects to any of the measurements recorded, a note shall be made to that effect with reason and signed by both the parties.

If for any reason the contractor or his authorised representative is not available and the work of recording measurements is suspended by the Engineer-in-Charge or his representative, the Engineer-in-Charge and the Department shall not entertain any claim representative does not remain present at the time of such measurements after the contractor or his authorized representative has been given a notice in writing three(3) days in advance of fails to countersign or to record objection within a week from the date of the measurement, then such measurements recorded in his absence by the Engineer-in-Charge or his representative shall be deemed to be accepted by the Contractor.

The contractor shall, without extra charge, provide all assistance with every appliance, labour and other things necessary for measurements and recording levels. Except where any general or detailed description of the work expressly shows to the contrary, measurements shall be taken in accordance with the procedure set forth in the specifications notwithstanding any provision in the relevant Standard Method of measurement or any general or local custom. In the case of items which are not covered by specifications, measurements shall be taken in accordance with the relevant standard method of measurement issued by

the Bureau of Indian standards and if for any item no such standard is available then a mutually agreed method shall be followed.

The contractor shall give not less than seven days notice to the Engineer-in-Charge of his authorised representative incharge of the work before covering up or otherwise placing beyond the reach of measurement any work in order that the same may be measured and correct dimensions thereof be taken before the same is covered up or placed beyond the reach of measurement and shall not cover up and place beyond reach of measurement any work without consent in writing of the Engineer-in-charge or his authorised representative incharge of the work who shall within the aforesaid period of seven days inspect the work, and if any work shall be covered up or placed beyond the reach of measurements without such notice having been given or the Engineer-in-Charge's consent being obtained in writing the same shall be uncovered at the Contractor's expense, or in default thereof no payment or allowance shall be made for such work or the materials with which the same was executed.

Engineer-in-Charge or his authorised representative may cause either themselves or through another officer of the department to check the measurements recorded jointly or otherwise as aforesaid and all provisions stipulated herein above shall be applicable to such checking of measurements or levels.

It is also a term of this contract that recording of measurements of any item of work in the measurement book and/or its payment in the interim, on account or final bill shall not be considered as conclusive evidence as to the sufficiency of any work or material to which it relates nor shall it relieve the contractor from liabilities from any over measurement or defects noticed till completion of the defects liability period.

CLAUSE-7

Payment on Intermediate Certificate to be Regarded as Advances

No payment shall be made for work, estimated to cost Rs. Twenty thousand or less till after the whole of the work shall have been completed and certificate of completion given. For works estimated to cost over Rs. Twenty thousand and interim or running account bills shall be submitted by the contractor for the work executed on the basis of such recorded measurements on the format of the Department in triplicate on or before the date of every month fixed for the same by the Engineer-in-Charge. The contractor shall not be entitled to be paid any such interim payment if the gross work done together with net payment/adjustment of advances for material collected, if any, since the last such payment is less than the amount specified in Schedule 'F', in which case the interim bill shall be prepared on the appointed date of the month after the requisite progress is achieved. Engineer-in-Charge shall arrange to have the bill verified by taking or causing to be taken, where necessary, the requisite measurements of the work. In the event of the failure of the contractor to submit the bills, Engineer-in-Charge shall prepare or cause to be prepared such bills in which event no claims whatsoever due to delays on payment including that of interest shall be payable to the contract. Payment on account of amount admissible shall be made by the Engineer-in-Charge certifying the sum to which

the contractor is considered entitled by way of interim payment at such rates as decided by the Engineer-in-Charge. The amount admissible shall be paid by 10th working day after the day of presentation of the bill by the contractor to the Engineer-in-Charge of his Asstt. Engineer together with the account of the material is issued by the department, or dismantled materials, if any.

All such interim payments shall be regarded as payment by way of advances against final payment only and shall not preclude the requiring of bad, unsound and imperfect or unskilled work to be rejected, removed, taken away and reconstructed re-erected. Any certificate given by the Engineer-in-Charge relating to the work done or materials delivered forming part of such payment, may be modified or corrected by any subsequent such certificate(s) or by the final certificates and shall not by itself be conclusive evidence that any work or materials to which it relates is/are in accordance with the contract and specifications. Any such interim payment, or any part thereof shall not in any respect conclude, determine or affect in any way powers of the Engineer-in-Charge under the contract or any of such payments be treated as final settlement and adjustment of accounts or in any way vary or affect the contract.

Pending consideration of extension of date of completion interim payments shall continue to be made as herein provided, without prejudice to the right of the department to take action under the terms of this contract for delay in the completion of work, if the extension of date of completion is not granted by the competent authority.

The Engineer-in-Charge in his sole discretion on the basis of a certificate from the Asstt. Engineer to the effect that the work has been completed upto the level in question make interim advance payments without detailed measurements for work done (other than foundation, item to be covered under finishing items) upon lintel level (including sunshade etc.) and slab level, for each floor working out at 75% of the assessed value. The advance payments so allowed shall be adjusted in the subsequent interim bill by taking detailed measurements thereof.

CLAUSE 8

Completion Certificate and Completion Plans

Within ten days of the completion of the work, the contractor shall give notice of such completion to the Engineer-in-Charge and within thirty days of the receipt of such notice the Engineer-in-Charge shall inspect the work and if there is no defect in the work shall furnish the contractor with a final certificate of completion, otherwise a provisional certificate or physical completion indicating defects(a) to be rectified by the contractor and/or (b) for which payment will be made at reduced rates, shall be issued. But no final certificate of completion shall be issued, nor shall the work be considered to be complete until the contractor shall have removed from the premises on which the work shall be executed at scaffolding, surplus materials, rubbish and all huts and sanitary arrangements required for his/their work people on the site in connection with the execution of the works as shall have been erected or constructed by the contractor(s) and cleaned off the dirt from all wood work, doors, windows, walls, floor or other parts of the building, in upon, or about which the work is to be executed or of which he may have had possession for the

purpose of the execution thereof, and not until the work shall have been measured by the Engineer-in-Charge. If the contractor shall fail to comply with the requirements of the Clause as to removal of scaffolding, surplus materials and rubbish and all huts and sanitary arrangements as aforesaid and clearing off dirt on or before the date fixed for the completion of work, the Engineer-in-Charge may at the expense of the contractor remove such scaffolding, surplus materials and rubbish etc., and dispose of the same as he thinks fit and clean off such direct as aforesaid, and the contractor shall have no claim in respect of scaffolding or surplus materials as aforesaid except for any sum actually realised by the sale thereof.

CLAUSE 9

Payment of Final Bill

The final bill shall be submitted by the contractor in the same manner as specified in interim bills within three months of physical completion of the work or within one month of the date of the final certificate completion furnished by the Engineer-in-Charge whichever is earlier. No further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Payments of those items of the bill in respect of which there is no dispute and of items in dispute, for quantities and rates as approved by Engineer-in-Charge, will, as far as possible be made within the period specified hereinunder, the period being reckoned from the date of receipt of the bill by the Engineer-in-Charge or his authorised Asstt. Engineer, complete with account of materials issued by the Department and dismantled materials.

- (i) If the Tendered value of work is upto Rs.5 lakhs. : 3 months
- (ii) If the Tendered value of work exceeds Rs.5 lakhs : 6 months

CLAUSE 25

Settlement of Disputes & Arbitration

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in-before mentioned and as to the quality of workmanship or materials as used on the work or as to any other question, claim, right matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the work or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter.

- (i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract of carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall

give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractors appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Commissioner MCD for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

- (ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above disputes or difference shall be referred for adjudication through arbitration a sole arbitrator appointed by the Commissioner MCD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by such Commissioner M.C.D. as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of the contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have waived and absolutely barred and the MCD shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provision of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

If is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the

total amount of the claims by any party exceeds Rs.1,00,000/- the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.

It is also a terms of a contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

6. To decide the issue of limitation, the facts of the present case will have to be read in the context of the aforesaid Clauses. It is necessary therefore to understand the ingredients and the interpretation /meaning to be given to the aforesaid Clauses. A conjoint reading of Clauses 6, 7, 8, 9 and 25, shorn of minor aspects, brings out the following position.

7. During the performance of the work, a contractor raises running account bills or interim bills. These running account bills are raised by a date which is fixed by Engineer. On such running bills being submitted, the Engineer carries out measurements. He, thereafter, decides the amounts to be paid under the running account bill. There may be disputes under different running account bills, whether with respect to quantity or rate, or defective work and so on. The Engineer thereafter on considering of all the relevant aspects decides to release a particular payment. This payment however is treated as advance payment only and there is no final determination or conclusion of

various disputed issues. The disputed issues are those issues which are written in the measurement book by the contractor or his representative at the time of incorporation of the measurements in the measurement book. Clause 7 makes it more than abundantly clear that all disputes, of every nature, of either party remain live for being finally settled at the completion of the work and at the stage of preparation/submission/determination of the final bill. This content of Clause 7 is logical because if this was not so written in this Clause, work on account of disputes will grind to a halt, and which surely is not the intention of either, the contractor or the owner. So far as the recording of measurements is concerned, the contractor is bound to depute his representative at the time of making measurements and if even after notice, the contractor or his representative is not present, then, the measurements as recorded in the measurement book achieve finality. There is an aspect with regard to concealed items of work on the issue of measurement and which is not relevant for the facts and circumstance of the present case and therefore I am not dilating on this aspect. Once the work is completed, the contractor under Clause 9 submits a final bill within three months of physical completion of the work or within one month of the date of the final completion certificate furnished by the Engineer. It may be noted that the expression used in Clause 9 is “or”, meaning thereby, the final bill has to be raised by the contractor on completion of the work or on receipt of a completion certificate i.e. even if, no completion certificate is given, the final bill has to be raised within three months of completion of the work.

Payment of the final bill, which final bill is necessarily and only submitted by the contractor, is to be made within three months/six months, as the case may be depending upon the value of the tender, of the receipt of the final bill by the department. In terms of Clause 25, it is necessary that a notice for appointment of an Arbitrator has to be given. This aspect would become relevant keeping in view Sections 21 and 42 of the Act. In Clause 25 what is further provided, is that, if a demand for appointment of an Arbitrator is not made within 120 days of receiving the intimation from the Engineer that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred. I need mention that with respect to this part of Clause 25, such clauses which extinguish claims, much before the prescribed period of limitation under the Limitation Act, are void as per Section 28 of the Contract Act 1872, as amended w.e.f.1997. This issue is also no longer *res integra* and has been pronounced upon by a learned Single Judge of this Court (Hon'ble Mr. Justice Sanjay Kishan Kaul) in the case reported as ***Pandit Constructions Company Vs. DDA (2007) 143 DLT 270***, I have also had an occasion to deal with this aspect of the law, by further expanding and expounding upon the same in the judgment reported as ***M/s Stup Consultants Pvt. Ltd. Vs. Indian Oil Corporation***, Arb. P.No. 208/2009 decided on 15.12.2009

8. Keeping in view the aforesaid salient features and the ingredients of the aforesaid Clauses, one will have to examine in the facts and circumstances

of the case to decide the question as to whether the petition can be said to be time barred. However, before doing so, it is necessary to refer to the various judgments which have from time to time decided the issues pertaining to limitation for filing of a petition seeking reference of disputes to arbitration.

9. The first relevant judgment is the judgment in *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority, (1988) 2 SCC 338*. para 4 of this judgment is relevant, and the same reads as under:-

“4. Therefore, in order to be entitled to order of reference under Section 20, it is necessary that there should be an arbitration agreement and secondly, difference must arise to which this agreement applied. In this case, there is no dispute that there was an arbitration agreement. There has been an assertion of claim by the appellant and silence as well as refusal in respect of the same by respondent. Therefore, a dispute has arisen regarding non-payment of the alleged dues of the appellant. The question is for the present case when did such dispute arise. The High Court proceeded on the basis that the work was completed in 1980 and therefore, the appellant became entitled to the payment from that date and the cause of action under Article 137 arose from that date. But in order to be entitled to ask for a reference under Section 20 of the Act there must not only be an entitlement to money but there must be a difference or dispute must arise. It is true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on February 28, 1983 and there was non-payment, the cause of action arose from that date, that is to say, February 28, 1983. It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Act. See *Law of Arbitration* by R.S. Bachawat, first edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case”. (underlining added)

Three things, inter-alia, can be culled out from these paragraphs.

Firstly ordinarily on the completion of the work, the right to get payment begins. Though Article 18 is not stated, this line is in terms of Article 18 of the Limitation Act. The second aspect is that a dispute arises when there is a claim on one side and its denial/repudiation by the other. The third aspect is that a person cannot postpone the accrual of cause of action by repeatedly writing letters or sending reminders.

10. The next relevant judgment on this aspect is the judgment in *Union of India v. L.K. Ahuja and Co., (1988) 3 SCC 76*. This judgment is also of the same Bench which decided the case of *Inder Singh Rekhi* (supra). Para 8 of this judgment lays down the ratio with regard to limitation and which reads as under:-

“8. In view of the well settled principles we are of the view that it will be entirely a wrong to mix up the two aspects, namely, whether there was any valid claim for reference under Section 20 of the Act and, secondly, whether the claim to be adjudicated by the arbitrator, was barred by lapse of time. The second is a matter which the arbitrator would decide unless, however, **if on admitted facts a claim is found at the time of making an order under Section 20 of the Arbitration Act, to be barred by limitation.** In order to be entitled to ask for a reference under Section 20 of the Act, there must be an entitlement to money and a difference or dispute in respect of the same. It is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable. In this case the claim for reference was made within three years commencing from April 16, 1976 and the application was filed on December 13, 1976. We are, therefore, of the view that the High Court was right in this case. See in this connection the observations of this Court in *Inder Singh Rekhi v. D.D.A.*⁵”

Two important points have been decided as per the discussion in the aforesaid paragraph. Firstly, the limitation for filing of a petition, seeking reference of the disputes to Arbitration, is different than the period of limitation for the subject claims as such. Meaning thereby, that the petition may be within limitation because, it may be filed within three years of arising of disputes however, whether the main claims are time barred or not is an issue on merits to be decided in the arbitration proceedings. The second aspect, and which is in fact is the more important aspect, is that, if on the admitted facts, the claims are clearly barred by limitation at the time of passing of the order under Section 20 of the Arbitration Act, 1940, then, there need not be reference of the disputes to arbitration because there is no entitlement to money, and therefore no dispute or difference with respect to the same, once the same are clearly time barred.

11. On this aspect whether the decision on the issue of limitation on merits of the matter should be decided at the stage of passing of an order referring the disputes to the Arbitrator or not, the Supreme Court has further clarified this position in the judgment reported as ***J.C.Budhraja Vs. Chairman Orissa Mining Corporation Limited 2008(2) SCC 444*** wherein the distinction has been maintained for separate periods of limitation for filing of a petition and as to the claims being barred by time on merits, and which latter issue is to be decided in the arbitration proceedings.

12. A learned Single Judge of this court, Hon'ble Mr. Justice Rajiv Sahai Endlaw had an occasion to consider the aspect as to whether time barred claims should be referred to Arbitration or the issue should be left open for decision in the arbitration proceedings. This judgment is reported as ***Progressive Construction Limited Vs. National Hydroelectric Power Corp Ltd.*** **MANU/DE/1293/2009**. It has been held by the learned Single Judge that claims which are ex facie barred by limitation need not be referred for decision in the arbitration proceedings. Some of the relevant paragraphs of this judgment read as under:-

7. The senior counsel for the petitioner has at the outset contended that the plea of the respondent of the claims being barred by time was a plea which was not necessarily required to be adjudicated in a proceeding under Section [11\(6\)](#) of the Act. Reliance is placed on National Insurance Company Ltd v. Boghara Polyfab Private Ltd [MANU/SC/4056/2008](#) : (2009) 1 SCC 267. It was contended that this court as the designate of the Chief Justice ought to in the exercise of its discretion not enter into the controversy of whether the claims were within time or not and such questions were best left to the arbitrator.

8. However, in view of the observations of the Supreme Court in para 24 of SBP and Company v. Patel Engineering Ltd [MANU/SC/1787/2005](#) : AIR 2006 SC 450 that dragging a party to an arbitration when there existed no arbitrable dispute can certainly affect the right of that party and even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration, even if it be preliminary expenses and his objection is upheld by the arbitral tribunal and further considering the long lapse of time from the completion of work, after which the present application has been filed, I am not inclined to blindly refuse to exercise the discretion of referring the dispute of the claims being barred by time also to the arbitrator. In my view, if on the basis of admitted facts, the court can come to the conclusion of the claims sought to be referred to the arbitrators being barred by limitation and/or whether the claims sought to be adjudicated is a dead one that is sought to be resurrected, the Chief Justice or his designate ought not to refer the parties to arbitration. It is only when the facts from which the aforesaid questions can be determined are disputed or when evidence may have to be recorded or detailed investigation required to be done with respect thereto, that the court would be justified in instead of returning a

finding itself, exercise the discretion to refer the same also to arbitration. I thus proceed to determine whether the claims in the present case can be said to be long barred and dead or not.

22. As far as the plea of the petitioner on the basis of Inder Singh Rekhi (supra) is concerned, Article 18 to the Schedule of the Limitation Act prescribes the Limitation of three years commencing from the date when the work is done, for the price of work done, where no time has been fixed for payment. In the present case the time of 30 days from completion of work was fixed for the petitioner to submit the final bill and the time of three months thereafter was fixed for the respondent to make the payment. The said period of four months from the date of completion i.e. 30th April, 1993 would expire in end of August, 1993 and the claims could have been made only within 3 years thereafter i.e. till the end of August, 1996. The claims have been made long thereafter. As aforesaid, the notice for appointment of arbitrator was given only on 29th December, 2006. The claims, if any, of the petitioner as on that day were not within limitation. Reliance in this regard can be placed on J.C. Budhiraja v. Orissa Mining Corporation Ltd [MANU/SC/0602/2008](#) : (2008) 2 SCC 444. Besides the claims having stood forfeited, abandoned and waived under Section [28](#) as prior to its amendment, the claims are even otherwise barred by time. Moreover Inder Singh Rekhi (supra) which is on an interpretation of Section [20](#) of the 1940 Act also makes a distinction between the Limitation for making the claims and the limitation for preferring the petition for appointment of arbitration. In the present case the Supreme Court having held that the appointment of arbitrator shall not be made when the claim is palpably barred by time, or when a dead claim is sought to be resurrected, even if it were to be held that the petition under Section [11\(6\)](#) has been made within three years from failure to appoint the arbitrator, the same will still not succeed if the claim is sought to be agitated are barred by time. (underlining added)

13. The conclusion with respect to the issue of limitation therefore is that there is a separate limitation for filing of a petition seeking reference of disputes to Arbitration and which is separate from a decision on merits whether the claims are within limitation or not. The latter aspect is not seen, ordinarily, at the time of passing of an order referring the disputes to arbitration, however, if the claims which are sought to be referred are clearly barred by time on the date of filing of the petition for referring of the disputes to arbitration, then, a petition seeking reference of the disputes to arbitration is dismissed. When I

say that the disputes are barred by limitation on the date of filing of the petition, what I mean, and what was meant by the learned Single Judge in the case of ***Progressive Construction (supra)*** and the Hon'ble Supreme court in ***L.K.Ahuja's case***, is that ex facie the claims are barred by limitation i.e., from the admitted facts, it can be made out that the claims are barred by limitation. If, however, there is a disputed question of fact to decide the issue whether the claims are time barred or not, then, this issue is left open for decision in the arbitration proceedings.

14. That time barred claims need not be referred for decision in the arbitration proceedings, has now been once again reiterated by the Supreme Court in the judgment reported as ***National Insurance Company vs. Boghara Polyfab (P) Ltd. 2009 (1) SCC 267***. Paras 22 to 22.2 of the said judgment read as under:-

22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.*³¹³ This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection. (underlining mine.)

Para 22.2. (a) of the above Boghara Polyfab's case clearly specifies that there cannot be reference to arbitration when the claim is dead i.e a time barred claim. A time barred claim has been held not to be a live claim.

15. Before I conclude in referring to the earlier decided cases, it is necessary to refer to the judgement of the Supreme Court reported as *National Aluminium Co. Ltd Vs. G.C Kanungo 2009 (3) R.A.J 70 (SC)*. In this judgment, it was held that where there is processing of the claim of a contractor, then, disputes remain live. In my opinion, the decision in *National Aluminium case* has to be read in the peculiar facts of that case, more so, because in the said judgment, there is no reference to the earlier judgments of the Supreme Court in the cases of *Inder Singh Rekhi*, *L.K.Ahuja* and *Orissa Mining Corporation*. Of course, if the issue is a live issue, because there is correspondence keeping the same alive, the issue is not a dead issue meaning thereby, by entering into correspondence, and by acknowledging the claims, though the same are disputed, there is in fact acknowledgment within the meaning of Section 18 of the Limitation Act to extend the period of limitation what was meant by the Supreme Court in *National Aluminum Company's* case is by processing of claims i.e. by acknowledgment of the same, the claims remained live claims. This has also been so held by the Supreme Court in the case of *Orissa Mining Corporation (supra)* and the relevant paragraphs 14 to 18 of the said judgment hold accordingly. It cannot be disputed that by an acknowledgment, the period

of limitation is rolled over and therefore the claims remain live claims and not time barred or dead claims. This judgment therefore cited by the counsel for the petitioner in *National Aluminium Co.* case is confined to the facts of the said case. While saying so, I am reminded of the observations of the Supreme Court in *Inder Singh Rekhi's* case in paragraph 4 in which it is clearly stated that the period of accrual of cause of action cannot be postponed by writing letters or by sending reminders and once a claim has been made then a cause of action necessarily accrues although no final is prepared.

16. A summary of the conclusions on reading of the aforesaid relevant clauses of the contract in question and the judgments as dealt with above, bring out the following salient points:

- (i) Limitation commences when the cause of action accrues/arises.
- (ii) Accrual/arising of cause of action necessarily varies as per facts and circumstances of each case and the nature of jural relationship between the parties viz contractual or otherwise and so on.
- (iii) As regards contracts for execution of building work, Article 18 comes into play in that when no specific date for payment is fixed, limitation commences and the cause of action accrues for the purpose of limitation on the completion of work.

(iv) In its application, Article 18 will cause different dates for accrual of causes of action in building works when a time period is fixed for submitting of a bill by the contractor and to which there is no response of the owner. Where a final bill is submitted and liability under the same, even if, in part, is admitted or some payment is made then such actions extend limitation in terms of Section 18 of the Limitation Act.

(v) No fresh period of limitation can arise simply because letters and reminders are written time and again, attempting to keep the claim alive, although the claim by virtue of Article 18 of the Limitation Act, has become clearly time barred.

17. Let us now turn to the facts of the present case. That the work was completed by the contractually stipulated date of 14.2.2005 is not in dispute. In terms of Clause 9 reproduced above, of the General Conditions between the parties, the final bill was to be submitted by the petitioner within three months of physical completion of the work i.e. by 14.5.2005. Since there is no completion certificate or provisional certificate issued in this case, the second portion of the first line of Clause 9 with respect to submitting of the bill within one month of the date of the completion certificate is not relevant. The payment as per Clause 9 had to be made within six months from the receipt of the bill by the Engineer in –Charge. Taking the best case of the petitioner, that the bill was submitted by him of on the last date of the three month period of physical

completion of the work, the payment had to be made at the very last by 14.11.2005.

18. The petitioner has no doubt been writing letters from 24.10.2005 till 12.12.2008, but the fact of the matter is that all such letters have never specifically given any notice for appointment of the Arbitrator as required under clause 25 of the contract. The first such letter whereby request was made was for reference of the disputes to Arbitration is only in 2009 viz 13.3.2009. Sections 21 and 43(2) of the Arbitration and Conciliation Act, 1996 can be touched upon at this stage. These sections read as under:

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

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

(2) For the purposes of this section and the Limitation Act, 1963 (XXXVI of 1963), an arbitration shall be deemed to have commenced on the date referred in Section 21.

In terms of Sections 21 and 43(2) read with Clause 25 of the contract between the parties, the limitation period stops only on 13.3.2009 and a petition for reference of the disputes can be made only if the petition was made on 13.3.2009 i.e. the date of 13.3.2009 has to be within three years of accrual of the cause of action. The earlier letters simply either asked for payment or asked for finalization of the bills or at best informed the respondent that if the respondent does not resolve the matter, then, the petitioner would go for arbitration, and which is surely much different than a specific notice invoking arbitration as

required under Sections 21 and 43(2) of the Act read with Clause 25 of the contract. Even if I take a liberal view of the fact, even then, the earliest notice seeking reference of disputes to arbitration is the letter dated 5.1.2009 of the petitioner to the respondent and in which it is stated that steps be taken by the respondent to resolve the disputes as per Clause 25.

19. In my opinion, therefore, the present petition is clearly time barred. The limitation period either in terms of Article 18, the time for payment being fixed being 14.11.05, notice seeking reference of the disputes to the arbitration had necessarily to be served upon the respondent by 14.11.2008. Admittedly, the earliest notice is only dated 13.3.2009 or 5.1.2009. Clearly, disputes were *ex facie* time barred when the notice invoking arbitration was sent on 5.1.2009 or 13.3.2009. Even assuming that there is no fixed date for payment in terms of Article 18, then, in my opinion, the position will be even worse. This is because then the notice of invocation of the arbitration in such a case ought to have been served on the respondent on or before 14.2.2008 viz three years within the completion of the work.

20. To conclude, I must refer to the twin principles which are the objectives for the enactment of the Limitation Act. The first objective is that there must be a quietus and a lid put on the filing of litigation and resolving of disputes by a particular period of time. The second principle is that due to long passage of time vital evidence which would be the defence of the opposite party

is bound to get lost or misplaced. Therefore seeking adjudication of claims preferred after long lapse of time would cause more injustice than justice.

21. In view of the aforesaid, I hold that the present petition is barred by time and I dismiss the same with costs of Rs.1,00,000/- to be paid within a period of four weeks from today failing which it will carry interest @ 9% per annum simple till actual payment. The Supreme Court in its recent judgment of ***U.P Coop. Federation Ltd Vs. Three Circles (2009) 10 SCC 374*** has also awarded interest on costs which ought to be paid and has referred to the recommendations of the Law Commission in its 55th report of the year 1973 that interest ought to be payable on the costs which are incurred because costs are incurred at a relevant point of time and are payable much later.

With the aforesaid observations, the present petitions are disposed of.

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22. The legal position with regard to limitation I have already decided above. In the facts of this case, it is admitted that the work was completed on 28.10.2003 and the final bill was got signed by the respondent from the petitioner on 28.4.04. In terms of the judgment of Supreme Court in ***Orissa Mining Corporation's*** case (supra) by virtue of admitting payment under a final bill, there is acknowledgment of payment as a result of which there is fresh

period of limitation from the date of such acknowledgment in the form of admission of dues payable under the final bill. The petitioner, therefore, should have issued notice invoking arbitration under Sections 21 and 43(2) within three years from 28.4.04 i.e. by 28.4.07. The notice was issued on 8.5.2006 and thus the present petition is therefore within limitation.

23. At this stage, Mr. Sehgal says that in case the respondent pays the amount of the final bill alongwith interest from the date of the final bill at 6% per annum till payment, he would withdraw the petition because no disputes will survive. Ms. Ahlawat, appearing for the respondent, subject to further instructions, agrees that the amount of the final bill can be paid to the petitioner. Accordingly, I hold that in case the payment of the final bill is made within a period of eight weeks from today alongwith interest @ 6% per annum simple from 28.4.04 till the date of payment, then, there will survive no disputes for being referred to the arbitration. The only remaining thing to be clarified is that besides the payment under the final bill, the respondent also will return the bank guarantee given by the petitioner as security deposit and which has otherwise already expired. This bank guarantee be returned alongwith payment under the final bill. Accordingly, this petition is for the time being disposed of as there remain no disputes between the parties and as similarly held by a learned Single Judge of this Court in the case of *Progressive Construction Company*, however, if the respondent fails to do the aforesaid with respect to making of

the payment under the final bill alongwith interest and return the bank guarantee, then, the petitioner is at liberty to file an application to revive this petition for appointment of an Arbitrator in terms of the agreed arbitration clause.

With the aforesaid observations, the present petition stands disposed of.

VALMIKI J.MEHTA, J

February 04, 2010/ib