

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

Judgment reserved on: 31.08.2012

% **Judgment delivered on: 12.09.2012**

+ **O.M.P. No. 320/2010**

M/S. RAJ KISHAN & COMPANY Petitioner

Through: Mr. Chetan Sharma, Sr. Advocate
with Mr. D. Moitra and Mr. Sanjay
Bhaumik, Advocates.

versus

NATIONAL THERMAL POWER CORPORATION..... Respondent

Through: Mr. S. K. Taneja, Sr. Advocate with
Mr. Puneet Taneja, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), is directed against the arbitral award dated 13.11.2009 and the order of modification

dated 22.02.2010 – passed by the Arbitral Tribunal comprising Hon’ble Mr. Justice P.K. Bahri (Retd.).

2. The brief facts, leading to the present petition and relevant for the present purposes, are summarised as under:

2.1. Respondent herein awarded a contract for General Civil Work Package (4 x 210 MW) at its NCPS (Project) Dadri District, Gautum Budh Nagar, U.P. to the Petitioner herein. A formal contract was executed between the parties on 21.03.1989.

2.2. It appears that the petitioner raised certain claims on the respondent and demanded payments from the respondent vide letter dated 22.02.1999. On 09.08.1999 (vide R-46), the respondent disputed the said claims. It was alleged that the petitioner had stopped the work and did not restart the same despite notice. It was also stated that the respondent had no alternative but to get the balance work executed at the petitioner’s risk and cost. It was specifically stated that “*there is a lot of owner issue materials outstanding with M/s RKC which is required to be returned to NTPC. The detail of the outstanding owner issue material based on the last RA Bills no.142 is accounted and*

enclosed as Annex-I. It is a matter of record that no efforts have been made to return balance owner issue material inspite of repeated verbal and written requests”. The respondent demanded the petitioner to return the balance owner issue material. It was stated that the total recoveries amounted to Rs.283 lacs approximately which includes recoveries against unaccounted owner issue material. It was stated that in case the amount of Rs.283 lacs is not paid within 15 days, the respondent would be constrained to seek arbitration under clause 56 of the GCC for recoveries. In Annexure III of this letter, the respondent at serial No.5 claimed an amount of Rs.1,79,81,140 “against FOC material”. The respondent issued a communication dated 06.12.1999 (R-47) to the petitioner in response to the petitioner’s letter dated 25.08.1999. The respondent in this communication, inter alia, stated:

“....With respect to the release of the payment due, it is pertinent to mention that the same has not been released in order to recover the outstanding advance arisen out of material reconciliation amounting to Rs. 180 lacs approx. For which detailed calculations have already been enclosed in terms of material accounting/reconciliation as per special condition of contract vide our letter dated 9.8.99.” (emphasis supplied)

- 2.3. On 10.05.2000, the petitioner sent a communication to the Manager (CCD) of the respondent stating that:

“...Disputes and differences arose between M/s. Raj Kishan & Co. And N.T.P.C as the Manager (P.H) N.T. P.C Vidyut Nagar has not made the payment even though notice was sent vide letter no.RKC/HO/SKG/99/2547 dated 22.2.99.

Subsequently, various correspondence have also been made which reconfirms/crystallize that dispute formed earlier could not be amicably settled but remain as a dispute, requiring adjudication, inspite of various efforts made by the parties to reconcile.

However at this stage it is very clear that dispute and difference remain as it is.”

The petitioner requested for payment within 15 days failing which, the petitioner stated that it would be free to approach a forum for sorting out the dispute.

- 2.4. On 31.5.2000, the petitioner addressed a communication to Shri V.K. Srivastava, Sole Arbitrator of the respondent stating that disputes and differences had arisen between the parties as the Manager of the respondent had not made payment even though notice was sent vide letter dated 10.05.2000. The sole Arbitrator was called upon to adjudicate the disputes thus formed. The disputes and differences were shown in Annexure A to this communication. On 15.09.2000, the petitioner sent another communication to the Chairman and

Managing Director of the respondent invoking the arbitration agreement.

2.5. However, on the respondent's failure to appoint an arbitrator as per the terms of the Contract, the Petitioner filed a petition under Section 11 of the Act before this Court. Vide order dated 25.11.2003, this Court appointed the aforementioned arbitrator to adjudicate the disputes between the parties.

2.6. The Arbitral Tribunal vide impugned Award dated 13.11.2009 allowed:

A. Claims of the Petitioner to the following extent:

<u>Claim No.</u>	<u>Head</u>	<u>Amount awarded</u>
1(a) and 1(i)(i)	Balance amount payable to the Petitioner/claimant on the basis of the measurements of the work executed by the Petitioner/claimant and duly entered by the Respondent in its measurement books.	Rs. 17,96,281/-
1(i)(ii)	Balance payment of structure steel of cladding structure	Rs. 73,500/-
1(k)	Fitting and fixtures of teak wood frames	Rs. 1,69,802/-

2	Quantities of Work executed beyond the deviation limits in various items of work	Rs. 1,54,28,696/-
3	Escalation charges	Rs. 47,54,047/-
7 and 9	‘Overhead losses suffered by the Petitioner/claimant due to under utilisation/ partial utilisation of tools, plants, machinery, staff and personnel- for the prolongation of work from the stipulated date of completion’ AND ‘Loss of profitability/ loss of turnover for prolongation of the work’	Rs. 60,04,386/-
10	Extra expenditure incurred in use of the difference in the theoretical and actual weight of steel	Rs. 10,50,000/-
11	Amount of Bank Guarantee encashed by the Respondent	Rs. 12,00,000/-
18	Amount of the Construction material belonging to the Petitioner/claimant and taken over by the Respondent	Rs. 6,92,924/-
Total:		Rs. 3,11,69,636/-

(emphasis supplied)

B. Counter Claim No. 1 of the Respondent- For recovery for wastage and excess consumption of cement, reinforcement and structural steel, which were supplied by the Respondent as free issue material- to the extent of Rs. 1,56,33,435/-.

The Respondent was, thereby, directed to pay the difference amount, being Rs. 1,55,36,201/- within three months, failing which the Respondent would pay to the Petitioner interest at the rate of 12% p.a. on the unpaid amount, from the date of the award till payment.

2.7. Both parties, thereafter, filed applications under Section 33 of the Act- seeking corrections in the Award. The Award was corrected vide impugned order dated 22.02.2010- to the extent that the awarded amount mentioned under Claim No. 2 was stated to be a clerical mistake in as much, as, Rs.1,47,49,458.70/- out of Rs.1,54,28,696/-, admittedly, already stood paid by the Respondent to the Petitioner, which was also taken note off in Para 79 of the Award. The awarded amount under Claim No. 2 was, thus, held to be Rs.6,79,237.45/- instead of Rs.1,54,28,696/-.

2.8. At this stage, I may take note of some of the disputes and differences of which the petitioner sought reference to arbitration. Under Point

No.7, the petitioner sought a “sum of Rs. 75 lakhs being amount withheld illegally”. Under point No.12 (a) and 12 (b), the petitioner raised the following disputes and differences:

“12.a A sum of Rs. 9 lacs being difference in theoretical and actual weight of steel for the work done up to 31.1.99.

12.b A declaration stating that payment of difference in theoretical and actual weight of steel will continue to accrue, if work is allowed to be done, after 31.1.99 till date of completion.”

2.9. Being aggrieved by the Award and the order of modification, the Petitioner has preferred the present petition.

3. The Petitioner herein has sought to challenge the Arbitral award to the extent it has allowed Counter Claim No.1 of the Respondent.

Petitioner’s Submissions

4. Learned Senior Counsel for the petitioner, Mr. Chetan Sharma, submitted that the Counter claims of the Respondent could not have been adjudicated upon as the same were barred by limitation. It is submitted that the Respondent raised a demand towards material accounting/reconciliation vide letter dated 06.12.1999. Therefore, the cause of action for the

respondent to initiate recovery proceedings arose on that date and, as such, the Respondent should have filed its counter claims within 3 years from that date either by filing a suit or commencing arbitral proceedings in terms of Section 21 of the Act. Not having done so, the counter claims were barred by limitation. The Counter claims, for the first time, came to be filed along with the Statement of defence, on or about June 2004, which was beyond the prescribed period of limitation. Reliance was placed upon the judgments of the Supreme Court in *State of Goa v. Praveen Enterprises*, 2011 STPL (Web) 561 SC; *J.C. Budhiraja v. Chairman, Orissa Mining Corporation Ltd. & Anr.*, (2008) 2 SCC 444; *S. Rajan v. State of Kerala and Anr.*, AIR 1992 SC 1918; and the judgment of this Court in *Smt. Biba Sethi v. Dyna Securities Limited*, 2009 (6) R.A.J. 454 (Del).

5. It was submitted that, even otherwise, the amount awarded under Counter Claim No. 1 of the Respondent is in violation of Clause 8.3.1 and more particularly 8.3.1 (e) of the Contract and, as such, is liable to be set aside. It was submitted that as per the said clause the outstanding unaccounted material shall not be more than 10% of the value of the security deposit i.e. Rs 1,20,000/- (10% of Rs. 12,00,000/-) unless otherwise

permitted in writing by the Engineer In-charge. It was submitted that the Engineer in-charge had not provided any such written permission.

6. It was further submitted that even going by the contractual rates and the Respondent's documents, the counter claims of the Respondent cannot go beyond Rs.22,52,370.60/-.

7. As regards the order of modification, it was submitted by the Learned Senior Counsel that the awarded amount of Rs.1,54,28,696/- (under Claim No. 2) was in addition to the amount of Rs.1,47,49,458.70/-. It was submitted that the amount of Rs.1,47,49,458.70/- had been paid way back in December, 1997 whereas the rate analysis, which is the basis of Claim No. 2, had been prepared and finalised by the Respondent on 25.10.2001 and no payment had been after that. Hence, the modification was wholly uncalled for and unwarranted.

Respondent's Submissions

8. Learned Senior Counsel for the Respondent, Mr. S.K. Taneja, on the other hand raised a preliminary objection to the maintainability of the present petition- on the ground that the petitioner is an unregistered partnership concern and as such is barred, by virtue of Section 69 of the Partnership Act, 1932, to institute claims and prosecute the same before this

Court or any other forum including before the learned Arbitrator. Placing reliance on Order XXX Rule 20 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'), it was further submitted that present petition has also not been filed by a duly authorised and competent person. The locus of the person executing the General Power of Attorney in favour of the person who has filed the present petition was disputed by the Respondent

9. Learned senior counsel submitted that limitation is a mixed question of fact and law. Specific pleading with necessary particulars with regard to the question of limitation should have been raised before the Arbitral tribunal. Since such a plea was never raise by the Petitioner before the tribunal, the Petitioner cannot raise the same before this Court for the first time in these proceedings. Reliance was placed on the judgment of the Bombay High Court in *Bharat M. Nagori v. Satish Ashok Sabnis & Anr.*, 2003 (4) R.A.J. 47 (Bom); *Vimal G. Jain v. Vertex Financial Services Pvt. Ltd.*, 2007 (4) Arb. LR 18 (Bombay) (DB) and judgment of the Supreme Court in *Balasaria Construction (P) Ltd. v. Hanuman Seva Trust & Ors.*, (2006) 5 SCC 658.

10. It was submitted that even under Order VII Rule 11, CPC, a suit cannot be dismissed on the ground of limitation without proper pleadings, framing of issues and taking of evidence. Reference in this regard was made to the judgment of the Supreme Court in ***Ramesh B. Desai and Others v. Bipin Vadilal Mehta and Others***, (2006) 5 SCC 638. It was submitted that this Court while exercising jurisdiction under Section 34 of the Act cannot re-appreciate the facts and evidence. The Court does not sit in appeal to take up the issues which were never argued or pleaded before the Arbitral Tribunal.

11. Learned senior counsel submitted that the counter claims were not time barred as per the law of limitation. The Petitioner having invoked the arbitration clause under the contract, there was neither any contractual nor any legal requirement for the Respondent to invoke arbitration clause again for its counter claims arising under the same contract between the same parties. It was therefore submitted that the question of non-invocation of the arbitration agreement in compliance of Section 21 of the Act does not arise.

12. It was submitted by the Respondent that clause 8.3.1 (e) has no application in the facts of the case and, therefore, has rightly not been relied upon by the Arbitral tribunal. It was submitted that merely because as per

clause 8.3.1 (e) the unaccounted outstanding material cannot be beyond 10% of the value of the security deposit given by the contractor, unless otherwise permitted by the Engineer In-charge, it does not mean that the counter claim of the Respondent for the recovery of wastage and excess consumption cannot, in fact, be beyond 10%. It was submitted that the Petitioner has itself not disputed the quantum of material issued and consumed and is now, merely to evade the liability, relying upon a clause which even otherwise has no application in the facts aforesaid. Such a plea was never set up by the Petitioner before the Arbitral Tribunal and, therefore, cannot be raised before this Court in these proceedings.

13. It was submitted that there was no basis for the Petitioner to submit that the counter claim of the Respondent cannot go beyond Rs.22,52,370.60/-. It was submitted that the Petitioner cannot be permitted to so allege, at this stage, when he had not disputed the quantity of materials issued, consumed, and wastage of materials issued by the respondent owner, and the only issue raised was of benefit of overweight steel, which was also accounted for. It was reiterated that the Petitioner cannot be permitted to set up a new defence in the present proceedings which did not form part of the pleadings before the Arbitrator.

14. It was submitted that by virtue of the modification order, the Arbitral tribunal corrected a calculation error with respect to the payment of claim no. 2 and that the same was well within the powers of the Arbitrator under Section 33 of the Act. It was denied that the Petitioner is entitled to Rs.1,54,28,696.15/- in addition to the amount of Rs.1,47,49,458.70/-. According to the Respondent, the same was merely an afterthought. It was submitted that the entire claim allowed with respect to claim no. 2 was Rs.1,54,28,696.15/-, which was the amount shown in the final bill (as the recovery amount could have been worked out only then). After giving adjustment of the payment made, till the second last running bill of Rs.1,47,49,458.70/-, the petitioner (under the final bill) was entitled to only Rs.6,79,237.45/- under claim no. 2.

Petitioner's submissions in Rejoinder

15. The Petitioner in rejoinder arguments denied that the Petitioner is an unregistered partnership firm. It was submitted that the same objection was raised by the Respondent before the Arbitral tribunal, to which the Petitioner had furnished a registration certificate- available on the records of the Arbitral Tribunal at page C-820. It was further denied that the present petition had not been duly instituted by an authorised person. Reliance was

placed by the Petitioner on a power of attorney executed in favour of the person who has instituted the present petition, viz. Shri Jitendra Singh S/o Late Sh. Khajan Singh. Furthermore, it was submitted that in terms of Section 19 of the Act, the provisions of the CPC, specifically Order XXX Rule 1 and 2, are not strictly applicable to the proceedings under the Act and, as such, the preliminary objection of the Respondent, as regards maintainability of the present petition, is unsustainable.

16. It was submitted that the question of limitation being a pure question of law, could be raised at any point of time. Reference in this regard was made to the judgments of the Supreme Court in *The Management of State Bank of Hyderabad v. Vasudev Anant Bhide etc.*, 1969 (2) SCC 491, *V.M. Salgaocar & Bros. v. Board of Trustees of Port of Mormugao and Another*, AIR 2005 SC 4138, and *Gannmani Anasuya and Others. v. Parvatini Amarendra Chowdhary and Others*, (2007) 10 SCC 296; judgments of this Court in *Ashok K. Khurana v. M/s Steelmen Industries and Anr.*, AIR 2000 Delhi 336, *Oil & Natural Gas Corporation Ltd. v. Amtek Geophysical Pvt. Ltd.*, 2004 (3) R.A.J. 581 (Del), *Jammu & Kashmir Bank Ltd. v. Shree Digvijay Cement*, 154 (2008) DLT 80 (DB) and *Gannon Dunkerley and Co. Ltd. v. National Thermal Power Corporation*,

MANU/DE/2910/2009; judgment of the High Court of Punjab in *Santa Singh Gopal Singh and Others v. Rajinder Singh Bur Singh and Others*, AIR 1965 Punjab 415 ; judgment of the Calcutta High Court in *M/s Orient Ceramic Products Pvt. Ltd. v. Calcutta Municipal Corporation*, AIR 2000 Calcutta 17; and judgment of the Bombay High Court in *Sealand Shipping & Export Pvt. Ltd. Vs. Kinship Services (India) Pvt. Ltd.*, 2012 (1) R.A.J. 589 (Bom).

17. In view of the above referred pronouncements, it was submitted that mere failure to raise the plea of limitation would not be fatal, as it was the duty of the Arbitral tribunal to deal with the same. It was submitted that the Limitation Act, 1963 applies to arbitrations under the Act, as it applies to proceedings in Court. Relying upon Section 28(1)(a) of the Act, it was submitted that in an arbitration (other than an international commercial arbitration), which takes place in India, the arbitral tribunal is bound to decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India. It was submitted that Section 4 of the Act applies only to derogable provisions under the Act, such as, Section 12(3), 19(2), 20(1), 22 etc., and the said provision (Section 4), therefore, cannot be invoked to render Section 28 of the Act and Section 3 of the

Limitation Act otiose. The Tribunal would, therefore, be obliged to decide the dispute in accordance with the Substantive law in force in India.

18. It was submitted that the 'Counter Claims' are also 'Claims' raised by a Respondent. Hence, the provision of Section 21 of the Act is squarely applicable and, consequently, until and unless a notice is served upon the claimant, the question of Arbitral proceeding, in respect of the counter claim, commencing would not arise.

19. It was submitted that the Arbitral tribunal being a creature of the contract between the parties, cannot ignore the provisions of the contract and more specifically, clause 8.3.1 (e) in the present case. It was submitted that the counter claim allowed was beyond the scope of the contract and as such was liable to be set aside.

20. The Petitioner denied to have not disputed the quantity of materials issued, consumed and wasted. It was submitted that the Learned Arbitrator, under the garb of Section 33 of the Act, has re-written the Award against claim No.2 as an adjustment- which is not permissible under the law.

Discussion

21. The primary question to be determined in the present petition is, whether, the petitioner can be permitted to urge for the first time in these

proceedings that the counter claims of the Respondent were barred by limitation. However, before I examine the same, I shall first deal with the preliminary objection raised by the Respondent with regards to maintainability of the present objections/petition.

22. The petitioner, on this objection being raised before the learned Arbitrator had placed (at page C-820 of the arbitral record), a copy of the Certificate of Registration of the petitioner firm which shows, inter alia, Shri Ashwini Kumar Gupta as one of the partners. The copy of the Power of Attorney given to Shri Jatindra Singh – who has instituted the objection petition- duly authorised him to institute legal proceedings on behalf of the petitioner firm, and the same has been filed along with the rejoinder. The learned Arbitrator has not allowed the aforesaid preliminary objection of the respondent. Therefore, in view of the aforesaid, I find no merit in the respondent's objection either on the ground that the petitioner is not a registered firm, or that the present petition has not been instituted by a competent person.

23. The petitioner claims that the counter claims of the respondent was barred by limitation on the premise that, since the respondent raised a demand towards material accounting/reconciliation vide letter dated

06.12.1999, the cause of action arose on that date and, as such, the Respondent should have filed its counter claims within 3 years from that date, either by filing a suit or commencing arbitral proceedings in terms of Section 21 of the Act. Not having done so, the counter claims were barred by limitation. To fortify its submission, the petitioner referred to the judgment of the Supreme Court in ***State of Goa v. Praveen Enterprises*** (supra), and more specifically to the following observation:

“17. As far as counter claims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of Limitation Act, 1963 provides that in regard to a counter claim in suits, the date on which the counter claim is made in court shall be deemed to be the date of institution of the counter claim. As Limitation Act, 1963 is made applicable to arbitrations, in the case of a counter claim by a respondent in an arbitral proceedings, the date on which the counter claim is made before the arbitrator will be the date of ‘institution’ in so far as counter claim is concerned. There is, therefore, no need to provide a date of ‘commencement’ as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counter claims. There is however one exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counter claim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under section 11 of the Act, the limitation for such counter claim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counter claim.”

24. The issues which arose before the Supreme Court for consideration, and which the Supreme Court was dealing with were not the same as the one raised by the petitioner. The issue raised and considered by the Supreme Court was “*Whether the respondent in an arbitration proceedings is precluded from making a counter-claim, unless a) it had served a notice upon the claimant requesting that the disputes relating to that counter-claim be referred to arbitration and the claimant had concurred in referring the counter claim to the same arbitrator; and/or b) it had set out the said counter claim in its reply statement to the application under section 11 of the Act and the Chief Justice or his designate refers such counter claim also to arbitration*”. Therefore, the issue was not of limitation for filing a counter claim, but of the maintainability thereof without giving notice therefor.

25. The judgment of the Supreme Court in ***S. Ranjan*** (Supra), also does not advance the case of the petitioner. In that case, the question before the Supreme Court was when did the right to apply under Section 20 of the Arbitration Act, 1940, for appointment of arbitrator, accrue- for the purpose of deciding the maintainability of the application under Section 20 on the issue of limitation. The Supreme Court observed that, reading Article 137 of the Limitation Act and sub-section (1) of Section 20 of the Arbitration Act

together, the right to apply accrues when differences arise between the parties. The same being a question of fact has to be determined having regard to the facts of the case.

26. Petitioner's reliance upon the judgment of this Court in *Smt. Biba Sethi* (supra) is entirely misplaced. The question before the Court was whether the period of limitation to prefer claims as provided for under the byelaws of NSE would override the law of limitation. In other words, the issue before the Court was whether an arbitration, under the Byelaws of NSE, is an arbitration under any other enactment, within the meaning of Section 2(4) of the Arbitration Act, so as to make Section 43 thereof- and, consequently, the Limitation Act inapplicable to such arbitration. The Court held that the legislative intent was not to empower the State Government to, while framing rules, prescribe the period of limitation for preferring claims. The byelaw to that extent was held to be purely contractual and, in view of Section 28 of the Contract Act, the same was declared to be void.

27. The judgment of the Supreme Court in *J.C. Budhiraja* (supra) also does not bolster the submissions of the petitioner herein, since the same dealt with an entirely different issue. In that case, the Supreme Court set aside the finding/assumption of the Arbitrator that if the application for appointment

of arbitrator was made in time, then all claims made in the claim statement filed before the appointed arbitrator are also in time. The Supreme Court held that Section 37(3) of the Arbitration Act 1940 provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served, it has to be seen whether the claims were in time as on that date. If the claims are barred by limitation on that date, it follows that the claims had to be rejected by the Arbitrator on the ground that the claims were barred by limitation. The said period of limitation has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Arbitration Act, 1940 for appointment of an arbitrator- as the cause of action in that case would arise when the other party fails to comply with the notice invoking arbitration.

28. For the purposes of deciding the question whether the counter claims were barred by limitation, the starting point of institution of counter claim would have to be the date of institution of counter claims before the Arbitral tribunal. If the said date was within the period of limitation when taken from the date on which the cause of action to institute the counter claims last

arose, then the same would not be barred by limitation and if not so, then it would be barred.

29. There can be no quarrel with the above proposition. But what is to be examined in each case, as a matter of fact and of law is – when the cause of action last arose in respect of a particular claim/counter claim. Since the primary issue, i.e. when the cause of action last arose for raising the counter claim, is a mixed question of fact and law, the issue of limitation cannot be raised in proceedings under Section 34 of the Act for the first time.

30. In *Santa Singh* (supra), the full bench of the Punjab High Court permitted the raising of the plea of limitation, though the same had not been raised before the trial court, as the same was not altogether a new issue in the facts of the case. It was observed that the no new facts had to be proved, and all that had to be seen was whether, according to the pleadings of the parties and the findings which have been given and which are binding on them, the suit was barred by limitation. In *Management of State Bank of Hyderabad* (supra), the Supreme Court permitted the appellant to raise a plea of limitation for the first time since no fresh facts had to be investigated and the matter could be dealt with as a pure question of law. In *Ashok K. Khurana* (Supra), the appellant had assailed the order of trial court- dismissing the

appellant's suit for recovery, filed against the respondent, on the ground that the same was barred by limitation. The respondent/defendant had it in its written statement, inter-alia, raised a preliminary objection that the suit was barred by limitation. On the basis of the pleadings the trial court framed the preliminary issue- whether the suit is within the period of limitation. The trial court decided the same in favour of the respondent/defendant and dismissed the suit. In appeal, this Court observed that the question of limitation, in the case at hand, was a question of fact and the appellant/plaintiff could not be non-suited without a trial. The order of the trial court was accordingly set aside and the suit was remanded back to the trial.

31. The last three decisions referred to above do not advance the petitioner's submissions for the reason that in all those cases, the Court which permitted the raising of the issue of limitation for the first time was acting as the appellate Court. It is well settled that an appeal is a continuation of the original proceedings. The entire matter is at large before an appellate Court. The same is not true about a Court hearing objections to an arbitral award under Section 34 of the Act. The arbitrator is the final

judge of facts. The Court while hearing objections does not scrutinize the award as an appellate forum.

32. Reliance placed on *Orient Ceramic Products Pvt. Ltd.* (supra) also seems to be misplaced. In this case, the defendant sought to set up a counter claim. The Court, after examination of the facts before it, as pleaded in the application, whereby the counter claim was sought to be set up, came to a definite conclusion that the same was barred by limitation. It was on this account that the Court did not permit the counter claim to be filed by the defendant. Moreover, the counter claim was sought to be set up after the filing of the written statement and without furnishing any justification for not raising the same when the written statement was filed.

33. In *Bharat M. Nagori* (Supra), the issue before the Bombay High Court was whether it is open for the petitioner to raise a plea of limitation, in a case where the plea was not raised before the Arbitrator, while assailing the award. The Court observed that the issue of limitation, pleaded on facts, would be mixed question of fact and law and as such considering the pleadings, in the case at hand, it was not possible to hold that the claim filed is barred by limitation. The High Court also took note of the judgment of the Supreme Court in *Oil & Natural Gas Commission v. M.C. Clelland*

Engineers S.A., 1994 (4) SCC 327, wherein the Supreme Court while dealing with the contention of limitation raised before it, observed that when no foundation has been laid in the course of the proceedings before the Arbitrator either in the pleadings or in the evidence, it would be difficult to examine the plea as raised.

34. *Oil & Natural Gas Corporation Ltd. v. Amtek Geophysical Pvt. Ltd.* (supra), is a decision rendered in its own facts and does not advance the petitioner's case. The petitioner assailed the award of the Arbitral tribunal dismissing the counter claim filed by it on the ground that the same was barred by limitation. Therefore, the issue of limitation was raised before, and considered by the Arbitral Tribunal, which is not the position in the case at hand.

35. *V.M. Salgaocar* (supra) too has no relevance for the simple reason that the plea of limitation had been squarely raised by the defendant in the written statement. The issue examined by the Court was whether the defendant had waived the said plea, as a partial decree had been passed on admission under Order 12 Rule 6 C.P.C. The Supreme Court held that the plea of waiver was not a pure question of law, and could not be permitted to be raised at a later stage. Therefore, the issue of limitation had to be

examined. As aforesaid, in the present case the issue of limitation qua the counter claim was never raised by the petitioner before the Arbitral Tribunal. It cannot be said that the counter claim was ex-facie barred by limitation. Consequently, this case is of no avail to the petitioner.

36. In ***Balasaria Construction (P) Ltd.*** (Supra), the Supreme Court took the view that *the “suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time.”*

37. In ***Ramesh B. Desai*** (Supra), the appellants had filed a company petition under Section 155 of the Companies Act, 1956. Respondent no. 1 and 2 moved an application to dismiss the petition on the ground that the same was barred by limitation. The application was allowed by the Ld. Company Judge and the order was affirmed in appeal by a Division Bench of the High Court. The Supreme Court, in appeal, observed that *“A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every given case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a*

mixed question of law and fact”. Relying upon the principle laid down in its earlier judgment, in ***Balasaria Construction (P) Ltd.*** (Supra), it observed that “*unless it becomes apparent from the reading of the company petition that the same is barred by limitation, the petition cannot be rejected under Order VII Rule 11 (d) CPC*”. After considering the contents of the petition and having regard to the provisions of the Limitation Act, 1963, the Supreme Court observed that the company petition could not have been thrown out at the preliminary stage- as being barred by limitation without giving opportunity to the appellants to lead evidence.

38. In ***Vimal G. Jain*** (supra), a Division Bench of the Bombay High Court observed that on a conjoint reading of Section 4 and 16(2) of the Act it would appear that a party to the arbitration proceedings seeking to raise the point of bar of limitation for initiating the arbitration proceedings should raise the issue at the earliest opportunity and, in any case, not later than the submission of the statement of defence, otherwise it would be deemed to have been waived. Referring to the decision of the Supreme Court in ***Narayan Prasad Lohia v. Nikunj Kumar Lohia***, (2002) 3 SCC 572,- wherein it has been held that unless the objection in terms of section 16(2) is raised within the time prescribed under the said Section, it would be deemed

to have been waived in terms of section 4 of the said Act- the Bombay High Court held that since the point regarding the bar of limitation was never raised before the learned arbitrator, the same should be deemed to have been waived.

39. In ***Jammu & Kashmir Bank Ltd.*** (Supra), the appellant, assailed the judgment of the learned Single Judge, inter alia, on the ground that the suit instituted by the Respondent was barred by limitation. The Division Bench observed that “*An issue of limitation does not arise as a pure question of law. It is always a mixed question of fact and law. In order to decide the issue of limitation, the Court has to perforce appreciate the facts and evidence, unless from a plain reading of the plaint, the suit appears to be unambiguously barred by limitation*”. This Court further observed that “*In such a case, the appellate Court may set aside the decree and dismiss the suit on the ground of limitation on the basis of the evidence and record available if, from such record and evidence, without more, the suit appears to be struck by the law of limitation. However, if the question of limitation is allowed without examining the relevant facts and evidence, or if the appeal, in which the plea has been raised for the first time, is allowed and suit is dismissed without giving an opportunity to the plaintiff to oppose it on the*

facts and evidence, it may cause prejudice to some of the parties to the suit.”

The situation, in a case like the present, is still worse for the party raising a belated plea of limitation because the Court, as aforesaid, is not an appellate forum qua the arbitral award. As aforesaid, an appeal is a continuation of an original suit proceeding. Therefore, it is possible to amend the plaint even during the pendency of an appeal. It is also possible to lead additional evidence at the appellate stage. But this facility is not available before the Court hearing objections to an arbitral award. For the aforesaid reason, the decision in ***Gannmani Anasuya*** (supra), has no relevance.

40. In ***Gannon Dunkerley*** (Supra), this Court allowed the plea of limitation to be raised for the first time in a petition/objections under Section 16, 30 and 33 of the Arbitration Act, 1940 against an arbitral award, as the facts of the case were not disputed and the issue of limitation appeared on the face of the record. As aforesaid, that does not appear to be the position in the present case.

41. In ***Tamil Nadu Water Supply and Drainage Board v. N. Abdul Kareem and Ors.***, (2010) Arb. LR 581 (Madras) (DB), the Division Bench of the Madras High Court upheld the order of the Ld. Single Judge wherein, the plea of limitation, having been raised for the first time in the

petition/objections under Section 34 of the Act, had been rejected. It was observed that specific pleading with necessary particulars with regard to the question of limitation could have been made before the arbitral tribunal. Considering that the question of limitation is a mixed question of law and facts, the High Court, in view of the lack of evidence on record, observed that the same could not be decided at this stage.

42. The decision in *Sealand Shipping & Export Pvt. Ltd.* (supra), in my view, has no application for various reasons. Firstly, this decision does not take note of the Division Bench decision of the same High Court in *Vimal G. Jain* (supra). Secondly, the fact situation in that case was materially different. The plea of limitation had been raised before the Arbitral Tribunal, however, the Tribunal did not frame an issue on this plea and did not decide the same. In the present case, admittedly, no plea of limitation was raised by the petitioner. Pertinently, the respondent raised the plea of limitation in respect of the petitioner's claim. In spite of this, the petitioner did not raise the plea of limitation in respect of the counter claim.

43. Last but not least, I may take note of the decision of this Court rendered *inter partes* in *M/s Raj Kishan & Company Vs. National Thermal Power Corporation Limited*, O.M.P. No. 333/2004 decided on 13.03.2012.

In that case as well, the petitioner herein did not raise the plea of the respondent/NTPC's claim being barred by limitation before the Arbitral Tribunal. The only difference is that, whereas, in the present case this plea has been raised in these proceedings, in O.M.P. No. 333/2004 it was not even raised in the objection petition. The learned Single Judge rejected the said plea by holding as follows:

*“This ground has been raised only at the time of the arguments. It is a settled position of law that plea of limitation cannot be decided as an abstract plea of law divorced from the facts. As explained in **Ramesh B. Desai v. Vipin Vadilal Mehta 2006 (5) SCC 638** “a plea of limitation is a mixed question of law and fact.” Consequently, unless the plea of limitation is raised at the earliest point in time before the learned Arbitrator, it cannot be adjudicated upon as a mixed question of law and fact. In **Oil and Natural Gas Corporation Limited vs. Mc Chemical Engineers, 1999 (2) Raj. 149 (SC)** the Supreme Court negated the plea of limitation raised for the first time in the course of challenge to the award before the Court. In **Tamil Nadu Water Supply v. M. Abdul Karim, 2010 (4) ALR 581 (Madras)** it was again held that without a proper foundation of facts laid before the learned Arbitrator to demonstrate that the claims were barred by limitation, a plea to that effect cannot be raised for the first time in Court. A Division Bench of Bombay High Court in **Vimal G. Jain v. Vertex Financial Services Pvt. Ltd., 2007 (4) Arb LR 18 (Bombay)** held that if the point regarding the bar of limitation is not raised before the Arbitrator, it should be deemed to have been waived. Consequently, “the question of entertaining such point in proceedings under Section 34 of the Act or in an appeal arising from the order passed therein cannot arise.” This Court has held to the same effect in **M/s. Uppal Engineering Corporation v. C.W.C., 2009 (3) Raj. 666 (Del.)** and **M. Sons Enterprises***

Pvt. Limited v. Shri Suresh Jagasia and Anr. 2011(123) DRJ 266. In that view of the matter, the Petitioner cannot be permitted to urge the ground regarding limitation for the first time during arguments.”

44. It is not for this Court to speculate with regard to the possible defences that the respondent may have been in a position to raise and may have raised, as also all the defences which may have been accepted by the learned Arbitrator in answer to the bar of limitation that the petitioner could have raised but failed to raise. However, to deal with the petitioner’s submission that the present case is an open & shut case in which the respondent could possibly not have raised any defence to the plea of limitation in respect of the respondents counter-claim and that, therefore, this Court should entertain the said plea even at this stage, I may only demonstrate what all pleas the respondent could and might have raised, had the petitioner raised the plea of limitation, which defences may have been accepted by the Arbitral Tribunal, which come to my mind.

45. On the basis of the correspondence exchanged between the parties, as referred to in para 2.2 and 2.3 above, the respondent could have contended that what the respondent nomenclatured as a counter claim was, in fact, an already undertaken adjustment of the amount due to it from the petitioner on account of owner issued materials. The respondent could have contended

that since the amount adjusted on this account was less than the amount due from the respondent to the petitioner, there was no need or occasion for the respondent to have invoked the arbitration agreement, and to seek reference of the said dispute to arbitration. It could have been argued that the respondent could well have waited for the petitioner to invoke the arbitration agreement to claim the amounts due to it, and in such proceedings to set up its defence to seek adjustment of the amount due from the petitioner to the respondent towards owner issued materials. One possible view that the tribunal could have taken, could be that the limitation did not run against the respondent, as such a defence could be raised at any point of time, as and when the claim is made against the respondent. The respondent could also have argued that when the petitioner invoked the arbitration agreement, the petitioner itself sought to raise the issue of adjustment sought to be made by the respondent on account of owner issued material, by placing reliance on the communication dated 10.05.2000 extracted in para 2.3 above. The respondent could have also contended that the petitioner itself sought reference of the disputes with regard to the amount adjusted by the respondent to arbitration, as that was the justification offered by the respondent to not pay the dues of the petitioner under the contract. It

appears, that because the issue of limitation was never raised by the petitioner, the tribunal could not examine whether the counter claim was in the nature of an adjustment. Even if the said counter claim was not in respect of an adjustment but an independent counter claim, the learned Arbitrator was precluded from considering the issue as to when the cause of action last arose in favour of the respondent, and when the period of limitation for making the said counter claim started to run against the respondent. This was a mixed question of facts and law. The tribunal could also not consider the issue, whether in terms of the arbitration agreement, it was incumbent for the respondent to have raised the claim and also demanded arbitration before preferring the counter claim.

46. Lastly, the tribunal was also precluded from considering whether the said issue of adjustment/counter claim of the respondent was covered by the invocation of the arbitration agreement by the petitioner.

47. Consequently, I find no merit in the petitioner's objection that the counter-claim of the respondent was barred by limitation. This plea is not open to the petitioner to raise at this stage as the same was never raised before the Arbitral Tribunal.

48. The objection of the petitioner that the award made by the learned Arbitrator qua recovery for wastage and excess amounts of cement, reinforcement steel and structural steel is contrary to the contractual terms also has no merit. The petitioner has placed reliance on Clause 8.3.1 (e) of the contract, which reads as follows:

“At any point of time, the material outstanding as unaccounted for, shall be limited to 10% of the value of the security deposit given by the contractor for the materials unless & otherwise permitted in writing by Engineer Incharge.”

49. The petitioner’s submission is that since no permission was given by the Engineer-in-Charge permitting the petitioner to retain the material in value terms beyond the limit of 10% of the security deposit, it could not be accepted that the petitioner, in fact, was holding or had consumed excess amounts of cement, reinforcement steel or structural steel.

50. The Arbitral Tribunal has dealt with the submission of the petitioner and interpreted Clause 8.3.1(e) in the award in paragraphs 195 to 198. The learned Arbitrator notes that the said clause requires reconciliation of material on quarterly basis on the execution of works up to the specified percentages including at the final stage. He also notes that there was no

evidence or averment of the respondent that the procedure had been followed by the Engineer-in-Charge. He thereafter goes on to observe as follows:

“196. However, the claimant cannot be allowed to get undue enrichment, if on getting the details from the documents, the respondent is able to prove that the respondent is entitled to make recovery in accordance with the provisions of the contract for excess/less consumption of material is enumerated in the contract, which is not in dispute.

197. I will first take up the recovery in respect of Reinforcement Steel. Although in the statement of counter claim, the amount claimed in respect of this material was Rs. 1,49,89,462/-. Yet, in the details filed by the respondent during the proceedings on 24.5.2007, which were furnished to the counsel for the claimant at that time but filed on the record on 31.1.2009, show that the respondent is now claiming Rs.1,27,70,884/-. There is no dispute with regard to the quantity of material issued to the claimant.

198. The claimant however, has endeavored to show that the steel so issued was over weight. The respondent in its calculation has given due account of the overweight material as appeared on the record. The claimant on the other hand has assumed without any basis that over weight found in respect of particular quantity of steel should be spread over by average in a generalized manner in respect of the entire quantity of the steel issued to the claimant. There is no basis for the same. It can be seen at page 151 of Book No.5 (Vol.XXX), the claimant had mentioned about the weight difference at Sl No.3.Col.No.3 for the quantity of steel issued for section 16mm dia, whereas, the store issue voucher (SI V) at C-682 (Book No.6) Vol.XIV, the steel of section 16 mm dia is underweight i.e. 1.56 kg/mt as compared to theoretical weight of 1.58 kg/mt and similarly, in C-697, the claimant is getting the weight certified in respect of the steel of section 20 mm dia and not of 16 mm dia, when it is to the knowledge of the claimant that steel of 16 mm dia issued

to the claimant was under weight. The respondent has taken out the actual issued material and the weight so recorded and whenever so desired by the claimant for giving its calculation. There is no reason to doubt the correctness of the details given by the respondent, hence, I allow Rs.1,27,70,884/- as recovery on the rates fixed in the contract, which are not in dispute.”

51. The Respondent under counter claim no. 1 claimed Rs. 2,83,38,453/- (which thereafter, on 31.01.2009, was claimed to be Rs. 1,27,70,884/-) as a recovery for wastage and excess consumption of cement, reinforcement steel and structural steel, which were supplied by the respondent as free issue material. The petitioner herein refuted the counter claim and also denied the correctness of the details given in respect of the counter claim.

52. As per clause 8.3.1. (a) of the GCC, the re-conciliation of the actual consumption and the theoretical consumption of the material so issued, was to be done as directed by the Engineer-in-charge on quarterly basis and also at different stages of the works in accordance with the procedure prescribed therefor. However, as noted by the arbitrator, there was no averment or evidence that such procedure had been followed by the Engineer-in-charge.

53. The same, however, as observed by the Ld. Arbitrator, and rightly so, would not entitle/allow the petitioner to get undue enrichment. Mere non-observance of the procedure prescribed in clause 8.3.1(e) could not efface the factual position as it was found to be existing on the record. The said

clause does not say that if the said procedure is not adopted, the respondent would not be entitled to claim any amount in excess of 10% of the security deposit or that the remaining claim of the respondent would be barred or stand waived. The Arbitrator has returned a finding of fact that the respondent was able to prove that there was excess consumption of free issue material. The aspects of the method of calculating the consumption of material, as enumerated in the contract, and the quantity of material issued to the petitioner- were not disputed. These aspect, therefore, do not call for interference in these proceedings.

54. The petitioner herein, however, tried to wash its hands of the said liability by endeavouring to show that the steel issued by the respondent was over-weight. The Ld. Arbitrator, while returning a finding of fact, rejected the said defence on the ground that the petitioner assumed, without any basis, that the over weight found in respect of particular quantity of steel should be spread over by average in a generalised manner in respect of the entire quantity of the steel issued to the claimant. The respondent, on the other hand, as taken note of in the award, gave a due account of the overweight material and the material actually issued along with its recorded weight and the corresponding calculation- to stake its counter claim.

Consequently, the Ld. Arbitrator found no reason to doubt the correctness of the details given by the respondent and accordingly allowed the counter claim. The reasons given by the Ld. Arbitrator while dealing with the counter claim of the respondent appear to be logical and plausible. There is nothing to suggest that the interpretation of clause 8.3.1 of the contract is perverse or contrary to the contractual terms. This objection of the petitioner, accordingly, stands rejected.

55. The petitioner has assailed the aforementioned modification of the award, as noticed in para 2.7 above, not on the ground that the amount of the second last running bill was not paid to it by the respondent, but on an entirely new ground i.e. that the amount of Rs. 1,54,28,696/- under Claim No. 2 was in addition to the amount of Rs. 1,47,49.458.70/-. It was submitted that the amount of Rs. 1,47,49.458.70/- had been paid way back in December, 1997, whereas the rate analysis, which is the basis of Claim No. 2, had been prepared and finalised by the Respondent on 25.10.2001 and no payment had been made thereafter. The raising of such entirely new grounds, obviously, cannot be permitted at this stage.

56. The said plea is otherwise also unsustainable as, before the arbitrator (at the time of the order of modification) it was pleaded that the said amount

had not been paid. However, the petitioner in the present proceedings admits to have received the same - and that too, way back in December 1997. The petitioner cannot be permitted to blow hot and cold at the same time and take frivolous stands, just to somehow defeat the claim of the respondent. The same is, accordingly, dismissed.

57. Accordingly, the present objection petition is dismissed with costs quantified at Rs.30,000/-, to be paid by the petitioner to the respondent.

(VIPIN SANGHI)
JUDGE

SEPTEMBER 12, 2012
BSR/sr