

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

+ **FAO No.8/2010**

% **2nd January, 2014**

MUNICIPAL CORPORATION OF DELHI Appellant
Through: Ms. Mini Pushkarna, Advocate.

VERSUS

M/S. GURBACHAN SINGH & SONS Respondent
Through: Mr. B.M. Sehgal, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (in short 'A&C Act') against the judgment of the lower court dated 11.9.2009. Learned ADJ by the impugned judgment dismissed the objections filed by the appellant/Municipal Corporation of Delhi (MCD) against the Award of the sole Arbitrator dated 19.9.2008. The Award of the Arbitrator is a common Award with respect to two claim petitions filed by the respondent/contractor with respect to two separate works. The parties were the same and therefore the Arbitrator delivered the common Award. One claim petition which was

filed by the respondent was with respect to construction of pucca school building at M.C. Primary School at Sagarpur (old) West Zone, New Delhi. The second claim petition which was filed was with respect to construction work at Dabri. There were more or less similar heads of claims for both the works of the respondent-contractor and therefore the same were disposed of by the common Award dated 19.9.2008.

2. A reading of the impugned judgment shows that the court below has not at all discussed any of the claims, reasoning with respect to the same, or as to how awarding of the claims are legal or illegal or in accordance with the contract or not in accordance with the contract or perverse or if the Award is the view of a reasonable person. Except dealing with the findings of the Arbitrator with respect to the issue of limitation, the impugned judgment does not contain much. It is not expected of a court, much less the first court which hears objections under Section 34 of the A&C Act, to pass a cursory judgment without referring to the arguments qua each of the objections and as to how the said arguments are not acceptable under Section 34 of the A&C Act. Counsel for the appellant has therefore argued before me the various objections which have been raised against the Award as stated in the petition under Section 34 filed before the court below.

3. The first aspect which is argued on behalf of the appellant is that the claims filed by the respondent-contractor were barred by time. It is argued that the work in this case was completed, so far as the Sagarpur project is concerned, on 10.10.1996; and so far as Dabri project is concerned on 21.4.1994, and therefore the claim made for arbitration well after three years on 14.6.2000 would have the effect that the claim petitions would have been filed on 14.6.2000 and which claim petitions being beyond three years from the completion of works on 10.10.1996 (Sagarpur) and 21.4.1994(Dabri) would be barred by limitation. Reliance in support of claims being time barred is placed upon a judgment delivered by this Court in the case of **Satender Kumar Vs. Municipal Corporation of Delhi & Anr. 168 (2010) DLT 15**. The judgment in the case of **Satender Kumar (supra)** has been followed in two other judgments by another learned Single Judge of this Court in the cases of **Bindra Builders Vs. DDA & Anr.** in CS(OS) 1001A/2001 decided on 30.7.2012 and **Municipal Corporation of Delhi Vs. M/s Harcharan Dass Gupta** in OMP 249/2006 decided on 21.8.2012 and which are also relied upon by the appellant.

4. I may note that the counsel for both the parties conceded before me that the contractual clauses in the present case are completely identical

with the contractual clauses in the reported judgment in the case of *Satender Kumar (supra)*. Let us therefore refer to the relevant paragraphs of the judgment in the case of *Satender Kumar (supra)* and which read as under:-

“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 right to apply elsewhere in this division	Three years	When the 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.

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.

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 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.”

(emphasis added)

5. In the present case, since the admitted fact is that the Dabri contract stood completed on 21.4.1994, applying the ratio in the case of *Satender Kumar (supra)*; and emphasized portions of which are relied upon; it is clear that the claims which are taken to have been filed on

14.6.2000 when the claim for arbitration was made would be time barred. The claim for arbitration or claims before the Arbitrator in the present case qua the work at Dabri had to be filed in terms of the ratio in the case of *Satender Kumar (supra)* within three years from the end of ninth month period ending from 21.4.1994 i.e within 3 years from 21.1.1995, but however since the claim of the arbitration has not been filed on or before 21.1.1998, but only later on 14.6.2000, the claims filed by the contractor with respect to the Dabri construction work are barred by limitation and are accordingly dismissed as being time barred. However, so far as the Sagarpur construction work is concerned, since the same was completed on 10.10.1996, a period of nine months would come to an end on 10.7.1997 and three year period therefrom ends on 10.7.2000. The claim for arbitration has been filed qua Sagarpur work on 14.6.2000 i.e before 10.7.2000, and therefore the claims made for the Sagarpur construction work are within limitation and will have to be examined on merits within the scope of the Section 34 of the A&C Act.

6. The scope of hearing objections in a petition under Section 34 is now well-settled. A Court only interferes with the Award if the Award is against the provisions of the contract (Section 28(3)) or against the

provisions of the law of the land (Sections 28(1)(a) and 28(2)) or the findings and conclusions of the Arbitrator are completely perverse that Arbitrator is consequentially said to have acted beyond the provisions of the contract and the law. The law in this regard is summed up by the Supreme Court in its celebrated decision in the case of *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. 2003 (5) SCC 705* in the following words in paragraph 74 of the judgment:-

“74. In the result, it is held that:--

A. (1) The Court can set aside the arbitral award under Section [34\(2\)](#) of the Act if the party making the application furnishes proof that:--

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

2) The Court may set aside the award:--

(i) (a) if the composition of the arbitral tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the arbitral tribunal was not in accordance with Part-I of the Act.

(ii) if the arbitral procedure was not in accordance with:--

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part-I of the Act.

However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part-I of the Act from which parties cannot derogate.

(c) If the award passed by the arbitral tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:--

(a) fundamental policy of Indian law;

(b) the interest of India; or

(c) justice or morality, or

(d) if it is patently illegal.

(4) It could be challenged:--

(a) as provided under Section [13\(5\)](#); and

(b) Section [16\(6\)](#) of the Act.

xxxx

xxxx

xxxx

xxxx”

(underlining added)

7(i) The first argument which is raised before me on behalf of the appellant is with respect to claim No.2 of the respondent/contractor which

pertains to refund of security deposit of Rs.25,000/-. Arbitrator has allowed this claim by holding that neither any notices were given for unsatisfactory work by the appellant and nor there was any delay on the part of the respondent/contractor in execution of the work. I may state that this claim is related to claim No.3 which is the claim for higher amount on account of higher prices of labour and material as per clause 10-CC of the agreement as also claim No.8 on account of damages caused for the loss suffered by delay in completion of the work. Arguments under claim Nos.2,3 and 8 are accordingly taken up together.

(ii) A reading of the Award shows that Arbitrator has held the appellant guilty of delay in performance of the contract and has referred to various letters being Ex.C-1 to Ex.C-25 written by the respondent/contractor showing that it was the appellant who was guilty of delay in supply of cement and steel whereby the contract was delayed. Counsel for the appellant sought to argue that respondent/contractor was only given a provisional extension however when asked to show documents that the provisional extensions were given to the respondent/contractor by attributing delay to the contractor/respondent, counsel for the appellant could not point out any extension letter which stated that it was the respondent who was

alleged to be guilty of delay in performance of the work by the appellant. Therefore, in the absence of any such record before me, as also obviously such record not existing before the Arbitrator, it cannot be held that Arbitrator has committed any perversity or violation of law or violation of the contract in holding the appellant guilty of delay in prolongation of the work. This Court cannot re-appraise the findings of facts under Section 34 of the A & C Act, much less as an appellate Court. Also I may note that the argument on behalf of the appellant is misconceived that under clause 10-CC documents have to be filed to show increase of prices for the labour and material inasmuch as formula prescribed under clause 10-CC refers to price index of the Government and therefore it is a misconceived argument on behalf of the appellant that respondent had to prove the increase of prices by filing of documents. Accordingly, I do not find any illegality or perversity in the findings of the Arbitrator in allowing the claim under clause 10-CC for an amount of Rs.6.10 lacs. Accordingly also there is no illegality in the finding of allowing claim No.2 of refunding of the security deposit of the amount of Rs.25,000/- ,once it is held that it is the appellant who was guilty of delay caused in the prolongation of the work and delay is not on account of the respondent/contractor. Once, there is no delay on behalf of the

respondent/contractor, the appellant cannot in terms of clause 2 of the contract forfeit the amount of the security deposit.

(iii) However, so far as the claim allowed for damages of Rs.72,000/- (as against the claim of Rs.8 lacs) counsel for the appellant in my opinion is fully justified in contending that the Award of the Arbitrator is totally perverse because the details of the claims and the documents were never filed by the respondent/contractor either in its pleadings or as evidence and the defect was sought to be remedied by filing the details and the documents only for the first time in the written arguments and therefore Arbitrator could not have granted any damages in the absence of any pleadings and evidence. Learned counsel for the appellant is also justified in my opinion in arguing that the Arbitrator could not go on assumptions and presumptions by relying upon the 'probabilities' of the respondent/contractor having employed a Chowkidar. If damages are claimed then damages have to be proved and if amount is granted as damages for salaries paid to Chowkidar, then, such aspect had to be proved by leading of evidence. There is no law that damages can be awarded although damages are not proved. In my opinion, the following portion of the Award dealing with the grant of damages shows that same is perverse

and therefore conclusions of the Arbitrator alongwith interest in this regard are set aside:-

“It is, however, pertinent to mention that the claimant has not disclosed the calculation how the said figure of Rs.8.00/5.00 lakhs was reached either in the Statements of Claims or in the affidavit of Gurnam Singh. It was for the first time that alongwith written arguments the claimant annexed the statements giving the break up of the said amounts. Statement in the case of Sagarpur (Annexure-A) would show that for the delayed period of 1350 days, the claimant has charged the salaries for one Chowkidar, one Supervisor, one Engineer, depreciation on mixers, vibrators, water pumps, generator and hire charges paid for the steel plates, bullies and pallus. By and large similar statement has been filed in the case of Dabri. Claimant has not filed affidavit either of the Engineer or Supervisor concerned in support of their having received the salaries shown in the statements. None of the vouchers collectively exhibited as C-29 pertain to the payment of hire charges of steel plates, bullies and pallus. There is no evidence to suggest as to how many mixers, vibrators, water pumps and generators were used in execution of the works by claimant nor the amount of depreciation thereof for the delayed period has been pleaded in the Statement of Claims. In cross-examination, Gurnam Singh admitted that firm is assessed under the Income Tax Act and losses have not been shown in Income Tax return in respect of the two cases. Said statements filed alongwith written arguments would not form part of either of the pleadings or the evidence. In all **probabilities** the claim must have employed one Chowkidar each at both the sites uptil the work was completed. Salary paid to the Chowkidar as is manifest from the vouchers ranges between Rs.1200/- to Rs. 1800 p.m. Thus, the amount of Rs. 1600/- p.m. be safely taken as average salary paid to the Chowkidar for the delayed period. For the forgoing discussions and evidence, it must be held that the respondent is not entitled to any amount by way of counter claims and the claimant is entitled only to Rs. 72,000/- being the amount of salary of one Chowkidar each @ Rs.1600/- p.m. in the case of Sagarpur and Rs.24,000/- in the case of Dabri for the delayed period.”

(underlining added)

Accordingly, claim Nos.2 and 3 have been rightly awarded by the Arbitrator and which conclusions and Award of the Arbitrator are sustained but the claim no.8 awarded with respect to damages of Rs.72,000/- being totally perverse and against the law is set aside.

8. The next argument urged before this Court by the appellant is with respect to the Arbitrator awarding the claim towards extra height in shuttering. Respondent-claimant in this regard had claimed that shuttering was done at a higher height (being double the height) and therefore respondent/contractor was entitled to Rs.25,000/-. Arbitrator has allowed an amount of Rs.12,500/- on this count. The Award, in this regard, is totally illegal and perverse and is set aside for the reasons given hereinafter. There be no clause in the contract for providing payment for higher shuttering and in fact contract provides in clause 2 that the rates will apply for all heights and depths and therefore the Arbitrator has clearly acted against the law and the contract in awarding the claim for double height of shuttering and which finding accordingly is set aside.

9. In view of the above, appeal is allowed by dismissing the claims of the respondent-contractor with respect to Sagarpur contract as being time barred. The challenge by the appellant to awarding claim nos.2 and 3 is dismissed, however, the findings and conclusions of the Arbitrator

with respect to claim No.5 and awarding of damages of Rs.72,000/- is set aside. To the extent the claims are set aside interest also would not be payable with respect to such dismissed claims. The appeal is therefore partly allowed and partly dismissed in terms of observations made above, leaving the parties to bear their own costs.

JANUARY 02, 2014
Ne

VALMIKI J. MEHTA, J.