

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 814 OF 2012

**Maharashtra Industries Development
Corporation**

..... Petitioner

VERSUS

M/s.Kolwalkar Gupte Construction

..... Respondent

Mr.P.P.Chavan, a/w. Mr.C.M.Lokesh, Ms.Reshma Nathani, Ms.Vaibhavi Gole, i/b.
A.R.Bhole & CO. for the Petitioner.

None for the Respondent.

CORAM : R.D. DHANUKA, J.

DATED : 22nd APRIL, 2015

P.C.

Mr.Chavan, learned counsel for the petitioner states that the respondent has been served. Pursuant to the order passed by this court on 9th April, 2015, the petitioner had issued fresh notice upon the learned advocate representing the respondent. None appeared for the respondent. No affidavit in reply is filed. No Vakalatnama has been filed by the learned advocate representing the respondent.

2. By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short the said 'Arbitration Act') the petitioner has impugned the arbitral award dated 26th March, 2012 rendered by the learned arbitrator thereby rejecting the claims made by the petitioner and allowing one of the counter claim in favour of the respondent in the sum of Rs.6,89,000/- with interest. Some of the relevant facts for the purpose of deciding this petition are as under :-

3. The petitioner herein was the original claimant whereas the respondent was

the original respondent in the arbitral proceedings. The respondent had filed a counter claim against the petitioner in the arbitral proceedings.

4. On or about 9th September, 1993 the petitioner had invited tenders from prequalified contractors for the work in standard B-1 form at an estimated cost Rs.8,10,13,155/-. The respondent submitted their bid for the said work at the rate of 0.9% below the estimate. The petitioner awarded the said work comprising of construction of a standard design factory building VI in the Seepz area at Andheri, Mumbai. The petitioner issued work order on 9th February, 1994. The stipulated time for completion was 24 months including the monsoon period.

5. It was the case of the petitioner that the respondent did not complete the work and committed breaches of the contract. Petitioner terminated the contract. The petitioner prepared the final bill.

6. It is the case of the petitioner that under the provisions of the contract, the petitioner had granted advance against the material such as cement, steel and bricks to the respondent which was to be utilised for the purpose of carrying out the work awarded to the respondent. It was the case of the petitioner that the petitioner had awarded advance of Rs.43,25,975/- to the respondent. The respondent had brought the steel on site to the tune of 308.855 tones. Under the agreement entered into between the parties, the petitioner was entitled to recover the appropriate amount from the bills payable to the respondent periodically which was given as and by way of secured advance to the respondent. It is the case of the petitioner that though the petitioner had called upon the respondent repeatedly to attend the site for joint measurement after the contract was terminated on 28th February 1995, the respondent did not remain present. The petitioner accordingly

prepared inventory under a joint panchanama and handed over the quantity of steel found lying on the site to the new contractor. According to the petitioner, there was shortfall of about 166.186 metric tonnes of steel which was unaccounted for by the respondent and which was not used for the work awarded to the respondent by the petitioner.

7. The petitioner accordingly filed a suit for recovery of a sum of Rs.20,66,648/- with interest against the respondent in a civil court. The final bill was prepared in the year 2006 which was accepted by the respondent. The petitioner had filed a suit on 20th February, 2000. The respondent filed a written statement in the said suit on 18th January, 2001. The matter was by consent of parties referred to the arbitration. In the arbitration proceedings for the first time the respondent made a counter claim on 18th October, 2007 and filed the same before the learned arbitrator in November 2007. Insofar as counter claim made by the respondent is concerned, the same is resisted by the petitioner on various grounds including on the grounds of limitation.

8. None of the parties led oral evidence before the learned arbitrator. Insofar as issue of limitation raised by the petitioner is concerned, by a separate order passed by the learned arbitrator on 28th May, 2010, he rejected the counter claim nos. 1 to 10 on the ground that the same were barred by law of limitation. However he rejected the plea of limitation insofar as claim no.11 which was for refund of the amount withheld by the petitioner in the sum of Rs.6,89,000/- is concerned.

9. Mr.Chavan, learned counsel for the petitioner invited my attention to the relevant paragraphs of the award and submits that since the respondent was liable to return the steel material lying utilized on the termination of the contract, the

petitioner was entitled to recover the balance amount of the secured advance which could not be recovered from the bills for the respondent for the work done. He submits that the respondent did not attend the site for the purpose of joint measurement and thus the learned arbitrator ought to have allowed the said claim made by the petitioner for recovery of the balance amount of the secured advance.

10. Insofar as counter claim no.11 which is allowed by the learned arbitrator is concerned, it is submitted by the learned counsel that though the learned arbitrator rendered a finding that the cause of action in respect of the entire counter claim had arisen prior to the date of three years of filing the counter claim, the learned arbitrator though rejected counter claim nos. 1 to 10 on that premise has rejected the plea of the petitioner on the issue of limitation insofar as counter claim no.11 is concerned. He submits that the award shows patent illegality. The conclusion drawn by the learned arbitrator on the issue of limitation insofar as claim no.11 is concerned, he submits that the same is inconsistent with the findings rendered by the learned arbitrator in respect of the counter claim nos. 1 to 10.

11. Insofar as first submission of the learned counsel on the issue whether the learned arbitrator was right in rejecting the claim made by the petitioner is concerned, a perusal of the award indicates that the learned arbitrator has rendered a finding of fact to the effect that all the material brought to the site by the respondent contractor against the secured advance was inspected closely by the officers of the petitioner and only after that they were fully satisfied about the quality and quantity of the material, entry was made in the register kept at site. The secured advance was given against such material in favour of the respondent. Each of such material brought to the site was recorded in the material register kept at site. The learned arbitrator had also visited the site in presence of the parties

and their respective counsel and held that considering the location of the site and the security provided by the petitioner at site, it was impossible to remove any material by the respondent that also to the tune of 166.621 tones of steel which could have required 16 trucks for the purpose of shifting such material from the site outside.

12. It is noticed by the learned arbitrator that in absence of 16 trucks loads of steel out of a total expected balance about 30 truck loads (308.855 tone) would be very noticeable even at a glance at the time of taking measurements in February 1995 or while taking over the site. The learned arbitrator has also noticed that the petitioner never made any complaint against the respondent for illegal removal of the material after termination of the contract. In my view the findings rendered by the learned arbitrator on this issue are based on the pleadings and documents produced by both the parties and after site visit personally. In my view such findings of fact rendered by the learned arbitrator are not perverse and thus no interference with such findings is permissible under section 34 of the Arbitration and Conciliation Act, 1996.

13. Insofar as second submission of the learned counsel for the petitioner that the counter claim no. 11 which has been allowed by the learned arbitrator was barred by law of limitation is concerned, it is not in dispute that the final bill was prepared in the year 1996 and the payment according to the petitioner whatever was payable to the respondent was already paid. The petitioner had filed a suit for recovery of Rs.20,66,648/- in the year 2000 on the premise that the petitioner came to know about the shortfall of the steel only sometime prior to the three years of date of filing of suit. A perusal of the order dated 28th May, 2010 passed by the learned arbitrator clearly indicates that though the learned arbitrator has held that

the cause of action started on 4th April, 1996 and on that premise has rejected the counter claim nos. 1 to 10, the learned arbitrator has rejected the plea of the petitioner that even counter claim no.11 was time barred.

14. Though the learned arbitrator has held that the cause of action arose in respect of all counter claims at the same time, insofar as counter claim no.11 is concerned, learned arbitrator has applied different yardsticks. In my view the cause of action in respect of the counter claim no.11 also arose at the same time which arose in respect of the other counter claim viz. counter claim nos. 1 to 10. The award shows patent illegality on the face of the award. In my view the learned arbitrator has allowed counter claim no.11 which was ex-facie barred by law of limitation. The conclusion drawn by the learned arbitrator insofar as counter claim no.11 is concerned is contrary to and inconsistent with the findings rendered by the learned arbitrator. In my view, the award discloses patent illegality on the face of award insofar as counter claim no.11 is concerned. I, therefore, pass the following order :-

- (a) Impugned order forming part of the arbitral award dated 28th May, 2010 insofar as it allows the counter claim no.11 with corresponding interest thereon is concerned set aside.
- (b) Rest of the award is upheld.
- (c) Arbitration petition is disposed of in the aforesaid terms.
- (d) No order as to costs.

[R.D. DHANUKA, J.]