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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPEAL NO. 555 OF 2011
IN
ARBITRATION PETITION NO. 305 OF 2011**

MAHAVIR PRASAD JANGID	]	...Appellant.
Sole Proprietor of M/s Vimal	]	(Claimant)
décor having address at F-114,	]	
Nahar & Seth Industrial Estate,	]	
Near P & G Plaza, Chakala Road,	]	
Andheri (East), Mumbai-400 099	]	

VS

ECGC Limited	]	...Respondent.
A Company incorporated under the	]	
Indian Companies Act, 1956	]	
having its registered office at	]	
Express Towers, 10 th Floor,	]	
Nariman Point, Mumbai-400 021.	]	

.....

Mr Zal Andhiyarujina a/w Shruti Sardesai a/w A Dasgupta i/b Jhangiani
Narula & Associates for the Appellant.
Mr Pankaj Savant Sr. Advocate with Mr Faisal Sayyed i/b M.K.Ambalal
& Co. for the Respondent.

**CORAM : ANOOP V MOHTA &
S.C. GUPTE, JJ.**

MARCH 08, 2016

ORAL JUDGMENT (Per ANOOP V MOHTA J.):

Called out from final hearing board. Heard learned
counsel for parties finally.

2 This is an appeal under Section 37 of the Arbitration and
Conciliation Act, 1996, (for short "Arbitration Act") against the judgment

of a learned Single Judge dated 7th July 2011 whereby the Section 34 Petition filed by the appellant (contractor) was dismissed, rejecting all claims on the ground of limitation.

3 The disputes arise out of an agreement between parties for carrying out renovation work at the Respondent's office premises. The Appellant (claimant - contractor) completed the work and was issued a certificate of completion on 29 June 2001. On 22 January 2001 the Appellant submitted his final bill. The Respondent made part payments on 6 June 2001 and 12 September 2001. As there arose disputes for non-payment of the balance amount, the Appellant invoked the arbitration agreement forming part of the contract on 2 September 2003 for balance payment of Rs.1,48,79,957/-. There were negotiations between the parties in pursuance to the demand notice. The last part payment was made on 15 October 2004. As there was no further payment forthcoming from the Respondent, the Appellant issued another notice dated 1 August 2005, for a balance claim of Rs.1,75,59,320/-.

4 There was no response to the Appellant's request for appointment of an Arbitrator. Therefore, Arbitration Petition No. 11 of 2006 was filed under Section 11 of the Arbitration Act on 12 December 2005, seeking appointment of an Arbitrator. Ultimately, the matter was referred to a Sole Arbitrator by an order dated 19 August 2006.

5 The learned Arbitrator after considering rival pleadings and submissions, passed an award on 4 December 2010, granting eight claims raised by the Appellant. The Respondent challenged the award by filing an application under Section 34 of the Act. After hearing the

parties, the learned Single Judge, by the impugned judgment, set aside the award solely on the ground of limitation. Hence, this appeal by the original claimant.

6 The basic contention raised by the learned counsel appearing for the Appellant is that the arbitration agreement was invoked by the first notice dated 2 September 2003. This notice is in accordance with Section 21 and within limitation as provided by Section 43(2) of the Arbitration Act. Learned counsel appearing for the Respondent, in support of the impugned judgment, however, submits that the second notice dated 8 February 2005 should be treated as a notice of invocation of arbitration agreement, since the arbitrator was appointed on a Section 11 petition filed by the Appellant in pursuance of this notice. The learned Single Judge accepted this submission and passed the impugned order setting aside the award. This issue goes to the root of the matter for deciding present appeal.

7 Learned Arbitrator, Justice P.S.Patankar (Retd.), after considering the rival contentions of both parties, referring to these two notices, held as under:

“In our case the final bill was submitted on 22/01/2001. It was followed by payment of Rs.3,40,057/- dated 06/06/2001 and Rs.2,40,581/- on 12/09/2001. The Claimant invoked arbitration by notice dated 02/09/2003. Discussions and meetings followed between the parties and further payment was made in October 2004 of Rs.1,33,104/-. The arbitration application was filed on 12/12/2005. Hence, the said judgment of the Supreme Court has no application here. Considering all this, I hold that all the claims are within limitation”

8 The Learned Single Judge, however, in spite of these clear observations, accepted the case of the Respondent by holding as under:

“When notice dated 2.9.2003 was issued by the respondent to the petitioner invoking the arbitration clause, a dispute was raised that an amount of Rs.1,48,22,204/- was payable by the petitioner to the respondent, and thus, by that notice dated 2.9.2003 the arbitration clause was invoked. However, no application for appointment of Arbitrator was made though the petitioner did not make the payment. On 1.8.2005 a fresh notice was issued now demanding much higher amount of Rs.1,75,59,957.70. In the notice dated 1.8.2005 even notice dated 2.9.2003 and the amount claimed by that notice was not even mentioned. The contention of the petitioner before the learned Arbitrator was that the conduct of the respondent of demanding much higher amount by notice dated 1.8.2005 without even claiming that the amount is increased because of the amount of interest on the amount, amounts to abandonment of notice dated 2.9.2003. The learned Arbitrator in the Award though has analysed the claims made in two notices, has neither recorded a finding that the amount claimed by notice dated 2.9.2003 and the amount claimed by notice dated 1.8.2005 are the same amounts on account of same claim, nor has he given any explanation as to how the amount is increased and still the claim remains the same. In my opinion, it was really for the claimant i.e. respondent to explain in his statement of claim as to how by notice dated 2.9.2003 an amount of Rs.1,48,22,104/- was demanded and how the amount demanded by notice dated 1.8.2005 is the same. In my opinion, in view of the language used under Section 21 of the Act as quoted above, the finding that ought to have been recorded by the learned Arbitrator was whether the dispute which was referred to by notice dated 2.9.2003 was the same dispute which was referred by notice dated 1.8.2005. The Award shows that there is not even an

attempt made in this regard. There is no explanation also given by the respondent that the dispute raised by these two notices is the same. In my opinion, once it is found that there is drastic difference between the amounts claimed by two notices, the burden is entirely on the respondent to explain as to how when there is drastic increase in the amount, the dispute remains same”

9 After hearing both parties and considering the rival contentions, we are inclined to observe that the provisions of Section 21 of the Act make it clear that once there is a dispute between parties and the aggrieved party makes a request for reference of such dispute to arbitration, the arbitration proceedings commence. After disputes arose between the parties, since there was no payment in spite of demand, by notice dated 2 September 2003 the Appellant requested the Respondent that the disputes be referred to arbitration. This invocation, in our view, was sufficient for commencement of arbitration proceedings from the date of such invocation. This invocation is relevant even for deciding the issue of limitation in accordance with Section 43(2) of the Act. Thus, the parties having agreed to an arbitration clause and one party having invoked that clause within the prescribed period of limitation, there is no reason to hold that the first notice should be overlooked or treated as having been given a go by because there was another notice issued on 1 August 2005, making some more claims, but mainly seeking appointment of an arbitrator as no arbitrator was appointed on the earlier notice. The invocation of the arbitration agreement within limitation cannot be disregarded on account of non-appointment of the arbitrator by the other side.

10 The submission of the learned Counsel for the Respondent based upon the second notice, in our view, is

unacceptable, as the same was issued in the background of failure of the Respondent to appoint the arbitrator in spite of notice of appointment of arbitrator. The payment was not made though demanded. Only a part payment of Rs.1,30,320/- was made on 15 October 2004 when the demand was of Rs.1,48,79,957/-. In this background, the Appellant issued a second notice on 1 August 2005. Issuance of this second notice is no ground to deny that the claim for arbitration was made by the Petitioner by issuing the first notice on 2 September 2003.

11 It is relevant to note that even in the Section 11 petition, the Appellant has specifically averred as follows:

“The Applicant, in view of the aforesaid facts, by his Advocate's letter dated 2.9.2003 invoked the said arbitration clause and nominated Shri A.B.Vaidya, a Retd. Executive Director (Technical), LIC of India, as the Sole Arbitrator. The Applicant also forwarded to the Respondent the Bio-data of the said sole arbitrator Mr. Vaidya and requested the Respondent to consent to the same. The Respondent has received the Applicant's said letter, however, has failed and neglected to consent to the said appointment”

12 The second arbitration notice, therefore, even if it raises some other claims in addition to the claims earlier made in the first notice or modifies those claims, cannot be considered as an act giving up the invocation by the first notice. The claims raised by the Appellant, thus, cannot be denied simply on the ground of limitation, without going to the merits of the matter, as done in the present case by the learned Judge.

13 The learned Arbitrator, as recorded above, has considered the merits of the matter apart from holding that the claims of the Appellant – original claimant were within limitation. The finding of the learned Single Judge is, in our view, unsustainable and required to be interfered with as there was no illegality committed by the learned Arbitrator, when he passed the award by a reasoned order. A case is, thus, made out for interfering with the order passed by the learned Single Judge. We order accordingly.

14 The power of the Appellate Court to restore the award of the Arbitrator is also settled as permissible under the law, considering the scheme of Order VII Rule 1 of the Code of Civil Procedure, 1908. The Apex Court in ***Rashtriya Ispat Nigam Ltd. Vs. M/s. Prathyusha Resources & Infra Private Limited & Anr.***¹ has restored the award by setting aside the Judgment passed by the Court while dealing with the similar issue of limitation. It is observed in paragraph No.5 as under:-

“5. We shall now consider the settled law on the subject. This Court in a catena of judgments has laid down that the cause of action arises when the real dispute arises i.e. when one party asserts and the other party denies any right.”.....

15 Learned counsel appearing for the Respondent, however, contended that as the learned Judge has passed the order and set aside the award only on the ground of limitation without touching the merits of other contentions raised specifically in the grounds of objection, an opportunity should be given to deal with the merits of the

¹2016(2) SCALE 375=AIR 2016 SC 861

matter referring to the respective claims raised, based on which the award was passed against the Respondent. Considering the rival contentions and after going through the submissions made by the parties before this Court, we are inclined to remand the matter to the learned Judge to deal with the Section 34 petition on merits after giving equal opportunity to all the parties. All contentions of the parties are expressly kept open on merits of individual claims except the issue of limitation decided in this Judgment. Hence, this order.

ORDER

- (i) Impugned order dated 7 July 2011 passed by the learned Single Judge is quashed and set aside;
- (ii) Arbitration Petition No.305 of 2011 is restored to file. Learned Judge to decide the same on merits in accordance with law, after giving full opportunities to both the parties;
- (iii) Liberty to the parties to apply before the learned Judge for an early hearing of the matter as the Appellant is a senior citizen;
- (iv) There shall be no order as to costs;
- (v) Parties are still at liberty to settle the matter.

(S.C.GUPTE J.)

(ANOOP V MOHTA J.)