

F.A.O.No.8466 of 2015 (O&M)

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

FA.O.No.8466 of 2015 (O&M)

Date of Decision: July 23rd, 2016

State of Punjab, represented by Chief Engineer (N.H.), Public Works
Department (B&R), Branch, Mini Secretariat, Patiala, Punjab

...Appellant

Versus

SDB Infrastructure Private Limited, New Delhi & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

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

Present: Mr.Chetan Mittal, Senior Advocate with
Mr.Varun Issar, Advocate,
for the appellant.

Mr.Arvind Minocha, Advocate,
for respondent No.1.

AMIT RAWAL, J.

This Court has come across many cases where there has been protracted litigation between the contractors and the State agencies both State and Centre. The instant case is of such kind where a contract was entered into in respect of work of Four Laning of NH-1 from Km.212.200 to Km.228.000 (Lot PB-1), including road work and 8 No.

of bridges. It is a matter of record that the tender was based upon the

provisional bills of quantities (Item-rate Contract) and the respondent was awarded the contract on 23.11.1994, which was signed between the parties on 4.1.1995. The date of commencement of the work was 25.3.1995 and the period of completion was 42 months and as a whole upto 24.9.1998. Clauses 6.4, 12.2, 40.2, 42.2 and 69.4 of the contract, already dealt with in extenso and extracted by the Arbitral Tribunal and referred to by the Objecting Court, provided that in the event of any delay in supplying the drawing etc., much less giving decision/instructions by the Engineer, delay in handing over the site free from obstructions and encumbrances, on account of any unforeseeable physical conditions, the contractor shall be entitled for extension of time and as well as payment for the extra cost. It is a matter of record that certain delays during the execution of the work occurred due to the alleged non-fulfillment of the obligations by the objector/employer and a notice dated 22.8.1997 was given at the instance of the respondent while seeking extension of time including the element of extra cost.

It is the conceded position on record that eight times extension was granted. The actual date of completion as well as extended date of completion of the work, except Ghaggar Bridge was 29.2.2000 and the actual date of completion of Ghaggar Bridge was extended upto 25.11.2000.

As per the terms and conditions of the Clauses, the matter was referred to the Engineer. The Engineer and the Employer made a determination with regard to Claim No.1 on 4.12.2000 and further claims on 16.5.2000, 28.5.2001, 7.6.2001, 29.6.2001 and 4.7.2001. Since the objector did not give any notice within the prescribed period of 70 days on receipt of the Engineer's decision of its intention to invoke arbitration as per Clause 67.1, a dispute arose and the matter was referred to the arbitration on 3.5.2002 concurred by the appellant in respect of the following five claims vide letter of the appellant dated 17.6.2002:-

- “1) Claim No.1 for additional cost compensation for extended time;
- 2) Claim No.2 for commercial interest on dishonoured cheques;
- 3) Claim No.3 for suspension of work on Ghaggar Bridge;
- 4) Claim No.4 for interest on early recovery of mobilization/machinery advance; and
- 5) Claim No.5 on account of increase in cost of bricks”

On 20.5.2003, statement of claims containing pleadings on merits and as well as the Engineer's decision was enclosed. Defence and supplementary defence of the appellant-objector were submitted on 15.10.2003 and 9.12.2003. The jurisdiction of the Arbitral Tribunal at the instance of the appellant was challenged, which was rejected by the

Tribunal on 17.11.2004. It is a matter of record that the appellant-objector also filed an application under Section 43(3) of the Arbitration and Conciliation Act, 1996 (for short "1996 Act") before the District Court, Patiala admitting delay in not giving notice within the period of 70 days. The said matter was declined vide order dated 13.8.2005. A revision petition bearing No.4568 of 2005 was preferred in this Court, which was dismissed on 29.11.2005. It is a matter of record that Civil Writ Petition No.4707 of 2005 was filed in this Court on 29.6.2005 at the instance of the respondent owing to certain grounds taken thereon, particularly with regard to the obstruction in the arbitration proceedings and this Court allowed the said writ petition and quashed the parallel arbitration proceedings vide order dated 26.9.2005. Special Leave petition was preferred before the Hon'ble Supreme Court, which was also dismissed. All the aforementioned facts are the admitted facts.

It is also a matter of record that the Arbitral Tribunal framed the issues as suggested by the parties on 26.8.2005, but an application at the instance of the appellant was filed to frame the issue to decide whether the claims of the respondents are maintainable against it or National Highway of India. The said application was rejected by the Arbitral Tribunal vide order dated 11.6.2008 on the premise that there was no privity with NHAI. Against the aforementioned order, objection

petition under Section 34 of 1996 Act was filed and the same was dismissed by the Objecting Court on 28.7.2009 on the premise that the objection petition was not maintainable.

Mr.Chetan Mittal, learned Senior Counsel assisted by Mr.Varun Issar Advocate, for the appellant, in support of the grounds of appeal filed under Section 37 of 1996 Act after the dismissal of the objection petition filed under Section 34 of 1996 Act against the Arbitral award dated 15.9.2011/5.11.2011, has raised manifold submissions.

He has made reference to 67.1, 67.2, 67.3 and 67.4. The same are reproduced herein below:-

“SUB-CLAUSE 67.1

If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Employer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. Not later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made

pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with the due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Employer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the

Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

SUB-CLAUSE 67.2

Amicable Settlement.

Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-Clause 67.1, the parties shall attempt to settle such dispute amicably before the commencement of arbitration. Provided that, unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, even if no attempt at amicable settlement thereof has been made.

SUB-CLAUSE 67.3

Arbitration

Any dispute in respect of which:

- (a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and*
- (b) amicable settlement has not been reached with the period stated in Sub-Clause 67.2.*

shall be referred to the adjudication of a Committee of three arbitrators. The committee shall be composed of one arbitrator to be nominated the Employer, one to be nominated by the Contractor. The third who will act as the Chairman of the Committee, but not as umpire, will be chosen jointly by the two nominees from a panel of five

candidates, none of whom would be in regular employment of the Central and/or State Government, supplied by the Executive Committee of the Indian Roads Congress. If either of the parties fail to appoint his arbitrator, or fail to agree on third nominee within sixty days after receipt of notice for the appointment of such Arbitrator, the Chairman of the Executive Committee of the Indian Roads Congress shall appoint upon request from either party and from such panel. The decision of the majority of the Arbitrators shall be final and binding on the parties. All awards shall be in writing and such awards shall state reasons for the amounts awarded. Save as aforesaid and/or otherwise provided in the Contract, the arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification or enactment thereof and shall be held at such place and time in India as the Committee of Arbitrators may determine.

Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his decision pursuant to Sub-Clause 67.1. No such decision shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute.

Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the employer, the engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the

progress of the Works. ”

He submits that the award is patently illegal, arbitrary and beyond the scope of reference, much less bias and against the public policy. In fact, the claim was not maintainable as claimant had sought direction of the Tribunal for implementation or compliance of the final and binding decision of the Engineer through Arbitral award and referred to Clause 53.1, which is reproduced as under:-

“53.1. Notwithstanding any other provision of the contract, if the claim any additional payment pursuant to any clause of otherwise, he shall give notice of his intention to the Engineer Employer, within 28 days after the event giving rise to the claim has first arisen”

No notice under this Clause was ever given to the Employer or to the Engineer or any contemporary records were verified, much less produced by the contractor. The Arbitral Tribunal has failed to advert to the aforementioned fact in a pragmatic and reasonable manner.

The claim was not maintainable on account of the law of *res judicata*. The Arbitral Tribunal failed to appreciate the scope of Section 55 of the of the Indian Contract Act, 1872, which states that when time is not essence of the contract, then damages can not be claimed on the basis of the extended time. An application dated 26.3.2008 in this regard

was moved, but the same was rejected vide order dated 11.6.2008.

As regards Claim No.1, the contractor had already been paid the escalation cost as per the contract. There is no provision under the contract for providing any additional cost. The damages sought by the claimant on the ground of delay were not tenable, much less supported by any documents. The purpose of break-up of rates was primarily met for cost comparison at the time of tender.

The Arbitrator had illegally awarded Claim No.3 for the period from 1.3.2000 to 20.11.2000.

As regards Claim No.4, as per the provisions under Clause 60.6 (a)(b), 10% towards mobilization charges and 5% towards equipment advance based on the contract price was made and recovery was to be made at the rate of 20% from the interim payment certificate and entire payment was to be repaid when 90% of the contract price has been paid. The claim of the contractor was not maintainable on the basis of the decision of the Engineer under Clause 67.1 as Clause 67.3 excludes any decision of the Engineer becoming final and binding, but the Arbitral Tribunal treated the claim by exercising Clause 53.4. The claim petition, if read as a whole, is based upon the decision of the Engineer and has drawn attention to the prayer clause.

The finding modified by the supplementary award dated

5.11.2011 is not in consonance with the provisions of Section 33(2) of 1996 Act. The Arbitrator has given the finding totally misjudging and misconstruing the issue and the ground raised. No document or basis has been raised in the claim petition nor it was ever amended. The Arbitrator failed to decide the matter on merits. The Arbitrator was required to go into the merits of the matter, but heavily relied upon the decision of the Engineer. This fact has been admitted by the Arbitrator while deciding the objections (at pages 142 and 143 of the paper book).

As per Clauses 6.4, 12.2, 42.2, 69.4 and 70.1, the cost of escalation has already been granted under the previous contract, therefore, the cost as defined under the contract does not include any allowance or profit, i.e., on account of idling of machinery etc., loss of profit or any kind of loss under Claim No.1 could not be granted. The Arbitrator has travelled beyond the terms and conditions of the contract and, thus, the objections were falling within the realm of Section 34 of 1996 Act, but the Objecting Court has failed to assign any reasons.

The cost defined under the contract only talks about “rise or fall” in the cost of labour and materials or any other matter affecting the cost of the execution of the works, in essence nothing else could have been awarded on account of extension or delay except escalation cost.

The contractor failed to place on record the contemporary

records as the Arbitral Tribunal was to decide the matter on merits. Reference to Clause 53.4 has been made. The contemporary record is nothing but the accounts bills etc.. On going through the findings given by the Arbitral Tribunal, all the letters and the correspondences could not be treated as part of the contemporary record, but yet gave the finding holding same as contemporary record, though the letters and the correspondences are necessary for the decision by the Arbitrator, but would not fall within the expression “contemporary record, in view of the law laid down by the Hon'ble Supreme Court in **State of West Bengal Versus Afcons Pauling (India) Limited, A.P.No.346 of 2005, decided on 10.9.2013** and **State of West Bengal Versus Afcons Infrastructure Ltd., 2012(2) Cal.L.T. 156.**

The finding of the Tribunal with regard to the adoption of methodology for the computation of damages or compensation is not on the actual damages, but based upon the decision of the Engineer. In fact, the Arbitral Tribunal has acted in bias manner while passing the award as it tantamounts to accepting the decision of the Engineer, which is not settled proposition of law, in view of the law laid down by the Hon'ble Supreme Court in **Bharat Coking Coal Ltd. Versus L.K.Ahuja, (2004) 5 SCC 109.**

judicata, the claims have been treated under Clause 53.4, but the same have been awarded, based upon the findings of the Engineer under Clause 67.1 and not as per contemporary record, in essence the Arbitral Tribunal has failed to decide the matter on its own, much less on merits, thus, thus, urges this Court for setting-aside the impugned order.

He further submits that the pendente lite interest w.e.f. 25.10.2001 @ 12% and thereafter future interest @ 12% till the actual payment should not be more than 6 to 9% because the alleged dispute is pertained to the illegal retention of the amount but is only based upon the alleged loss or profit.

Mr.Arvind Minocha, learned counsel for respondent No.1-contractor submits that it is now settled law that the Objecting Court can only interfere in the objections if the same have been strictly falling within the provisions of Section 34 of 1996 Act 1996 Act, de hors of the fact that the expression “public policy” has been expanded in view of the law laid down in **Associate Builders Versus Delhi Development Authority, 2015 (3) SCC 49**. There is no error apparent on the face of the record or to the fact that the Arbitral Tribunal has not followed the statutory provisions in dealing with the objections filed under Section 34 of 1996 Act, for, in case the Court starts undertaking to determine the merits of the grievances, it would be usurping the function which under

the 1996 Act is entrusted to the Tribunal. None of the grounds taken by the appellant are of the nature enabling this Court to interfere.

The statement of claims submitted contained pleadings on merits also apart from pleadings on final and binding aspect of the Engineer's decision. The relevant evidence along with the details of the quantification was also filed in *Volumes-2 to 4* with the statement of claims.

There was no direction by the District Court or by this Court in the previous round of litigation that the Arbitrator could not consider the claims on merit without amendment of the pleadings. As per the findings of the Tribunal, it has been noticed that both the parties submitted their pleadings on merits apart from final and binding aspect of the Engineer's decision. *Volume-1*, aforementioned, contained alleged grant of extension, details of quantification of claim, much less recommendation of the Engineer made in consultation with the employer. The relevant documentary evidence has been filed as *Exhibit-A available in Volume-II* of the arbitration record. The reference was enlarged by the District Court, Patiala to decide the claim of the contractor on merits, on the basis of fear of the State that the Arbitrators will confine itself to the fact as to whether the decision of the Engineer had become final or not, because, admittedly the State had not challenged the decision of the

Engineer within a prescribed period of 70 days, which fact is evident from the order dated 13.8.2005, referred (supra).

The argument with regard to the applicability of Clause 53.1 of the contract is wholly preposterous, whereas, on the contrary the respondent had given a notice of intention to claim on 22.8.1997, which has gone uncontested. This aspect has been noticed by the Arbitrator in extenso, rather it was recognised by the employer and the Engineer, as per contents of letter dated 4.12.2000. The Courts below have rightly held that Clause 53.1 is a procedural clause and is not a clause of limitation as it deals with giving of notice of intention to claim with no scope of penal consequences, in case notice is not given within the period of 28 days, the claim cannot be said to be beyond the period of limitation, rather it empowers the Engineer and the Arbitrator to decide the claim, even if the provision of Clause 53.1 to 53.3 are not adhered to.

Clauses 60.8 and 60.10, referred by the Arbitral Tribunal envisage special conditions provided by the appellant in the contract allowing the contractor to raise the claim upto the stage of preparation of final settlement/bill. The claim was submitted by the respondent on 15.11.2000, 1½ years before submission of the final account after approval of the format and basis approved by the Engineer in consultation with the employer. It is settled law that in case the notice is

not given within 28 days, the Arbitral Tribunal cannot be said to be incompetent to decide claim. The admitted position on record is that the Engineer determined and recommended the claim on 4.12.2000 and also gave the decision under Clause 67.1 on 7.6.2001. Thereafter, the dispute arose which was referred to the arbitration on 3.5.2002, thus, the claim cannot be said to be barred by law of limitation.

As regards the doctrine of akin to constructive res judicata, it has been submitted that the respondent, while referring the dispute to arbitration of earlier claims in 1998, had clearly reserved its rights to claim and seek arbitration in respect of further claims as may arise of the same contract in future.

Clauses 60.8 and 60.10 enable the contractor to submit the claim upto the stage of final account. No issue qua *res judicata* was framed by the Arbitral Tribunal nor was pressed by the appellant. The arbitration Clause 67 nowhere permits that all claims are to be raised together at one time because it would depend upon the accrual of cause of action. The cause of action of the claims adjudicated by the Arbitral Tribunal in the present case was continuing till the date of completion of work which was 29.2.2000, thus, plea on such point is not only erroneous but has no force.

As regards the submission with regard to the element of

bias, it is a matter of record that the appellant filed an application under Sections 12 and 13 of 1996 Act based upon minutes of meeting dated 7.3.2005, which were recorded in the presence of both the parties, much less signed and no protest was raised and there had been no change in the aforesaid minutes of meeting, thus, the application filed under Sections 12 and 13 of 1996 Act was rightly rejected by the Arbitral Tribunal vide order dated 1.6.2005 and its applicability has already been upheld.

As regards the plea of having not produced the contemporaneous/contemporary records, everything was referred in respect of Claim No.1, as referred to above, i.e., *Exhibit-A (pages 1 to 148 of Vol.II)*. The expression “contemporary” is of wide amplitude and has not been defined in the contract.

The respondent, on demand from the appellant-employer, submitted the break-up of rates to justify the reasonableness of rates quoted against each item of work and as a whole. The break-up of the quoted rates of each item contained the component cost of material, labour, plant and machinery, POL, overheads and profit. During the original contract period, the respondent suffered a loss of productivity owing to various delays on the part of the appellant in handing over the designs etc. The Engineer before submission of Claim No.1 on 15.11.2000 held several meetings with the employer and the contractor

and with their agreement, approved for adoption of break-up of rates and even prescribed format for evaluating/assessing the amount of claim as reflected in letter dated 4.12.2000. The extra cost incurred during the extended period has been claimed only in respect of Labour, Plant and Machinery and Overheads. There is no element of profit, as wrongly stated by the appellant during the arguments.

The objection of the appellant with regard to contemporary records, has been deliberated/pondered upon and dealt with by the Arbitral Tribunal in extenso on examination of details qua quantification.

The judgment rendered in **State of Bengal Versus Afcons Pauling (India) Ltd. (supra)** is distinguishable and not applicable to the facts of the present case as in that case, it was stated that the award was based upon no evidence and there were no valid reasons in support of the award, much less there was no contemporaneous record provided to the Arbitral Tribunal and no notice for claiming the damages was served, whereas, in the instant case, the award is based upon proper evidence and valid reasons have been given in support of the claim, much less notice much before expiry of the original contract period.

As regards the corrections made by the Arbitral Tribunal under Section 33 of 1996 Act on the application of the respondent, the same were withdrawn by the respondent during the stage of the

arguments, therefore beseeched this Court not to ponder on such, thus, urges this Court for upholding the award and the order under challenge and dismissal of the appeal.

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is no merit in the submissions of Mr.Mittal made with vehemence and eloquence.

The law regarding interference of the objections is no longer *res integra*.

It is now a settled law that in what circumstances, the award has to be interfered with. The question, which is now raised in the aforementioned appeal, has already been answered by the Hon'ble Supreme Court in catena of judgments, wherein it has been laid down that until and unless the award suffers from illegality as statutorily prescribed under Section 34 of the Act, the same cannot be interfered with. In this context, I intend to refer the judgments of the Hon'ble Supreme Court rendered in **Associate Builders Vs. Delhi Development Authority (2015) 3 SCC 49** and **Navodaya Mass Entertainment Ltd. Vs. J. M. Combines (2015) 5 SCC 698**. In the aforementioned judgments, the Hon'ble Supreme Court had culled out the ratio decidendi by holding that until and unless there is error apparent on the face of record or the arbitrator has not followed statutory legal position, it is only

in these circumstances, it would be justified interfering with the award. The High Court should not act as a Court of appeal and reappraise the material/evidence and embark on a path by substituting its own view in support of the Arbitrator's view. It is not the case of the appellant that the award is against the public policy or has violated the principles of judicial approach, much less against the statute and other provisions of Section 34 of the Act. The Arbitrator has dealt with the dispute, which was contemplated and was within its scope. The parties to the *lis* had participated in the proceedings and were given proper notice not only with regard to the appointment of the Arbitrator but vis-a-vis proceedings. In my view, the award of the Arbitrator does not suffer from any illegality in as much as the Arbitrator, who is expert, has dealt with the matter and decided the claims of respective parties to the *lis*, thus, it is now a settled law that the Arbitrator is the sole judge of quality and quantity of the evidence before him and decide on the basis of the available evidence.

It is on the basis of the factual background of this matter and ratio decidendi, this Court has to examine whether the objections at the instance of the appellant were actually falling within the provisions of Section 34 of 1996 Act. No doubt, the law of limitation applies to the entertainment of the claim, but equally it has to be seen whether Clauses,

i.e., 60.8 and 60.10 envisage the entertainment of the claims till the completion of the work which admittedly was completed on 29.2.2000 and in respect of Ghaggar Bridge, the actual date of completion after extension was 25.11.2000. The claims, as noticed above, were submitted on 15.11.2000.

It is a matter of record that the Engineer had made determination and recommended payment of Claim No.1 on 4.12.2000 and the matter was referred to the Arbitrator on 3.5.2000, thus, the claim was not beyond the period of limitation.

As noticed above, the appellant-objector did not raise any objections as per the provisions of Clause 67.1 qua the determination by the Engineer, who was appointed with their concurrence and with regard to seeking of condonation of delay in filing objections within 70 days has lost upto this Court. It is irresistibly concluded that Engineer's decision had become final and binding. It has to be seen whether the Engineer's decision was based on the evidence and the material and the claim was also supported by the contemporary records or not.

The Arbitral Tribunal has discussed the aforementioned objections raised on behalf of the appellant, particularly with regard to applicability of the provisions of Clause 53.1. As per the submissions of the appellant, the claim having not been filed within three years of the

cause of action being barred, i.e., beyond period of limitation. I am of the view that Clause 53.1 (supra) is for the facilitation of both the parties and is not a Clause of limitation. Clause 53.4 clearly provides for competency of the Engineer and the Arbitrator, that too, for making the claim for extra payment, but not in respect of compensation of additional cost. Further, Clause 53.4 envisages that if the provisions of Clause 53.2 and 53.3 are not adhered to, the Arbitral Tribunal is empowered to decide the claim based upon the contemporary record. The Arbitral Tribunal had relied upon the judgment rendered by the Hon'ble Supreme Court in **Union of India Versus Moksh Builders & Financiers Ltd. and others etc., AIR 1977 Supreme Court 409.**

Article 55 of the Schedule to the Limitation Act, 1963 envisages that for claiming the compensation for breach of any contract express or implied, period of limitation is three years. For the sake of brevity, Article 55 reads thus:-

<i>Description of suit</i>	<i>Period of Limitation</i>	<i>Time from which period begins to run</i>
Fore compensation for the breach of any contract express or implied not herein specially provided for	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.

above, leave no manner of doubt that the claim was filed within the period of limitation. For the sake of brevity, the claims duly quantified and submitted on the following dates are reproduced as under:-

- “a) Claim no.1-15th November, 2000 (Exh.A page 1-26)
- b) Claim no.2-3rd February, 2000 (Exh.B page 17-19)
- c) Claim no.3-20th February, 2001 (Exh.C page 81-82)
- d) Claim no.4-24th September, 1999 (Exh.D page 35-38)
- e) Claim no.5-3rd March, 2000 (Exh.E page 19-20)”

The Engineer rendered its decision on 7.6.2001 and not on 28.8.2001 and this fact is admitted by the appellant in the proceedings before the District Court, Patiala and this Court while seeking condonation of delay, thus, cause of action accrued at the relevant time in favour of the appellant for seeking the claim. The Arbitral Tribunal has discussed the issue of limitation threadbare. I would be failing in my duty in not referring to the aforementioned findings. The same read thus:-

“3.1.3 Findings of Arbitral Tribunal:

Clause 53.1 is not a Clause of limitation. Clause 53.4 clearly provides that the Engineer and the Arbitrator are competent to decide the claims based on the contemporary record even if the provision of Clause 53.1, 53.2 and 53.3 is not complied with. The Claimant stand is supported by not only Clause 53.4 but also by FIDIC Organisation as well as the settled position in law by Hon'ble Andhra High Court (filed with the Claimant's letter dated 10th February, 2005)

and Orissa High Court (Exh.CH-49). The Respondent also accepted the applicability of Sub Clause 53.4. We also find from the Contractor's aforementioned letter dated 22nd August, 1997 that the Claimant put the Employer to notice about its entitlement to be compensated for extra cost incurred due to non fulfillment of obligations by the Employer.

Also the Engineer in its letter no.1400/RAB/CE/00/727 dated 4th December, 200 (page 131 and 132 of Exhibit-A, Vol.2) filed by the Claimant has recorded the fact that several meetings were held between the Employer and the Contractor and the Engineer and all previous correspondence on the subject were recognized.

As per Article-55 of the Schedule to the Limitation Act, 1963 we also do not find any substance in the stand of the Respondent that the claim was not filed within 4 years from the cause of action because as per contract provision under Sub Clause 60.8 the Contractor is entitled to raise claim even upto the state of draft final account, and in case of continuous breach which we find from the extensions granted on the recommendation of the Engineer that breach of contract on the part of the Respondent continued till completion which was on 29th February,2000 except Ghaggar Bridge. The period of three years commenced only when the breach comes to an end. As per the Hon'ble Nagpur High Court judgment also cited by the Claimant, Claimant can file claim when the breach comes to an end. The claims have been filed on 15/11/2000 and referred to

arbitration on 3rd May, 2002 well within the period of limitation.

Regarding the Respondent's stand that the Engineer has not taken decision on 7th June, 2001 but has taken decision on 28th August, 2-001 we find in this regard that it is admitted by the Respondent in its application filed before District Court, Patiala and High Court that there was 12 days delay in giving notice in respect of Claim no.1, with reference to Engineer's decision on 7th June, 2001 and around three years delay in respect of claim no.3 and claim no.4. The same factual position was admitted by the Respondent before the Hon'ble High Court. Thus the Respondent itself has admitted that the Engineer had given decision on 7th June, 2001, and not 28th August, 2001. We, therefore, do not find any substance in the stand of the Respondent in this regard also.

In view of above, we decide that all the claims of the Claimant are not barred by limitation and are well within the period of limitation.”

Thus, the objection qua limitation is rejected.

As regards the decision of the Arbitral Tribunal with regard to the enforcement of the Engineer's decision dated 7.6.2001, I am of the view that for all intends and purposes, Clause 53.1 is not related to the applicability of the Limitation Act.

It is a matter of record that the contractor, vide letter dated

compensation for extra cost incurred due to the non-fulfillment of the obligations. The Engineer had also referred sufficient material contrively.

As regards the applicability of the doctrine of res judicata, I am of the view that the appellant did not press an issue, thus, it does not lie in the mouth of Mr.Mittal to submit that the Arbitrator failed to advert to the aforementioned issue. The Arbitral Tribunal was an expert in deciding the controversy with regard to the claims pertaining to increase in the cost of bricks, early recovery of advances, commercial interest on dishonoured cheques, additional cost compensation for extended period and suspension of work etc. It discussed the documentary and oral evidence on record threadbare. In my view, the aforementioned decision cannot be said to be falling within the realm of provisions of Section 34 of 1996 Act, much less against the expression “public policy”. For the sake of brevity, the issues framed by the Arbitral Tribunal read thus:-

- “1. Whether or not all Claims of Claimant are barred by limitation? (Respondent).*
- 2. Whether or not the Claims of Claimant are maintainable and arbitrable in the present form? (Respondent).*
- 3. Whether or not the decision of Engineer has become final and binding in respect of claims 1 to 5 of the Claimant and whether it is enforceable as per provision of clause 67*

of agreement in respect of the following five claims of the Claimant? (Claimant).

- i) Claim No.1- Claim for additional cost compensation for extended time.*
- ii) Claim no.2- Claim for commercial interest on dishonoured cheques.*
- iii) Claim no.3- Claim on account of suspension of work- Ghaggar Bridge D/S*
- iv) Claim no.4- Claim on account of early recovery of mobilization/machinery advances.*
- v) Claim no.5- Claim on account of increase in cost of bricks.*

4. Whether or not the Engineer has rendered a decision as required by Clause-67.1 and whether or not the provision of clause-67.4 are attracted to the present claims. (Respondent).

5. Whether or not the Claimant Contractor is entitled to relief in respect of the said claims and if so to what extent? (Claimant).

- a) Payment of Claim amount on account of*
 - i) Additional cost compensation for extended time- Rs.19,04,89,000.00*
 - ii) Commercial interest on dishonoured cheques- Rs.16,10,259.00.*
 - iii) Suspension of work- Ghaggar Bridge D/S- Rs.3,40,97,760.00*
 - iv) Early recovery of advances- Rs.53,21,582.00*
 - v) Increase in cost of bricks- Rs.15,40,113.00.*

- b) *Payment of interest on Claims no.1 to 5*
- i) *Claim for pre-reference period upto 2/5/2002-
Rs.2,19,41,308.00*
- ii) *Claim for pendente lite interest- @ 18%*
- iii) *Claim for future interest - @ 18%*

Thus, the objection raised with regard to *res judicata* was only for sake of it without any material. It is settled law by now that for succeeding on such objections, pleadings of previous proceedings are required to be brought on record. In the absence of issue, appellant-objector failed to discharge burden, thus it could not have been shifted to rebut. Accordingly, the argument is lacking legal force and hereby rejected. Therefore, I would not be devolving upon the merits of the matter, for, it would be a totally farcical exercise on this point.

As regards the word “contemporary record” the Arbitral Tribunal, much less the Objecting Court had dealt with the issue in extenso.

The voluminous evidence (Volume-II) has already been annexed by the complainant, which has been referred to by the Arbitrator, thus, it appears that the submissions and objections with regard to the findings rendered by the Arbitrator have been taken for the purpose of objections, whereas the claim of the contractor was not based upon the decision of the Engineer, but other documents as well.

It is a matter of record that all the documents brought on record by the claimant have not been denied or contested by the respondent, so they are deemed to be admitted. For the sake of brevity, the findings rendered by the Objecting Court in this regard read thus:-

“It is abundantly clear from the statement of claims of the Respondent (filed by the petitioner as Annexure O-6, relevant pages 23 to 25 and 30 and 31 for claim no.1, pages 37 and 38 for Claim no.3 and pages 40 to 41 of Claim no.4, pages 43 and 44 for Claim no.5 with its Objection Petition) that it contained pleading of the Claimant on merit also. The relevant documentary evidence in case of Claim no.1 have been filed in Exhibit A on pages 1 to 148 marked Volume-II which was filed before the Arbitral Tribunal with the statement of claims. The above documentary evidence have been referred in the statement of claims and fully contain the factual position about the delay on the part of the Employer, extension of time recommended by the Engineer and approved by the Employer eight times and delay on the part of the Employer continued till completion of the work. The basis of the claim on the break-down of rates which was duly approved by the Engineer/Employer before submission of the claim and which has been admittedly followed in evaluating another claim of the same contract and which has been upheld by Punjab and Haryana High Court and admittedly payment also made of the earlier claim by the Applicant to Respondent and has attained finality. Break up of rates and the details of

quantification of claim has been also filed by the Respondent in Volume-2 on pages 7 to 26 submitted with the statement of claims alongwith the determination of the Engineer of Claim no.1. In case of Claim no.3, 4 and 5 the documentary evidence which have been referred in the statement of claims of the Respondent (Contractor) has been filed in Volume-4 submitted with the statement of claims. Since the pleading on merit was duly supported by the documentary evidence there was no need to amend the statement of claim with regard to pleading on merit.”

Once the decision of the Engineer as per the provisions of Clause 67.1 had become final and binding and the appellant had sought implementation of the same, it does not lie in the mouth of Mr.Mittal to allege that the Engineer's decision is not based upon the contemporary record. In fact, the appellant has lost right to raise the objection vis-a-vis the decision of the Engineer, as noticed above i.e. having failed to file objections within 70 days.

No doubt, there is direction by this Court that the entire matter is to be seen on merits. I am of the view that the Arbitral Tribunal and as well as the Objecting Court have examined all the issues raised at the instance of the appellant vis-a-vis applicability of the limitation and as well as enforcement of the Engineer's decision. There is no force in the submission of Mr.Mittal regarding the applicability of Clause 53.1. I

have already expressed my opinion earlier, but for the sake of repetition, it is a matter of record that intention of the claim was given on 22.8.1997, which was never contested by the Engineer or by the objector, rather was recognised by the Engineer as can be seen from letter dated 4.12.2000. The breach continued till the completion of the work which was upto 29.2.2000 of the main work and November, 2000 of Ghaggar bridge and the claim was submitted on 11.11.2000.

The break-up of the rates were based on the prevailing market rates as on 31.1.1994 regarding the component costs of material, manpower, plant and machinery, POL and site and head office overheads costs and profit element. The Arbitral Tribunal was expert in examining the matter in controversy. I cannot sit on the arm chair of the Arbitrator and re-appreciate the evidence in view of the settled law.

As regards the contention of Mr.Mittal regarding the factum of non-receipt of notice in consonance with Clause 53.1, I am of the view that the entire Clause 53 has to be read in conjunction and not in isolation as Clause 53.4 provides that in case there is failure to comply with the said Clause, the entitlement of payment shall not exceed the amount as assessed by the Engineer or the Arbitrator, to be verified by the contemporary record.

It is the conceded position on record that the respondent had

given the notice of intention to claim on 22.8.1997, which was never contested by the appellant. This fact has been noticed by the Arbitral Tribunal in the award, much less by the Objecting Court. For the sake of repetition, the aforementioned fact has been admitted by the appellant as per their own letter dated 4.12.2000.

Clause 53.1 does not envisage any consequences on account of notice of 28 days having not been issued. The judgments rendered in **Afcons Pauling (India) Ltd. and Afcons Infrastructure Ltd.'s cases (supra)** were of 2005 and 2010 and contained the same very Clauses. The judgments in the aforementioned cases have been rendered as per the facts and circumstances of the cited cases by holding that no notice under Clause 53.1 was given, but in the present case, as noticed above, the position is contrary and, therefore, the ratio decidendi culled out would not apply as it was based upon the facts of the said cases. Otherwise also, the respondent has not claimed the amount more than what the Engineer has assessed and, therefore, there is no force in the submission of Mr.Mittal vis-a-vis applicability of Clauses 53 and 67. The judgments cited above do not apply to the facts of the present case. Each and every case has to be examined on the basis of the evidence brought on record.

For the foregoing reasons, I do not find any illegality and perversity in the award, much less order of the Objecting Court. No

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ground for interference is made out.

Appeal stands dismissed.

July 23rd, 2016
ramesh

(AMIT RAWAL)
JUDGE