

IN THE HIGH COURT OF JUDICATURE AT MADRAS**DATED: 18.08.2017****CORAM****THE HONOURABLE DR. JUSTICE ANITA SUMANTH****O.P.NO.90 OF 2017**

G. Rambabu,
Railway Contractor,
No.1-741, 9th Line,
Pandaripuram,
Chilakaluripet,
Guntur District 522 616,
Andhrapradesh

... Petitioner

Vs

The General Manager,
Southern Railway,
Head Quarters Office,
Park Town,
Chennai 600 003

.... Respondent

Original Petition filed under Section 11(6) of Arbitration and Conciliation Act 1996 as amended by the Arbitration and Conciliation (Amendment) act, 2015 praying to appoint an independent and impartial Arbitrator to hear and decide the disputes between the petitioner and the respondent arising out of the contract No.DY.CE/CN/CAN/HQ/4/07 dated 28.3.2007.

For Petitioner : Ms. K. Aparna Devi

For Respondents : Mr.P.T.Ramkumar

ORDER

This Petition is filed in terms of Section 11(6) of the Arbitration and Conciliation Act 1996 (in short 'Act') seeking appointment of an arbitrator to adjudicate upon disputes interse the parties arising out of Agreement for Works bearing No. DY.CE/CN/CAN/HQ/4/07 dated 28.3.2007.

2. Heard Ms. K. Aparna Devi, learned counsel appearing for the petitioner and Mr. P.T.Ramkumar, learned counsel appearing for the respondent Southern Railways.

3. Tenders were called for by the respondent for the 'Proposed Construction of Road Over Bridge [Railway Portion] with 1 X 30 M Span PSC Girder and 2 X 20 M PSC Girder in lieu of level crossing No: 276 at Km 825/15-826/1 (Bakel) in between Kanhangad and Kottikulam Stations – as part of doubling of track between SHORANUR and Mangalore (Balance Works) (Risk and Cost)'. The petitioner responded to the bid and was awarded the contract through a letter of acceptance bearing No.W.496/KM/361/CN-Vol.II (6803) dated 11.09.2006. The parties entered into a contract agreement bearing No.DY.CE/CN/CAN/HQ/407 into dated 28.03.2007.

4. The petitioner would state that in the course of execution of the contract, he encountered various difficulties and obstructions, which affected its proper performance and timely completion.

5. The contract provides for arbitration in terms of clauses 63 and 64 of the General Conditions of Contract and the petitioner invoked the same by letter dated 01.08.2016. Upon receipt of the aforesaid letter from the petitioner, the respondent, enclosing the same sent a letter to the Chief Administrative Officer, Ernakulam with a copy marked to the petitioner, instructing him to examine the matter in detail and send an interim reply to the petitioner and confirm his willingness to waive the applicability of Section 12(5) of the Act.

6. The Chief Engineer, by letter dated 15.11.2016, rejected the request of the petitioner citing Rule 64(1)(iv) of the general conditions of contract that requires the contractor to prefer their specific and final claims in writing within a period of 90 days of receipt of intimation from the Railways that the final bill was ready for payment. Mr. Ramkumar would circulate a copy of final bill dated 13.7.2013 raised by the Railways pointing out that any claim relating to and arising from out of the aforesaid bill would

have had to be raised within a period of 90 days of receipt thereof. This has, admittedly, not been done and the petition under section 11 of the Act has been filed in January 2017 praying for the appointment of an Arbitrator to resolve the disputes inter se the parties.

7. Mr. Ramkumar, at the outset, would raise serious objection to the maintainability of the present petition arguing that the claims were hopelessly barred by limitation in the light of clause 64(1)(iv) of the General Conditions of Contract.

8. Ms. Aparna would argue that Rule 64(1)(iv) was inapplicable in the light of section 43 of the Act reading thus:

'43. Limitations.—(1) The Limitation Act, 1963 (36 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 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred to in section 21. (3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the

time for such period as it thinks proper. (4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

9. Mr. Ramkumar would then rely on the judgment of the Supreme Court in the case of *Wild Life Institute of India, Dehradun Vs. Vijay kumar Garg* (1997) 10 SCC 528 where, in the face of a similar clause in the agreement between the parties, the Bench concluded that the non-raising of a dispute within the period as stated in the contract was fatal to the raising of a claim therefrom. This judgement is distinguished by Ms.Aparna citing a recent judgment of the Supreme Court in the case of *Grasim Industries Vs. State of Kerala* (2017 (6) SCALE 443), wherein, a Full Bench of the Supreme Court, upon considering the question of limitation, held as follows;

'Having perused Clause 9 of the supplementary agreement dated 27.10.1988, we are of the view, that the interpretation placed by the High Court on Clause 16, was wholly misconceived. The aforesaid clause, did not postulate the period within which a claim could have been raised by the parties to the contractual agreements. Even otherwise,

we are of the view, that in terms of Section 28 of the Indian Contract Act, 1872, such a stipulation in a contractual obligation would not be valid and binding. Section 28 of the Act is reproduced below:

*28. Agreements in restraint of legal proceedings,
void.--Every agreement,*

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

*(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights,
is void to that extent.*

.....

Section 28(b) unequivocally provides, that an agreement which extinguishes the right of a party on the expiry of a specified period, would be void. Therefore, even if a restricted period for raising an arbitral dispute had actually been provided for (as was determined, in the impugned order), the same would have to be treated as void...'

10. In the light of the above conclusion of the Full Bench

there is no merit in the argument advanced by the Railways relating to the time limit set out in the agreement itself for raising of a dispute and the same is rejected.

11. There is however, yet another aspect of the matter. The Railways would challenge the maintainability of this petition also on the ground that both the notice invoking arbitration as well as the petition under section 11(6) were filed belatedly, beyond three after the date of settlement of the final bill. To decide this issue, the sequence of undisputed dates and events are relevant. The contract was completed on 25.11.2010 and a no-claim certificate was issued on 22.3.2011 by the petitioner. On 8.3.2012 the petitioner writes to the Railways withdrawing all claims made earlier by him as well as the documents executed under protest, confirming for the second time that he has no claims against the Railways. The final bill was raised on 13.7.2013 by the Railways. No dispute is raised with respect to the final bill and the petitioner straight away issues notice dated 1.8.2016 invoking the clause for arbitration. Firstly, there is no dispute that has been raised by the petitioner and the clause for arbitration can be invoked only to resolve disputes that have arisen between the parties. Secondly, section 137 of the Limitation Act provides for a limitation of three years. The letter from the Chief Engineer Railways to the petitioner dated 13.7.2013, states as follows;

'Accordingly a sum of Rs.10,09,502/- was recovered from CC bills of this agreement. The balance

amount of Rs.6,14,934/- is to be recovered from the final bill. The value of final bill and SD amount of Rs.4,13,852/- are adjusted towards hire charges. The balance amount of Rs.2,01,082/- may please be remitted to Railways within 15 days from the receipt of this letter, failing which action will be taken to recover the amount.'

12. The Full Bench in the case of *Grasim* (supra) considers the rejection of a claim by the High Court as barred under Article 137 of the Limitation Act 1963 on the ground that the action had been brought beyond a period of three years from the date when the cause of action arose. The Bench states as follows:

'7. In view of the legal position expressed hereinabove, the limitation with reference to the claim raised by the Appellant, would have to be determined only under Article 137 of the Limitation Act. Insofar as the instant aspect of the matter is concerned, the High Court found that the claim raised by the Appellant was even beyond the period postulated under Article 137 of the Limitation Act. In this behalf, the High Court recorded the following observations:

*7. It is not actually a decision on the claim made under Annexure-X; but it is a decision of the arbitration clause in the agreement. Apart from that the claim put forward by the applicant in respect of the shortage of supply of raw materials from 1988-89 onwards also is barred by limitation under Article 137 of the Limitation Act. The Supreme Court in *Steel Authority of India Limited v. J.C. Budharaja**

MANU/SC/0542/1999 : (1999) (8) SCC 122 held that the provisions of Art. 137 of the Limitation Act would apply and any action should be brought within three years from the date when the cause of action to recover the amount rose. Thus the request for appointment of arbitrator will have only to be rejected.

Rejecting the conclusion of the High Court as above, the Bench holds thus:

8. It is not possible for us to accept the aforesaid determination rendered by the High Court for the simple reason, that in the claim raised by the Appellant in the notice, dated 01.02.2002, it was inter alia asserted as under:

While the matter was so pending before the Industrial Tribunal at the instance of the Labour Department of Government of Kerala, through the Labour Commissioner and the Additional Labour Commissioner, a settlement was eventually entered into with the Unions in the presence of the Hon'ble Minister for Labour on 7.7.2001, agreeing to the closure of the Undertakings with effect from 1.7.2001. The fact that the Government was not in a position to supply raw material in required quantity and in the proportion agreed to on account of its not having taken enough steps to ensure continued availability of eucalyptus by planting the same is also clear from the orders of the Secretary to the Government, Labour department, in the applications for closure of the

company's units at Mavoor. This has also been admitted by your department. The total amount that was paid to the employees inclusive of fixed overheads and idle wages during the period referred to above i.e. June, 1999 to June 2001 came to 5999.43 lakhs is enclosed, marked as Annexure - 2 and the compensation paid to the employees as a result of the settlement came to ` 5559.72 lakhs is enclosed, marked as Annexure - 3.

It is, therefore, apparent, that the Appellant raised a grievance with reference to issues, that emerged even upto June, 2001. Under Article 137 of the Limitation Act, the postulated period of limitation is 3 years. In the instant case, the period of limitation would be, three years prior to the date of invocation of arbitration. After the Appellant issued the notice dated 01.02.2002, it invoked the arbitral clause on 08.05.2002, and therefore, the period of limitation in terms of Article 137, would bar all claims prior to 09.05.1999.'

13. In the present case, in the absence of any grievance raised by the petitioner pursuant to the demand of the Railways dated 13.7.2013, that would be the date when the cause of action arose. Admittedly, no claim or dispute was raised within three years from the date of receipt of the above communication. The first communication that has been placed on record after letter dated 13.7.2013 is the notice invoking arbitration issued on 1.8.2016, beyond a period of three years. The petition under

section 11 of the Act has been filed only on 20.1.2017.

14. Learned counsel for the petitioner would draw attention to communication dated 5.8.2013 pointing specifically to the endorsement of receipt on 20.08.2013 which fact would, according to her, bring the cause of action within the period of limitation.

15. However, communication dated 5.8.2013 is not addressed to the contractor, but is an inter-office communication from the Southern Railways to the Deputy Chief Engineer, Construction, Kannur stating that an amount of Rs.2,01,082/- is to be recovered from the petitioner towards hire charges for the present Agreement and that the same was being recovered from payments to be made in another contract. The inter-office communication also specifically refers to the fact that the demand of Rs.2.01,082/- had been communicated to the contractor by letter dated 13.7.2013. The letter dated 13.07.2013 has been received by the contractor on 22.7.2013 and an acknowledgement from the petitioner in this regard has been filed by the Railways.

16. Thus the endorsement on communication dated 05.08.2013 to the effect that the bill copy is received cannot obviously refer to the letter and bill dated 13.7.2013. Perhaps and

in all probability, it refers to the bill submitted by the contractor duly endorsed by the Railways for payment referred to in the subject of the letter. The notice for arbitration is thus held to be barred by limitation.

17. Ms.Aparna would seek support from the judgement of the Supreme Court in the case of *Indian Oil Corporation Limited Vs. SPS Engineering Limited (2011)3 Supreme court Cases 507*, extracted below:

' On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the Court will not enter into a disputed question whether the claim was barred by limitation or not. The Court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under Section 11 of the Act.'

18. The question of limitation in the above matter was disputed. In the present case, there is no dispute on the position that the letter from the Railway dated 13.07.2013 has, in fact, been received on 22.07.2013 and the acknowledgement card placed on file is not disputed or denied by Ms.Aparna. She would

only, by referring to the endorsement on internal office letter dated 05.08.2013 make an attempt to state that the bill received on 20.08.2013 is letter dated 13.07.2013. Even assuming arguendo that letter dated 13.07.2013 is, in fact, a copy of the bill received on 28.8.2013, in the light of the acceptance of the position that the letter dated 13.07.2017 has already been received on 22.07.2017, the subsequent receipt can only be another copy of the same bill and will not serve to extend the limitation.

19. In view of the above discussion, I am of the view that there is no merit in this Original Petition and dismiss the same leaving the parties to bear their own costs.

18.08.2017

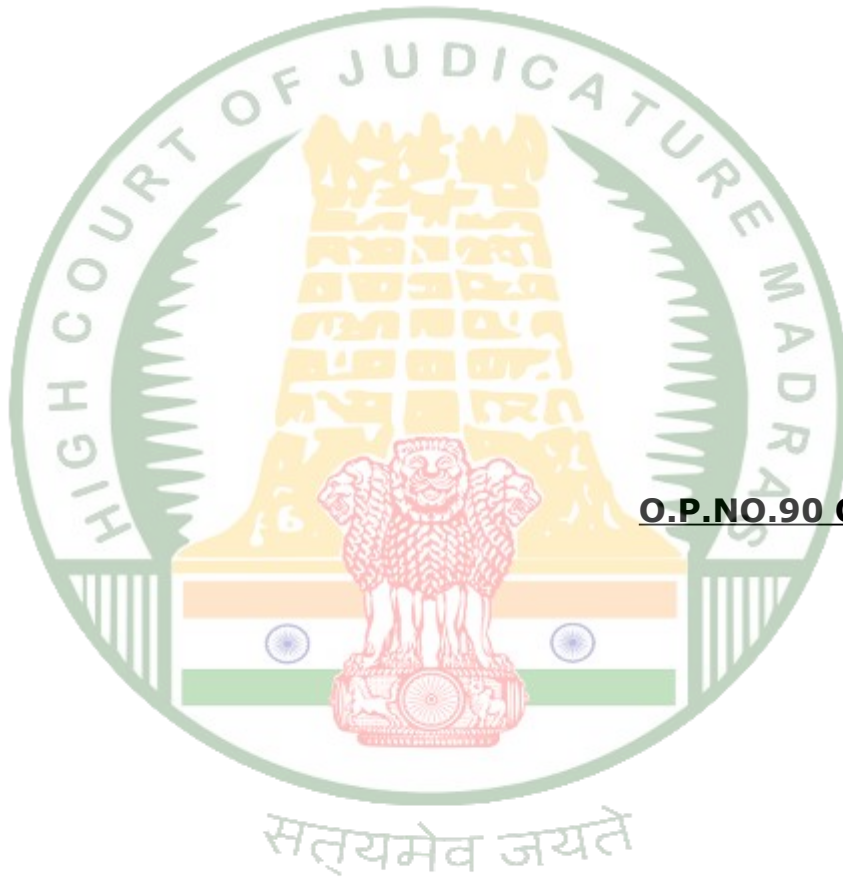
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DR. ANITA SUMANTH,J.

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