

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

**APPEAL NO. 329 OF 2018
IN
ARBITRATION PETITION NO. 466 OF 2006**

M/s. Geo Miller Co. Pvt. Ltd.	}	
through S. S. Mahanot,	}	
Director Finance, having its	}	
registered office at GMC House,	}	
F-3/2, Okhla Ph. I, New Delhi	}	Appellant
versus		
Maharashtra State Power	}	
Generation Co. Ltd.,	}	
through the Chief Engineer	}	
(C), Construction-III, having	}	
office at Prakashgadh,	}	
Bandra (East)	}	Respondent

Mr. Makarand D. Adkar with Mr. S. D. Singh, Mr. Shrikrishna R. Ganbavale I/b. Mr. Abhijeet A. Joshi for the appellant.

Mr. Sanjay Jain with Ms. Gauri Mestha I/b. LJ Law for the respondent.

**CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.**

DATE :- SEPTEMBER 21, 2018

ORAL JUDGMENT :- (Per S. C. Dharmadhikari, J.)

1. By this appeal, the original respondent in Arbitration Petition No. 466 of 2006 challenges the order of the learned Single Judge dated 16th December, 2011. By the order under challenge, the learned Single Judge allowed a petition under

section 34 of the Arbitration and Conciliation Act, 1996 (for short “the Act of 1996”) filed by respondent-Maharashtra State Power Generation Company Limited. The result was that the sole Arbitrator's award came to be set aside.

2. Since this appeal invokes section 37 of the Act of 1996 and is directed against the order setting aside the arbitral award, we proceed to formally admit it. Filing of paper book is dispensed with as there is a common compilation of the relevant documents placed before us. Since both sides agreed to final disposal of the appeal itself, notice of hearing of the appeal stands dispensed with.

3. The only question that arises for our consideration is, whether the learned Single Judge was justified in setting aside the arbitral award on the ground that the underlying claim of the appellant before us was barred by limitation. At the outset, we must indicate that there is a difference and in law between a reference to arbitration being barred by limitation and even if that is not barred, the claim, in relation to which the reference is made, is barred by limitation. It is only on the latter aspect, that the learned Single Judge feels that the award contains a perverse finding and therefore deserves to be set aside. Hence, only two points arise for consideration before us in this appeal and they

are, whether the view of the learned Single Judge that the award grants a time barred claim and is therefore perverse and contravenes the public policy of India, is correct. Secondly, if that is not correct, then, what relief should be granted to the appellant.

4. Before we refer to the rival contentions and relevant findings in the impugned order, we deem it appropriate to set out the undisputed facts.

5. It is common ground that the respondent before us is the State Power Generation Company Limited. The Electricity Act 2003 has now trifurcated the original Maharashtra State Electricity Board. There is a separate entity like the respondent, which is in-charge of power generation. There is another entity created by law, which is styled as a Transmission Licensee and thirdly, there is a Distribution Company (Licensee). The respondent before us is a power generation company. It filed the subject Arbitration Petition No. 466 of 2006 alleging that the award of the sole Arbitrator in allowing a time barred claim of the appellant before us, is illegal and contravenes the Public Policy of India. The finding in relation thereto contravenes the law of limitation prevailing in India and hence, the award is contrary to public policy of India.

6. It is common ground that there was a tender floated for the purpose of the works covered by the contract. That was a pre-water treatment plant at the MSDCL's Thermal Power Station. The appellant before us forwarded its bid and tender and was declared successful. It came to be awarded the contract. The work order was issued and the work was, design, manufacture, supply, erection, testing and commissioning of the pre-water treatment plant. There were several documents, including a layout plan and various drawings, including SKM-39, SKM-07 and SKM-98, were supplied to the bidders. The lumpsum price quoted by the appellant was 15,46,75,712/- and the breakup of the amount was in relation to the nature of the work. For civil works, the amount quoted was 6,50,35,005/-. For mechanical works, the amount quoted was 6,10,79,918/- and for electrical works, the amount was 2,49,47,475/-. On 4th March, 1989, the tender/bid of the appellant was accepted and the work order was issued mentioning therein various terms and conditions. On 22nd June, 1989, this work order, together with the conditions laid down therein was accepted by the appellant and on that very day, a contract was signed and executed by the parties. It is the case of the respondent in the original petition itself that this work was completed on 24th August, 1994, in the sense, the plant came to be handed over to it. On 10th October, 1995, certain claims for

reference to arbitration were raised by the appellant before us, which were duly considered, but rejected by the power generation company. Then, there is a reference made to correspondence between the parties between 1995 to 2000. On 27th January, 2001 a dispute was raised by the appellant before us and it invoked the arbitration. On 4th December, 2003, it filed a statement of claim claiming a sum of Rs.4,74,09,445.39, *inter alia*, for extra works. On 10th December, 2004, the respondent filed its statement of defence opposing the claim on all counts. The sole Arbitrator framed as many as 13 issues. Both parties led oral as well as documentary evidence in support of the respective contentions. On 2nd August, 2006, an award was made by the sole Arbitrator in the following terms:-

“37. In view of the above I pass the following Award:

(a) Respondents do pay to the Claimants a sum of Rs.58,32,500/- plus interest amount of Rs.39,40,338/- at the rate of 12% per annum on the said amount for the period from 16th December 2000 till 2nd August 2006 aggregating to Rs.97,72,838/-.

(b) The respondents also do pay to the Claimants interest at the rate of 12% per annum on the principal amount of Rs.58,32,500/- from 3rd August 2006 till the date of payment and/or realisation.

(c) Parties to bear their respective costs.

Dated this 2nd August 2006.
Award Signed at Mumbai

JUSTICE P. S. SHAH (Retd.)
SOLE ARBITRATOR”

7. On 1st November, 2006, the arbitration petition, invoking section 34 of the Act of 1996 came to be filed. Though several grounds were raised, from the record, it is an admitted position that only one ground pertaining to the claim being barred by limitation was pressed before the learned Single Judge. The precise objection was that in allowing the claim, the sole Arbitrator ignored and brushed aside the statutory prescription and to be found in the Limitation Act, 1963. The award makes reference neither to the Limitation Act, 1963 nor to the Schedule, much less a relevant Article therein, namely, Article 18 of the Limitation Act, 1963, to be found in the First Schedule. It makes no reference to the residuary Article 113 as well. The award simply grants the claim by holding that it is not barred by limitation. Such an approach of the sole Arbitrator was criticized and in the backdrop of the documentary and oral evidence. In other words, an *ex-facie* time barred claim was allowed is the objection to the award. By the impugned order, the learned Single Judge proceeded to uphold it.

8. Before noting the rival contentions, it would be useful to note the findings and conclusions of the learned Single Judge. The order being very short, we would reproduce the relevant portion therefrom. It reads as under:-

“5. Now in the light of these rival submissions, if the record is perused, it is clear from the award itself that there is no dispute between the parties that the extra work for the payment of which the present reference was made was completed on 15-6-1992. There is also no dispute that the Petitioner rejected the claim made by the Respondent for extra work by letter dated 10-10-1995. The learned Arbitrator has referred to this aspect of the matter in paragraph 21 of the award and has observed thus:

“Even if, there was rejection of the Claimants' claim for extra work on 10-10-1995 as submitted by them the limitation cannot be said to have commenced from that date, if regard be had to the fact that even according to the Respondents the final bill was prepared as late as on 16th December, 2000.”

Thus, according to the learned Arbitrator the cause of action does not accrue on completion of the work. It does not accrue even on rejection of the claim, but it accrues when the final bill is prepared.

6. On behalf of the Petitioner reliance is placed on Article 18 of the Limitation Act. That Article reads 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, the period of limitation is three years and the time begins to run when the work is done.

7. It is clear from the record that the present dispute which was referred to arbitration is for recovery of the price of the extra work done by the Respondent for the Petitioner at the request of the Petitioner and there was no time fixed for making the payment. Therefore, according to this Article, the cause of action will accrue when the work is done. The learned Counsel appearing for the Respondent relied on Article 113 of the Limitation Act. Article 113 reads as under:-

“Any suit for which no period of limitation is provided elsewhere in the Schedule, the period of limitation is three years and the time begins to run when the right to sue accrues.”

8. Therefore, unless a finding is recorded that Article 18 does not apply, Article 113 cannot apply. I do not see any reason why Article 18 will not apply to the present dispute, because the present dispute is in relation to the price of the work done by the Respondent for the Petitioner. The learned

counsel for the Respondent also could not give any reason why Article 18 will not apply. Thus, as the work was completed in the year 1992, the cause of action in terms of Article 18 will accrue in 1992 and therefore the reference will have to be made within a period of 3 years from 1992 unless according to Respondent the time gets extended because of any acknowledgment etc. Admittedly neither arbitration clause is invoked within three years from 1992 nor any extension of the period of limitation is claimed by the Respondent, and therefore the claim will be barred by the law of limitation. What is interesting is that the question before the learned Arbitrator was whether the claim was made within the period of limitation. The learned Arbitrator has recorded a finding that the claim is not barred by the law of limitation, but in the entire award there is no reference to any Article in the Schedule of the Limitation Act, which applies to the present case. In my opinion, this is an impossibility. An argument as to whether a claim is made within the period of limitation has always to be made with reference to some Article in the Schedule of the Limitation Act, without referring to any article in the Schedule of the Limitation Act, a finding either that the claim is barred by limitation or it is not so barred is impossible to be recorded. So far as application of Article 137 is concerned, that Article is in Part-II, relating to applications. For invoking the arbitration clause the limitation provided by the Limitation Act for making application will not apply, the limitation provided by the schedule for institution of a suit will apply. The 1996 Act does not contemplate any application to be made to the court for invoking the arbitration application and for commencement of arbitration proceedings. Sub-section 2 of Section 43 of the Arbitration Act lays down that for the purpose of limitation Act an arbitration shall be deemed to have commenced on the date referred to in Section 21."

9. Thus, the learned Single Judge held that by section 43 of the Act of 1996, applicability of the Limitation Act, 1963 is not ruled out. Rather, that is made expressly applicable. Hence, ignoring that provision would render the award contrary to the public policy of India. Such an award is unsustainable and must be set aside.

10. Mr.Makrand Adkar appearing for the appellant would submit that the impugned order is contrary to law. He would submit that the Act of 1996, in terms of section 34 permits recourse against an arbitral award. The recourse against the arbitral award is not permitted in general terms. The law contains a specific provision, based on which such recourse can be taken. He would invite our attention to section 34(1) and would submit that the recourse against an arbitral award can be made only by making an application under sub-sections (2) and (3). Mr. Adkar would submit that an arbitral award may be set aside by the court only if there is proof furnished by the party making that application and with regard to sub-clauses (i) to (v) of clause (a) of sub-section (2) of section 34. He would submit that clause (b) of that sub-section would enable the court to set aside the award only if it finds that it is in conflict with the public policy of India, or if the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force.

11. We are not concerned here with the amendments to the Arbitration and Conciliation Act, 1996 and particularly to the provision brought in by the Act 3 of 2016. Mr. Adkar would submit that the court must find that the arbitral award is in

conflict with the public policy of India. It may be that this conflict with the public policy could be on account of a blatant ignorance or brushing aside a binding statute or prescription thereof. If that is binding on the parties, then, no award could be rendered contrary to such statute or statutory prescription and that would conflict with the public policy of India. However, Mr. Adkar would submit that in the facts and circumstances of each case, the court must record such a satisfaction and it is not permissible to set aside an arbitral award merely because the court does not agree with the finding and conclusion of the sole Arbitrator. In other words, Mr. Adkar would submit that a petition under section 34 of the Act of 1996 is not a challenge to the award invoking an appellate power. Unless the findings and conclusions are not perverse or vitiated in the above manner, the award cannot be set aside. Merely because the court holds another view, it cannot upset or interfere with the award of the sole Arbitrator so long as the view taken by the sole Arbitrator is a plausible and possible one. Mr. Adkar would submit that in the instant case, on facts, the Arbitrator has taken a view, which is imminently possible. Merely because the sole Arbitrator has not referred to the specific provision of the Limitation Act, 1963 or any Article in the Schedule does not mean that he has failed to apply his mind. The claim has been considered within the four corners of the law of

limitation. During such consideration, the sole Arbitrator recorded a finding in favour of the appellant that its claim was not barred by limitation. Such a finding has been rendered on an appreciation and appraisal of the oral and documentary evidence on record of the sole Arbitrator. Such a finding, which is consistent therewith can never be termed as perverse. Once such a finding has been rendered, the award is not vitiated and the learned Single Judge fell in error in re-appreciating the factual findings to arrive at a different conclusion. That is why, according to Mr.Adkar, this appeal must succeed.

12. Mr. Adkar, relying on a compilation of documents, sought to justify the finding and conclusion of the Arbitrator. He would submit that from the admitted documents, it is evident that the appellant before this court raised a claim for extra works, pertinently to mechanical and electrical jobs and works. On 24th August, 1994, the work was completed and the plant was handed over. However, the claims for these extra works was raised by the appellant and the respondent before us claimed to have rejected it on 10th October, 1995. However, in the same breath, on 15th February, 1997, the respondent informed the appellant that its claims towards extra works (mechanical and electrical) were pending consideration. Pertinently, for extra civil work, which

was carried out (other than mechanical and electrical), the respondent paid the amount. The respondent finally rejected the claim for extra works (in relation to mechanical and electrical) on 31st May, 1999. Thereafter, it prepared the final bill on 16th December, 2000. On 27th January, 2001, Arbitration was invoked. Mr. Adkar would submit that neither the invocation was barred by limitation for now, in the scheme of the Act of 1996, contrary to section 20 of the Arbitration Act, 1940, it is only sections 8 and 21, which trigger the arbitration. He would rely upon section 21 to submit that on the date, when the arbitral proceedings commenced, the claim of the appellant was within limitation. Mr. Adkar would submit that it was found to be within limitation even when it was considered and granted by the sole Arbitrator. Thus, the invocation was not time barred nor was the claim. If this is how the claim was understood by the sole Arbitrator and he rendered a finding on the appreciation of the relevant material, then, that is perfectly tenable in law. Secondly, because another view could have been taken on the same facts and circumstances is no ground to interfere with the award. The respondent's technical objection to the claims on the ground that they were barred by limitation could not have been upheld by the learned Single Judge. Hence, we should proceed to quash and set aside the impugned order, is the submission.

13. In support of his contentions, Mr. Adkar relied upon the record, including the compilation of relevant documents handed over, section 21 and 43 of the Act of 1996 and its scheme and the eventual findings and conclusions of the sole Arbitrator on this issue. Mr. Adkar, in support of his contentions, placed reliance on the following judgments:-

- (i) M/s. Oriental Building and Furnishing Co. Ltd., New Delhi vs. Union of India, AIR 1981 Delhi 293;
- (ii) Hari Shankar Singhania and Ors. vs. Gaur Hari Singhania and Ors., (2006) 4 SCC 658;
- (iii) Shree Ram Mills Ltd. vs. Utility Premises (P) Ltd., (2007) 4 SCC 599;
- (iv) National Aluminium Company Limited and Anr. vs. G. C. Kanungo, (2009) 14 SCC 365;
- (v) Rashtriya Ispat Nigam Limited vs. Prathyusha Resources and Infra Private Limited and Anr., (2016) 12 SCC 405;
- (vi) Punjab State and Ors. vs. Dina Nath, AIR 2007 SC 2157;
- (vi) Vilayat Ram Mittal (P) Ltd. vs. Reserve Bank of India, AIR 2017 (6) Bom. R. 619.

14. On the other hand, Mr. Jain, supporting the impugned order, would submit that the learned Single Judge was perfectly justified

in setting aside the award. The award could not have been granting the claims in favour of the appellant as they were *ex-facie* time barred. If the award makes no reference to any provision of the limitation Act, 1963, though the sole Arbitrator frames the issue in specific terms “whether the claim of the appellant is barred by limitation?”, then, this is nothing but an ignorance and brushing aside of the Limitation Act, 1963. The applicable and relevant Article thereof has not been even referred, much less considered. Mr. Jain would submit that reliance on judgments which hold that invocation of arbitration is not time barred is hardly of any assistance to the appellant. The invocation may not be, but if the underlying claim is found to be barred by limitation, then, whether it is a suit or arbitration, no award could have been made. Mr. Jain would submit that if the claim for extra works has been made, but admittedly the plant was handed over and thereafter on 10th October, 1995, these claims were expressly rejected, then, on 27th January, 2001, a claim for this extra work could not have been granted. On that date, the claims were barred by limitation. The applicable Article was Article 18 and not the residuary Article. Mr. Jain would submit that whenever the conditions of Article 18 are satisfied, there is no choice for the court. Mr. Jain submits that equitable considerations are totally extraneous to the Limitation Act, 1963

and admits of no such considerations. Its language is plain, unambiguous and clear. There is no scope for interpretation then and if within the plain language of the Schedule, the time begins to run and an individual does not approach a court or an Arbitrator with a claim, which is alive, then, that cannot be granted. The present was not an alive claim, but an old and a stale one. Though the respondent, which is a statutory functionary, ordinarily does not raise such objection, which may sound to be hyper technical, but, at the same time, it is dealing with public funds and public interest demands that no award of the nature made by the sole Arbitrator can be honoured by a statutory body or public functionary like the respondent. In these circumstances, Mr. Jain would submit that each of the findings of the learned Single judge should be upheld. This is not a case of the learned Single Judge re-appreciating and reappraising the oral and documentary evidence, but a case of clear satisfaction that the award is in conflict with the public policy of India. How that is in conflict is explained in the impugned order. We should, therefore, proceed to dismiss the appeal.

15. Mr. Jain has relied upon the following judgments in support of his rival contentions:-

(i) J. C. Budhraj vs. Chairman, Orissa Mining Corporation Ltd. and Anr. (2008) 2 SCC 444;

(ii) Alibag Nagar Parishad vs. D. D. Hajare, 2005 (4) Bom.C.R.258;

(iii) Minu F. B. Mehta vs. Ratnasale Madavrao Vakil, 2001 (1) Bom.C.R.213;

(iv) State of Maharashtra vs. Sadiq and Company, (1993) Mh. L.J. 1476.

16. For a proper consideration of these submissions, we must refer to the award of the sole Arbitrator. The sole Arbitrator had before him a specific objection raised by the respondent in its written statement. That is to the effect that the claims are barred by the law of limitation. These are monetary claims for the alleged extra works. However, they cannot be granted as they are time barred. The dates referred by us above, including the documents are considered by the sole Arbitrator. On a full consideration thereof, he frames Issue No. 1 to the effect that “whether the claims made by the claimants are barred by limitation?”. To our mind, he does not refer to the Limitation Act, 1963 specifically or makes no reference to any provision or any Articles thereof would not by itself and without anything more vitiate the conclusion of the sole Arbitrator. His conclusion is that the claims are not barred by limitation. The sole Arbitrator, who

is a retired Judge of this court, was aware of the legal principles as is apparent from the manner in which he records every single objection, particularly on the ground of limitation. He gives ample opportunity to the respondents to establish and prove their defence or assertion in defence that the claims are time barred. He allows the parties to lead oral and documentary evidence. Then, he, in para 15, proceeds to consider the relevant materials, including the rival contentions. In para nos. 15, 16 and 17 and finally in para 21, the sole Arbitrator holds as under:-

“15. I now pass on to the contentions of the Respondents that the claim raised by the Claimants is barred by limitation having regard to the following facts as pointed out by Mr.Setalvad-

- a) The Claimants raised their Bill/Invoice dated 15-6-1992 for the alleged extra work done;
- b) The Plant was handed over to the Respondents by the Claimants' letter dated 24-08-1994;
- c) The Respondents considered and rejected the claimant's claim for the alleged extra work by their letter dated 10-10-1995;
- d) The Claimants have referred the present dispute to the Arbitration by their letter dated 27-1-2001 i.e. more than 5 years after the Respondents rejected their claim for the alleged extra work;
- e) The State of Claim was filed on 4th December, 2003 which is more than 8 years after the Respondents rejected the claimants' claim for the alleged extra work.

16. Mr.Singh, for the Claimants drew my attention to the various documents including the correspondence between the parties and the sequence of events and submitted that the contention of the Respondents that the claim is barred by limitation is ill founded. In order to appreciate the rival

contention it would be necessary to refer to the various documents on record:-

i. The Work Order dated 4.3.1989 was issued in favour of the Claimants pursuant to the contract. The work involved supplies pertaining to electrical and mechanical components including cables as also the civil construction of buildings necessary for accommodating the said equipments and a single Work Order was issued for execution of the job.

ii. On 20/21-3-1989 a meeting was held with regard to the electrical parts of the project. This meeting is referred to in Claimants' letter dated 17th April 1989 addressed to the Consultants.

iii. On 25/26-4-1989 a meeting was held. Para 5.0 of the minutes refer to the requirement of 9 Nos. of 1 Core x 630 sq. mm.

iv) By his letter dated 10th October 1995 the Executive engineer (C), Civil Construction Division No.III MSEB, Chandrapur, referring to Claimants' letters dated 6th June 1992 and 15th June 1992 for claims for extra work amounting to Rs.1,27,36,236/- informed the Claimants that-
 "The above claims were referred to the Chief Engineer (Gen. P&P) for his scrutiny.

The Chief Engineer (Gen. P&P) has intimated that all claims from (a) to (l), except Claim at F, referred in your letter dated 15.6.1992, are not tenable, only the claim for increase in cables as per Annexure IV covered by Item E, the same is payable to the extent of Rs.74,497.50 against your claim for Rs.1,20,426.00.

Kindly send your acceptance so that the same will be processed for approval of our Competent authority."

v. The Claimants sent their reply dated 31st October 1995 to the Executive Engineer (C), Civil Construction Div. No.III, MSEB, Chandrapur informing the Executive Engineer inter alia that -

"As far as our claims at Item (a) to (l) of our above referred letter are concerned, most of the items were cleared at Dy. CE (Project, MSEB level. Only items of cables & cable trays were referred to CE(Gen) P & P,

MSEB, for their scrutiny. CE Gen (P&P), MSEB must have consented for Rs.74,497.00 against Items of cables & cable trays only. Since other items of our extra claim, were not referred to them, the same are to be settled at your or CE(C), Gen. II office.

We would request you to look into the matter and inform so that we should be able to take up our case of extra claim at the appropriate level of MSEB for proper settlement. It will also be appreciated if we are informed of the reasons given by CE Gen (P&P) for passing only a meager sum of Rs.74,497.00 against our huge claim for the items of cables & cable trays which is based in toto on NIY/Agreement clauses”

vi. By their letter dated 23rd November 1995 addressed to the Executive engineer (Civil), Civil Construction Division III, MSEB, Chandrapur the Claimants drew his attention to clauses 15.00 and 15.10 of the Work Order regarding “Finalization of the Final Bill” and informed that as per these clauses the Claimants were entitled to receive 75% of the net amount of final bill and they are also entitled to receive the balance 25% if the final bill is not finalised within the further period of 6 months of submitting the Bank Guarantee.”

vii. The Claimants sent a reminder dated 27th December 1996 to the Executive Engineer (C), MSEB, Chandrapur requesting him to look into the matter and arrange to process all the items of extra claim for payment to the Claimant.

viii. The Respondents sent a Telegram dated 26th January, 1997 to the Claimants requesting them to attend the office of the Executive Engineer in connection with the finalisation of their Bill. The Claimants by their Telegram, dated 5th February 1997 informed the Executive Engineer (C) that Mr. Mittal or Claimants are reaching on 20th in connection with finalisation of Bill.

ix. The Executive Engineer (C)-III MSEB, Chandrapur wrote a letter dated 15th February 1997 addressed to the Claimants informing them that as per clause no.4 of Work Order, the amount equivalent to 25% of total security shall be released along with the payment of final bill only. This shows that the bill was not finalized till then.

17. It is important to note the further contents of the aforesaid letter dated 15th February 1997 viz; "However, it is to point out that though you have signed the measurement of final bill, but it has not been finalised so far. Still your claim of revision of rate of Elect./Mech. Items are not settled, extension of time limit not granted, some items of reduced rate yet to be finalised. However, after completion of all these formalities, bill will be finalised, in view of the above, you are also requested to take the action to settle these issues at the earliest, at your level. This office is also processing the cases for finalisation." This letter clearly shows that though the Claimants had signed the measurement of final bill – (a) Final Bill is not finalized; (b) The Claimants' claim for revision of rate of Electrical/Mechanical items are not settled; (c) Extension of time limit not granted; (d) Some items of reduced rate yet to be finalised; and (e) After completion of all these formalities, bill will be finalized; (f) the office of Executive Engineer is processing the case for finalisation and (g) Lastly the letter requested the claimants to extend the Bank Guarantee for further period of one year i.e. upto 31st December 1997. This letter shows that the Respondents had been considering the issue with respect to one final bill for revision of rate of Electrical/Mechanical items (i.e. as regards extra claim, extension of time limit etc. Thus at least till 15th February 1997 it cannot be said that the cause of action arose when the Respondents denied the claimants' claim by their letter dated 10th October 1995 as contended by the Respondents. It appears that by his letter dated 31st May 1999 the Executive Engineer (C) informed the Claimants that their Extra claim for electrical and mechanical work (i.e. cable and cable trace) is not tenable. This letter is not on record. However, as mentioned above the same is referred to in the Claimants' letter to the Executive Engineer dated 16th July 1999 and there is no further communication by the Respondents denying that the Executive engineer (C) wrote the letter dated 31st May 1999. From this letter it can be said that the Claimants' claims for extra work were being considered by the Respondents and the claims were finally rejected on 31st May 1999 and thereafter the Claimants' bill was finalised on 16th December 2000 and the Claimants invoked Arbitration by their letter dated 27th January 2001. In view of the facts stated above the present claim would be within limitation.

21. In the present case the finalisation of one bill was on 16th December 2000 as stated above and therefore the Arbitration petition is clearly within the limitation. It is not disputed before me that part payments were made depending on the progress of the work and this being a lump sum

contract no measurement of the work were recorded in the measurement book. In the course of the execution of a contract by the contractor there would be number of occasions when some claim or the other of the contractor may be rejected by the authority. Such peace meal rejection cannot affect the contractor's right to file the Arbitration Petition after the preparation and finalisation of the final Bill. It is not expected that the contractor must resort to arbitration at every stage during continuance of the contract when a dispute or difference arises about his claims between him and the employer. The cause of action is one and indivisible and cannot be split up in any manner as suggested by the Respondents. Even if there was rejection of the Claimants' claim for extra work on 10-10-1995 as submitted by them the limitation cannot be said to have commenced from that date, if regard be had to the fact that even according to the Respondents the final bill was prepared as late as on 16th December 2000."

17. Mr. Jain would submit that the conclusions are not only recorded in para 17, but para 21 as well. That is why we reproduced these paragraphs from the award itself. In paras 18 and 19, the sole Arbitrator refers to the written statement and the relevant documents. He finds that the final bill was not prepared on 15th January, 1997 but as late as on 16th December, 2000. The endorsement on Bill No. 64 made by the Deputy Chief Engineer (Civil) is that "passed for payment for Rs.7,71,156.00 only". There is a further endorsement below this to the effect that "full and final measurement and payment accepted by me and now no extra claim and other dues outstanding against this work". It is below these endorsements that a very senior officer of the appellant before us appends his signature. It is claimed that the appellant's senior officer denied having made any

endorsement or his signature, though he admitted his signature. The endorsement of the applicant/ appellant heavily relied upon by the respondent was not proved by it. Thus, the Respondent Power Generation Company failed to establish and prove that the amount as mentioned in the endorsement by the Deputy Chief Engineer (Civil) was accepted in full and final settlement against the extra claim as well. There was thus no evidence on record to show that the endorsement appearing above the signature of Mr.Doval was in existence when he appended his signature on 16th December, 2000. There was a blank space above his signature and which could be utilised for making the disputed endorsement. Secondly, the sole Arbitrator found that the contents of the letter dated 15th December, 2000 addressed by the appellant would go to show that they are requesting finalisation of the bill and releasing of the payment without prejudice. Thus, the amount as against the extra works and claimed by the appellant was due and payable, according to the appellant and no final decision was taken in that behalf by the respondent is the conclusion reached by the sole Arbitrator. He found that in answers to some relevant questions, it is the respondent's officials, who asserted that nothing was due and payable, but did not dispute the fact that there was a without prejudice mention in the letter of 15th December, 2000 of the appellant-claimants.

Thus, the appellant's assertion in writing and established and proved by examination of Mr. Doval was relied upon by the sole Arbitrator. More so, when nothing could be elicited in his cross examination by the respondent before us. The sole Arbitrator finds this to be a reliable version. Once the finalisation of one bill was on 16th December, 2000, then, the sole Arbitrator's conclusions are as above and particularly that the claim was not time barred, but within limitation. The sole Arbitrator, consistent with the nature of the claim, found that there is no substance in the objection of the respondent that such claims were rejected as far back as on 10th October, 1995.

18. The relevant documents have been complied for our perusal by Mr. Adkar. We have perused them, because Mr. Jain did not dispute that these documents were indeed on the record before the sole Arbitrator. These were exhibited during the course of evidence. The letter of 10th October, 1995 clearly says that various claims have been submitted. The claims were regarding extra claims regarding electrical and mechanical works. The Chief Engineer indicated that all claims, except claim at "F" in the appellant's letter of 15th June, 1992 are not tenable. Only the claim for increase in cables as per Annexure IV covered by Item "E", is accepted for payment. The letter ends by requesting the

appellant to send their acceptance so that the further process for approval and release of the amount by the competent authority can be undertaken.

19. Then, there is another document of 31st October, 1995 (Exhibit-C-38), which confirms that the appellant's understanding of the stand of the respondent has not been found to be incorrect. It is consistent with the contents of the letter dated 10th October, 1995. Then, there is a letter of 9th February, 1996, but that is not in relation to the subject claims. That is on the subject of variation in contracted technical specifications. That was not found to be relevant. However, the appellant's letter of 27th December, 1996, which is in continuation of their letter of 31st October, 1995 reiterates that there is no reason for rejection of the claim for extra works and carried out. The amounts in relation thereto are due and payable. The appellant requested the Executive Engineer (Civil) to look into the matter and arrange for processing of the extra works so that payment can be made. There is a confirmatory telegram as well. That is of 27th January, 1997. On 15th December, 1997, the respondent addressed a letter to the claimant-appellant in the following terms:-

“NO: EEC/CCD-III/CNP/Cash/B.G./0340 15 FEB 1997

To,
Shri. V. K. Mittal,

Sr. Project Manager,
Geo-Miller & Co. Ltd.
91, Nehru Place, New Delhi-110019

Sub :- Extension of Bank Guarantee No. 2/96 dated 4.1.96 for Rs.15.50 lakhs, submitted against the contract of Water pre-treatment plant for CTPS, Stage-III

Ref :- 1) T. O. ltr. No. EEC/CCD-III/CNP/2122 dt.19.11.96
2) T.O.Ltr. No. EEC/CCD-III/CNP/2270 dt.13.12.96
3) Your Office ltr. No. AKW/88-08A/7035 dt.16.12
4) T.O. Ltr. No. EEC/CCD-III/CNP/Cash/91 dt. 8.1.97
5) Your ltr. No. VKM/88-8A/7480 dt.17.1.97

Dear Sirs,

With reference to the above subject, it is to state that, as per clause no. 4 of work order, B. G. equivalent to 25% of the total security shall be rele... along with the payment of final bill only. However it is to point out that though you have signed the measurement of final bill, but it has not been finalised so far, still your claim of revision of rate of Elect./Mech. Items are not settled, extension of time limit not granted, some items of reduced rate yet to be finalised. However, after completion of all these formalities, bill will be finalised, in view of the above, you are also requested to take the action to settle these issues at the earliest, at your level. This office is also processing the cases for finalisation.

Your know that as per clause no. 4 of work order, we can not release the B. G. of 25% S. D. since validity of abovesaid period is expired on 31.12.96, hence you once again requested to kindly advise your banker to extend the validity of abovesaid Bank Guarantee for further one year period i.e. upto 31.12.97.

.....2/- (*incomplete*)”

20. A perusal of this letter also leaves us in no manner of doubt that the respondent had informed to the appellant that they had not finalised the issue. On 12th March, 1997, a letter was addressed by the appellant to the respondents stating that enough justification was provided for these claims and that they

are suffering on account of non examination of these claims. On 17th March, 1997, the appellant pointed out to the Executive Engineer that the bank guarantee has been extended upto 31st December, 1997. They requested to release the balance payment against the final bill even in this letter. This request was rejected with reference to the respondent's letter of 20th December, 1997, by their letter of 15th January, 1998 (Exhibit-“C-60”). By these letters, by Exhibit “C-63” dated 24th February, 1998, the respondent informed the appellant that the formalities for finalisation are under process and hence, extension of bank guarantee is requested by the respondent. Thus, on one hand the respondent was seeking the extension of bank guarantee from the appellant, but while arguing the matter before the sole Arbitrator and the learned Single Judge, they maintained a convenient silence on this aspect and urged that the claims are time barred. This aspect of the matter has been examined by the sole Arbitrator, particularly with reference to letter at Exhibit - “C-68”, which is the appellant's letter dated 16th July, 1999. This makes a reference to the letter of 31st May, 1999 of the respondent informing that the extra claims lodged are not tenable. It is, therefore, understood by the sole Arbitrator and as held in the above paragraphs that the extra claims were rejected only on 31st May, 1999. The time prescribed by law, which is,

either way, namely, under Article 18 or Article 113 of the Schedule in the Limitation Act, 1963, of three (3) years. That has not come to an end. It is in these circumstances, he held that the claims are not barred by limitation. This is also evidenced by the further correspondence culminating in the letter of 7th June, 2001. The sole Arbitrator also did not omit to make a reference to the contract clauses and particularly the relevant one. At page 104 of the paper book, the clause for extra work, being Clause No. 16 appears and it reads as under:-

“16.00.0 EXTRA WORK:

- 16.00.01 The contractor shall when requested by the engineer, perform extra work including supply of additional material where-ever required, thought not covered under his scope of work.
- 16.00.02 The Contractor shall be paid for all such work/material at actual cost of labour and material plus 15% for overheads. The cost of labour shall be gross wage of the workmen and the cost of material shall be F.O.R. site but the cost of supervision shall be covered in the fifteen percent for overheads.
- 16.00.03 The decision of the Engineer for such extra payment shall be final and binding.”

21. From a reading of this clause, together with its sub clauses, it is evident that the contractor, when requested by the Engineer, performed extra work, including supply of additional materials wherever required, though not covered under his scope of work. Hence, performance of extra work, which includes supply of additional materials wherever required is not ruled out. The

payment for such extra work at actual cost of labour and material plus 15% for overheads is provided in the contract itself. On merits, thus, there is no dispute that the extra works can be called upon to be performed and carried out and when they are so carried out, a payment is contemplated in relation thereto. However and pertinently, the decision of the Engineer for such extra payment shall be final and binding. It is nobody's argument, either before the learned Single Judge or before us that the claims are otherwise not arbitrable. All that is urged by the respondent is that the claims for extra works were time barred.

22. Upon a combined reading of the correspondence and the contract stipulations, the sole Arbitrator has taken a view that the claims are within limitation. To our mind, such a finding and conclusion is not vitiated for neither any applicable Article of the Limitation Act, 1963 has been omitted, ignored or brushed aside nor any finding is rendered in contravention thereof. The findings and conclusions in the award would indicate that the sole Arbitrator came to the conclusion that for Article 18 or analogous provisions to apply, there has to be a price of work done, which has to be paid and when no time has been fixed for payment, then, the three years' period of limitation begins to run when the work is done. In our opinion, this Article could not have been

axiomatically applied to the facts and circumstances of the case. It is in these circumstances that the residuary Article in the Limitation Act, 1963, which applies to suits, for which, there is no prescribed period as carved out by Article 113, would apply. Even in relation to the invocation of arbitration is concerned, no specific provision like section 20 of the old Act is now inserted in the Act of 1996. However, it is not the contention of the respondent that the arbitration agreement could not have been invoked at all. Their argument was that the claims referred to the sole Arbitrator were time barred. For that they are taking assistance of the specific period provided to a category of suit and carved out by Article 18. That is found to be plainly inapplicable. It is, thus, clear that if the period prescribed is of three years and when the time begins to run, then, the findings and conclusions on such issues are mixed. Such findings and conclusions, as are rendered in the instant case, are mixed questions of fact and law. The learned Single Judge could not have, in his jurisdiction under section 34 of the Act of 1996, held that the award is in conflict with the public policy of India, particularly when he was scrutinising the findings on such mixed issues. In the instant case, the issue of limitation was a mixed one. In these circumstances, if we look at the matter in the light of Mr. Adkar's submissions and his reliance on the judgments of the Hon'ble

Supreme Court, we are of the view that in the instant case, even when the arbitration was invoked by relying on the arbitration agreement or the claims were laid before the sole Arbitrator, they were not barred by time. Such a finding, therefore, should not have been interfered with by the learned Single Judge. The learned Single Judge proceeded on the footing that the parties conceded that the applicable Article was Article 18. That was not the admitted position. Reliance was placed upon such Article even by the respondent in the written submissions before the sole Arbitrator and that was highlighted before the learned Single Judge. The emphasis on such an Article of the Limitation Act, 1963 should have been viewed and considered by the learned Single Judge in the backdrop of the peculiar facts and circumstances of the case and the nature of the claims before the sole Arbitrator. The learned Single Judge does not dispute that payment for civil work done by the appellant-claimant has been made. Even in relation to the extra items, a part of it was sanctioned and payment was made. It is in relation to only two items of extra works that there was a dispute. It is incorrect, therefore, to say that because such extra work was completed on 15th June, 1992 and the plant was handed over on 24th August, 1994 that the claim laid in respect thereof was rejected by letter dated 10th October, 1995 the claim was time barred. With greatest

respect to the learned Single Judge, this is an incomplete recording of the factual position. The learned Single Judge should have referred to the facts in their entirety. The dates and events were pointed out to him in great detail. It is incorrect to hold that claim for the price of extra work was rejected on 10th October, 1995 and the invocation of arbitration on 27th January, 2001 was, therefore, barred by limitation. The learned Single Judge omitted from consideration the subsequent letters and of the respondents themselves. They do not assert that the claims were rejected on 10th October, 1995 for it is they who gave an impression to the appellant that these claims were under consideration and rejected only on 31st May, 1999. In these circumstances, had the learned Single Judge referred to all these materials, possibly, he would not have interfered with the subject award. The learned Single Judge, with greatest respect, has made only reference to one letter of 10th October, 1995, but did not make any reference to the entire correspondence. At the same time, the learned Single Judge has referred to the fact that the final bill was prepared on 15th December, 2000. However, prior thereto, the rejection of the claim is by the communication of 31st May, 1999. It is in these circumstances that the learned Single Judge has committed an error and that is sufficient for us to set aside the impugned order.

23. The learned Single Judge, in the above reproduced paragraphs, has made reference to the letter of 10th October, 1995. The learned Single Judge incorrectly understands the reasoning in the award of the sole Arbitrator. The sole Arbitrator does not hold that the cause of action does not accrue on the completion of the work, but when the final bill is prepared. The learned Single Judge should have carefully perused the findings on the point of limitation, as appearing in the award. If they had been read in their entirety, it would have been apparent to the learned Single Judge that the sole Arbitrator does not proceed on the footing that the cause of action accrues when the final bill is prepared. He proceeded on the footing that it accrues on the rejection of the claim for extra works. Such a finding of the learned Arbitrator was not contrary to the record nor can be termed as perverse. In these circumstances, there was no occasion for the learned Single Judge to have reappraised the materials and with reference to the ambit and scope of Article 18 and Article 113 of the Limitation Act, 1963. The learned Single Judge's finding that Article 18 will apply to the dispute is thus but another view of the matter. The learned Single Judge has in mind a view, which is not in consonance with that of the sole Arbitrator. However, because the learned Single Judge holds another view, he could not have displaced the opinion of the sole Arbitrator and

when it was found to be imminently possible. In the given facts and circumstances of the case, the sole Arbitrator committed no error in rejecting the technical defence of the respondent.

24. This was not a case of no discussion at all on the plea of limitation in the award. This is neither a case of the sole Arbitrator not making any reference to the relevant Article in the Schedule of the Limitation Act, 1963. That may not have been specifically referred to, as desired by the learned Single Judge and in the manner demanded by him. The sole Arbitrator may not have specifically reproduced or mentioned Article 18 or 113 in the award, but it is not as if he was not aware of the fundamental legal provisions governing the period of limitation. In other words, he was aware of the nature of the claims, the nature of the defence and that he would have to opine one way or the other on whether the claims are time barred. In these circumstances, the award could not have been faulted on the ground that the sole Arbitrator made no reference to any Article in the Schedule of the Limitation Act, 1963. The learned sole arbitrator was also aware that by section 43 of the Act of 1996, the applicability of the Limitation Act, 1963 is not ruled out to arbitration and that it applies to it as well. In these circumstances, the award could not have been set aside on the ground the claim is barred by limitation.

25. Since that was the sole ground on which the award came to be set aside and when we are not in agreement with the learned Single Judge on that score, this appeal must succeed.

26. Before allowing this appeal, we would make a reference to several judgments brought to our notice by Mr. Adkar. We need not make reference to every single judgment for we have gone by the principle laid down therein. We do not think that this is a fit case to discuss any larger issue or decide a wider controversy. The argument of Mr. Adkar that in arbitration matters, the whole approach should be to resolve the dispute between parties. It looks at the pleas and particularly considers the defence of limitation by applying a dispute resolution approach was the contention of Mr. Adkar. Therefore, he says that there is no scope to import strict principles of accrual of cause of action and assuming that principle can be applied, still, such interpretation must be placed on it, as would facilitate arbitration. Mr. Jain would submit that if the governing law of limitation is allowed to be ignored, then, by the broad approach suggested by Mr. Adkar, even time barred claims would be allowed. That would be a negation of the rule of law. It would not be a justice oriented approach. We do not enter into this controversy for the simple reason that even if we proceed as relied upon by Mr. Jain in the

case of *State of Maharashtra vs. Sadiq and Company* (supra), the facts speak for themselves. There, the contract was awarded on 22nd December, 1969. The firm, during the extended period, completed the work. The work was completed on 31st July, 1971. The firm claimed that it carried out certain extra work. That has not been covered by the scheduled items, during this period. The payment was made on 30th April, 1972 by clearing the final bill, but these items were not included in that bill nor in the payment. That is how on 17th July, 1974, the firm served notice under section 80 of the Civil Procedure Code, 1908 on the State. This court held that merely because such a notice was served would not assist the firm in saving the bar of limitation. The suit in the court of Civil Judge, Senior Division, Akola was laid for such claims of extra work not within three years of the accrual of the cause of action. The suit was filed on 14th April, 1975. It is in these circumstances that the claim was barred by the law of limitation. It is in the factual scenario that the observations relied upon by Mr. Jain and to be found in paras 6 and 7 of the judgment of the learned Single Judge have been made. These findings are rendered in the backdrop of the admitted dates and events. The argument that because a notice under section 80 of the Civil Procedure Code, 1908 was served, that period during which the State had time to honour the claim, namely, from the

date of receipt of the notice under section 80 of the Civil Procedure Code, 1908 till the time stipulated therein coming to an end, would have to be excluded even if accepted, would not save the bar of limitation. It is held by the learned Single Judge that assuming such a notice was given and which was on 17th July, 1974, that would not save the bar of limitation. That notice itself was given on 17th July, 1974. The right to sue accrued when the department refused to make payment for extra items on 30th April, 1972. Since this period was not to be excluded, the suit brought on 14th April, 1975 would not be within limitation. That is how the learned Single Judge proceeded in the facts of that case. We find that this judgment is distinguishable in facts.

27. The second judgment relied upon by Mr. Jain of the learned Single Judge of this court in the case of *Minu F. D. Mehta vs. Ratnasale Madavrao Vakil* (supra) was also rendered on facts. Article 18 was held to be applicable. It was the governing Article. In the backdrop of that, on facts, the learned Single Judge came to the conclusion that the work was done, on the plaintiff's saying, on 17th October, 1967. That was entered in the measurement book and on the basis of which, the final bill was prepared. The court held that the cause of action arose when the final bill was prepared and not from the subsequent date when the engineer

certified it to be correct. In that case, the bill was raised on 19th February, 1975. That was the starting point. The suit was filed on 28th November, 1978. It was clearly beyond the period of three years stipulated by Article 18 and particularly when the time stated therein began to run.

28. Even in the case of *Alibag Nagar Parishad vs. D. D. Hajare* (supra), the suit was filed on 14th July, 1993. The work was completed on 22nd May, 1990. The period of limitation ended on 22nd May, 1993. Assuming 30 days' time was added to it, still, the suit filed on 14th July, 1993 was barred by limitation. This is, therefore, a clear case where the claim was *ex-facie* time barred. Merely writing letters would not have saved the bar of limitation. We do not see how any legal principle and which we can apply to the facts and circumstances of the case before us can be culled out from this judgment either. All the three judgments, therefore, are distinguishable on facts. We have gone by the principle laid down in the case of *J. C. Budhraja vs. Chairman, Orissa Mining Corporation Ltd. and Anr.* (supra) heavily relied upon by Mr. Jain. Having applied that, we are unable to agree with him that the learned Single Judge was right in interfering in such an award.

29. As a result of the above discussion, the impugned order cannot be sustained and would have to be set aside. The award is

upheld. However, we have found that this award was rendered way back and to be precise, on 2nd August, 2006. The arbitration petition before the learned Single Judge was laid on 1st November, 2006. It was decided by the learned Single Judge on 16th December, 2011 in favour of the respondent. The instant appeal was filed in this court on 1st March, 2012, but initially there was an office objection. It came to be dismissed for want of removal of that office objection. It was later on restored. The appeal filed in the year 2012 has been heard by us and allowed today, namely, by our order pronounced in open court. That is after a good 6 and ½ years from the order of the learned Single Judge. In these circumstances, it would not be fair, just and proper to saddle the respondent with the liability to pay interest and in terms of the award. The award directs the respondent to pay interest during the pendency of the reference at 12%. That is from the period from 16th December, 2000 till 2nd August, 2006. That interest at the rate of 12% and the quantum in relation thereto is not interfered with. However, the obligation and liability to pay to the appellant interest at the rate of 12% on the principal amount from 3rd August, 2006 till date of payment and/or realisation definitely requires our intervention. In order to balance the rights and equities and particularly in the backdrop of the facts and circumstances of the case, we are of the opinion that interest of

justice would be served if we direct payment of interest at the rate of 6% per annum on the principal amount of Rs.58,32,500/- from 3rd August, 2006 till the date of payment and/or realisation. We order accordingly. The Registry is directed to now draw up a decree in the above terms. The decree can be enforced thereafter in accordance with law.

(B. P. COLABAWALLA, J.)

(S.C.DHARMADHIKARI, J.)

Jayant
Vishwanath
Salunke

Digitally signed by
Jayant Vishwanath
Salunke
Date: 2018.10.05
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