

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 26.09.2018	Delivered on 21.12.2018
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THE HON'BLE MR.JUSTICE M.SATHYANARAYANAN

AND

THE HON'BLE MR.JUSTICE N.SESHASAYEE

OSA.No.204/2018 & CMP.No.10221/2018

Chennai Petroleum Corporation Limited
536, Anna Salai, Teynampet, Chennai 600018
represented by its Chief General Manager
[Huma Resource and Legal]
Mr.M.Sankaranaryanan

.. Appellant

Vs.

1 M/s.Ion Exchange [India] Ltd.,
Registered office at ''Ion House''
42, zb.N.Reddy Road, T.Nagar
Chennai 600 017.

2 Mr. Justice K.Govindarajan, [Retd.]
The Sole Arbitrator
Tee Pee Bhavan, No.8,
Justice Ramanujam Street,
Malvya Avenue, Shastri Nagar
Chennai 600 041.

.. Respondents

Prayer:

Original Side Appeal filed under Section 13[1] of the Commercial Court Act, Order XXXVI Rule 1 of Original Side Rules read with section 37[1][B] of the Arbitration and Conciliation Act, 1996 and Clause 15 of the Letters Patent against the Judgment and Decreetal order passed by this court, dated 13.12.2017 made in OP.No.441/2014.

OP.No.441/2014:-

Petition filed under section 34 of the Arbitration and conciliation act 1996 to set aside the impugned arbitral award dated 20.03.2014 in so far as it directs payment of the sum of Rs.1,04,36,120/- to the first respondent with interest thereon and allow this petition with costs.

For Appellant : Mr.R.Senthilkumar and
Mr.Raghavendra Doss Divakar

For Respondents : Mr.Ramakrishnan Viraraghavan
Senior counsel
Assisted by Mr.S.Sathyaganesh
for R1
R2-Arbitrator

JUDGMENT

M.SATHYANARAYANAN, J.,

The petitioner, aggrieved by the dismissal of OP.No.441/2014 filed under section 34 of the Arbitration and Conciliation Act, 1996 [Arbitration Act] to set aside the Arbitral Award dated 20.03.2014 passed by the 2nd respondent/Arbitrator insofar as directing the payment of Rs.1,04,36,120/- to the 1st respondent herein / claimant with interest, by the learned Single Judge vide impugned order dated 13.12.2017, has filed the present Original Side Appeal.

2 The facts leading to this litigation have been narrated in the impugned order, which is the subject matter of challenge in this appeal and therefore, it is not necessary to re-state the facts once again except to cull out the relevant facts for the purpose of disposal of this appeal.

3 The 1st respondent herein filed a statement of claim before the 2nd respondent - learned Arbitrator / Arbitral Tribunal. The appellant herein has invited a Tender for expansion of New Effluent Treatment Plant [ETP-III] for the purpose of treating the effluents generated from it for meeting MINAS and after treatment, the treated water from the Effluent Treatment Plant is of MINAS quality and can be discharged into the Canal. For that purpose, the appellant proposed to install a new Zero Discharge Plant comprising of Ultra - Filtration and Reverse Osmosis Membrane Process to treat water from the said ETP, so as to make use of the treated water as feed to the De-Mineralised Water Unit [the new Zero Discharge Plant]. The invitation of Tender was made and in response to the same, the 1st respondent/claimant had submitted its proposal and after negotiation, the appellant sent its acceptance by FAX on 29.01.2004 of the 1st respondent/claimant and thereby, accepted the offer for a sum of Rs.10,43,61,200/-. The Tender conditions stipulate among other things that the 1st respondent/claimant was granted 11 months time to complete the plant from the date of FAX of Acceptance and the 1st respondent/claimant would allege that there were delays on account of the conduct of the

appellant which includes the delay in approvals, change in vendors, change in parameters, size of rooms etc., and cost thereon, the effect of Tsunami which took place during December 2004 and other natural causes such as heavy rains. The 1st respondent/claimant also pointed out that there was failure on the part of the appellant herein to provide ultra treated filtered water and requests were made praying for extension of time. Accordingly, the appellant had granted extensions from time to time and last of such extension of time was granted on 31.07.2005 and on that day, the plant became operational and PTR was completed on 19.12.2005 and the appellant had recorded in its Job Completion Report dated 01.10.2007 that the actual date of completion of the plant was on 19.12.2005. The 1st respondent/claimant, in the Claim Petition would also aver that Clause 58 of the special conditions of the Contract and Clause 34 of the general conditions of the contract would provide for the levy of compensation for delay at 'an amount equal to 1% or such smaller amount and the decision of the Engineer In-charge in writing shall be final'.

4 The sub-clauses [i] to [iii] of Clause No.34 also provide for liquidated damages at the stage of 10%, 40% and 75% of the work and it is the case of the 1st respondent / claimant that the appellant herein had deducted and withheld a sum of Rs.1.043 Crores amounting to 10% of the contract value as compensation for delay and in paragraph No.50, had given reasons as to the disentitlement of the appellant herein to levy compensation, which is as follows:-

''50 The claimant states that the respondent is not entitled to levy compensation for delay for the following reasons:-

- a) the aforesaid clause provides for a decision to be taken by the engineer in charge prior to the levy of compensation. In the present case, no such decision was ever taken by the engineer in charge is communicated to the claimant. Therefore, the primary condition precedent for levy of compensation has not been satisfied.
- b) The delay in performance of the contract is due to the acts of omission or commission by the respondent and is at any rate due to factors beyond the control of the claimant.
- c) Even assuming [without admitting] that there was a delay on the part of the claimant, respondent has not suffered any losses due to such delay and is therefore, disentitled to any compensation. The

respondent is not entitled to compensation in the absence of any proof at least on the factum of loss if not on the quantum of loss.

- d) The respondent is not entitled to compensation in as much as the respondent had failed to give notice of his intention to claim compensation at the time of acceptance of the ''delayed'' performance as required under section 55 of the Contract Act.
- e) The compensation clause is in reality a clause in the nature of penalty and is therefore not enforceable.''

5 It is further averred by the 1st respondent/claimant that the delay caused by the appellant herein resulted in the 1st respondent/claimant in continuing the work for a further period of twelve months up to 19.12.2005 and therefore, is entitled to compensation for twelve months pro-rata basis at 10% and also gave the quantification of the said amount as follows:-

[a] Overhead charges	-	Rs.1,13,84,858/-
[b] Plant and Machinery charges	-	Rs.1,13,84,858/-
[c] Loss of profit	-	Rs.1,13,84,858/-

The 1st respondent/claimant also claimed an interest at the rate of 18% pe annum for the said withheld amount of Rs.1,04,36,120/- as compensation for delay from December 2005 till the date of filing the claim petition. In paragraph No.54 of the claim statement, the 1st respondent/claimant quantified his claims against the appellant, which are as follows:-

No	Heads of Claim	Amount in Rs.
1	Refund of 10% amount wrongfully withheld by the respondent as ''compensation for delay''	1,04,36,120/-
2	Reworking of design and engineering due to change in the location of the plant	55,88,283/-
3	Consultancy charges towards change in scope of work and parameters suggested by the respondent	2,40,000/-
4	Additional costs due to shifting of the control panel	22,00,000/-

No	Heads of Claim	Amount in Rs.
5	Change in the dimensions of the MCC room	14,00,000/-
6	Overhead charges incurred by the claimant for 12 months beyond the agreed period	1,13,84,858/-
7	Plant and Machinery charges for the aforesaid period beyond the agreed period	1,13,84,858/-
8	Loss of profit beyond the agreed period	1,13,84,858/-
	Total	5,40,18,977/-
9	Interest on item 1 from December 2005 till date	1,34,42,866/-
	GRAND TOTAL	6,74,61,843/-

6 Thus, the 1st respondent/claimant prayed before the Arbitral Tribunal to pass an Award directing the appellant herein to pay a sum of Rs.6,74,61,843/-, interest @ 18% p.a., on the Principal amount of Rs.5,40,18,977/- from the date of claim statement till the date of payment as well as the cost of arbitration.

7 The Company Secretary of the appellant, on behalf of the appellant herein / respondent in the said claim petition, filed the counter statement, refuting the averments/allegations and took a stand that the 1st respondent/claimant had completed the work pertaining to plant only on 19.12.2005 and thereafter only, it was commissioned and the said delay is solely attributable to the 1st respondent/claimant. It is also averred that the plant was completed only on 19.12.2005 and the Performance Guarantee Test was conducted on 19.03.2006 and only thereafter, the water treatment plant became operational. Insofar as the extension of time granted to the 1st respondent/claimant, it is averred by the appellant herein that the said extensions were granted without prejudice to the contractual rights to claim compensation towards losses on account on delays and at a minimum rate, they incurred a loss of Rs.7,63,37,080/- towards cost of procuring water treatment during the period of delay. Insofar as withholding a sum of Rs.1.043 Crores, amounting to 10% of the contract value as compensation for delay, it is the stand of the appellant herein in the counter affidavit filed in the claim petition that since the delay in completion of the project/plant, is solely attributable to the 1st respondent/claimant and that no justification has been provided by them for fixing the percentage on profit at the pro-rata basis @ 10%, such a stand

taken by them, is wholly untenable and also averred that even at the time of issuing 'No Claim Certificate', on 03.01.2007, it has been specifically stated that apart from the amount of Rs.1.043 Crores, retained towards liquidated damages and amounts towards RA Bill Nos.18 and 19, which were also subsequently paid, it has been specifically stated that 'no other claim is pending from this contract' and as such, they are precluded from raising the said issue. The appellant, by way of legal plea, took a stand that all the claims are being barred by limitation and the 1st respondent/claimant is not entitled to any of the claims on account of the act of omission and commission of the claimant and the various terms under the contract and prayed for dismissal of the claim petition.

8 The 1st respondent/claimant filed his reply statement and took a stand that since the appellant herein had committed breach of contract, they are entitled to damages and in respect of the factors which are beyond their control, they cannot be held responsible for the delays and reiterated the earlier stand that the plant was completed on 31.08.2005.

9 The 2nd respondent / sole Arbitrator, upon considering the contents of the averments made in the claim statement, counter statement and the reply statement, had framed the following issues on 15.05.2013:-

1. Whether the claimant is entitled for the claims made in para 54 of the Claim Statement? If yes, for what extent?
2. Whether the Respondent is justified in levying Liquidated Damages on the claimant?
3. Whether the delay is attributable to the Claimant in completing the project so as to invoke Clause 58 of the Special Conditions and Clause 34 of the General conditions of the Contract?
4. Can the claimant sustain the claims on the ground that the delay in completing the project is attributable to the respondent?
5. Whether the claimant is estopped from making any or all the claims?
6. Whether any or all of the claims are barred by limitation?
7. Whether the claimant is entitled for interest as claimed and if yes, to what sum, to what rate and for what period?
8. To what other reliefs are the parties entitled to?

10 During the course of enquiry, before the 2nd respondent - Arbitrator, Mr.T.D.Srinivasan, examined himself as C.W.1 and marked Exs.C-1A, 1B, 1C, 1D and Exs.C2 to C97 and on behalf of the appellant/respondent in the claim petition, one Mr.N.Senthilnathan, was examined as R.W.1 and Exs.R1 to 34 were marked.

11 The 2nd respondent - Arbitrator has passed an Award on 20.03.2014 and in paragraph No.23 of the Award, observed that the dispute regarding delay has to be decided on the basis of the available facts on record and on evidence as the real position before the Tribunal is that no time schedule fixed between the parties is available except starting and ending point of the execution of the project and recorded a finding that the both the claimant/1st respondent herein as well as the appellant/respondent in the claim petition contributed for the delay in completing the plant and the 1st respondent/claimant alone cannot be blamed for the delay in execution and completion of project and insofar as Issue No.2 is concerned, the 2nd respondent-Arbitrator held that the appellant has not justified in levying Liquidated Damages on the claimant/1st respondent herein. In paragraph No.26 of the Award, the 2nd respondent - Arbitrator dealt with the procedure contemplated under the Contract and observed that the appellant herein had traced the right only under Clause 34 of the General Conditions of the Contract or 58.0 of the Special Conditions of the Contract and according to the said clauses, the Engineer-in-charge has to decide the quantum of compensation as to whether it is 1% or such smaller amount as the amount of the estimated cost of whole work for every week and such decision, if any, was communicated to the 1st respondent/claimant and further recorded the finding that no evidence is available to point out as to who fixed the Liquidated Damages at 10% before recovering the same from the Bill of the 1st respondent/claimant and since the appellant herein did not establish that the quantum of Liquidated Damages @ 10% was fixed by the Engineer-in-Charge and also admitted before the Arbitral Tribunal that no such material is available, held that levy and recovery of Liquidated Damages, without following the procedure contemplated under the Clauses, cannot be sustained and as a natural corollary to the said finding, held that the 1st respondent/claimant is entitled to get the refund of Rs.1,04,36,120/-.

12 The 2nd respondent - Arbitrator dealt with Issue No.6 - Whether any or all claims are barred by limitation and in paragraph No.28, the 2nd respondent - Arbitrator has extracted the claims made by the 1st respondent/claimant and the same is given as under:-

No	Heads of Claim	Amount in Rs.
1	Refund of 10% amount wrongfully withheld by the respondent as ''compensation for delay''	1,04,36,120/-
2	Reworking of design and engineering due to change in the location of the plant	55,88,283/-
3	Consultancy charges towards change in scope of work and parameters suggested by the respondent	2,40,000/-
4	Additional costs due to shifting of the control panel	22,00,000/-
5	Change in the dimensions of the MCC room	14,00,000/-
6	Overhead charges incurred by the claimant for 12 months beyond the agreed period	1,13,84,858/-
7	Plant and Machinery charges for the aforesaid period beyond the agreed period	1,13,84,858/-
8	Loss of profit beyond the agreed period	1,13,84,858/-
9	Interest on item 1 from December 2005 till date	1,34,42,866/-
	TOTAL	6,74,61,843/-

13 The 2nd respondent - Arbitrator held that the 1st respondent / claimant is estopped from making a claim in respect of claim nos.2 to 8 in view of ''No Claim Certificate'' under Ex.C.83 dated 03.01.2007. The 2nd respondent - Arbitrator while dealing with issue No.6, relating to limitation, has extracted the relevant dates of the events and the same are as under:-

*	18.07.2003	-	NIT was called for
*	29.01.2004	-	Fax of Acceptance
*	25.02.2004	-	Letter of Acceptance
*	27.07.2004	-	Agreement was signed
*	29.12.2004	-	Scheduled date of completion
*	19.12.2005	-	Date of Actual Completion
*	19.03.2011	-	Date of Expiry of Guarantee
			period as per Contract
*	05.06.2012	-	Letter invoking Arbitration Clause

14 It was the stand of the appellant herein before the 2nd respondent - Arbitrator that Guarantees relied on by the 1st respondent/claimant under Exs.C.95 and C.96 were only with respect to UF Membrane and for RO Membrane which are nothing to do with the claims now made and hence, the claims are barred by limitation and also relied upon Articles 18, 55, 113 under the Schedule to the Limitation Act, 1963. However, it was the stand of the 1st respondent/claimant that though the project was actually completed by them on 19.12.2005, the contract came to an end only after the obligation of the claimant as contemplated under the contract is discharged and when the guarantee period as per the contract came to an end only on 19.03.2011, the Arbitration Clause was invoked by them on 05.06.2012 under Ex.C.90 and therefore, the claims are well within the period of limitation. The 2nd respondent - Arbitrator incidentally formulated a question as to when the contract period came to an end, i.e., whether on the date of completion, i.e., on 19.12.2005 or whether on the date of expiry of the guarantee period, i.e., on 19.03.2011 [5 years from Performance Guarantee, trial run which was amended in the Meeting held on 19.03.2006].

15 The 2nd respondent - Arbitrator also referred to Clause 48.7 which came to be added as mentioned in Item No.14 to Annexure II to Letter of Acceptance, which says that "all the membranes shall be guaranteed for a period not less than 5 years by the bidder [claimant] and a warranty certificate to that effect should be produced from the membrane manufacturer by the claimant" and for that purpose, they were asked to provide Rs.10 Lakhs as guarantee amount and it was given on 24.10.2007 under Ex.C.95 with a covering letter dated 25.10.2007 marked as Ex.C.97 and taking into account the said date, a finding has been recorded that the contractual obligation of the claimant under the contract, came to an end only on 19.03.2011 and by referring to Article 113 of the Limitation Act, the 2nd respondent - Arbitrator held that the right to sue accrues only when a complete cause of action arises and it depends upon particular facts of each case. The 2nd respondent - Arbitrator proceeded further and observed that if the Engineer-in-charge has taken a decision as per clauses 34 and 58, it shall be final and in that event, the 1st respondent/claimant cannot invoke the Arbitration clause as it will come under the expected matter and only suit can be filed after such a decision and admittedly, no such decision was taken and communicated to the 1st respondent / claimant till date and held that the right to sue does not accrue till such decision was received from the Engineer-in-charge. The 2nd respondent - Arbitrator further recorded a finding that under Exs.C.83 to 89, the 1st respondent/claimant was repeatedly adjudicating the issue as to the refund of the Liquidated Damages but it was never rejected and no such communication as to the rejection order came to be placed before

the Tribunal and in the interregnum, the contract came to an end on 19.03.2011. It was also pointed out by the 2nd respondent - Arbitrator that the 1st respondent/claimant in their letters dated 05.06.2012 and 05.11.2012 respectively, made a request to the appellant to initiate arbitration proceedings which is well within the period of three years from 19.03.2011 and till that date, the obligations of the 1st respondent/claimant under the contract, subsists and therefore, Claim No.1, is not barred by limitation and accordingly, answered the said issue and in respect of issue No.7, the 2nd respondent - Arbitrator has held that the 1st respondent/claimant is entitled to get back the amount of Rs.1,04,36,120/- retained by the appellant herein towards Liquidated Damages and they are also entitled to an interest @ 12% p.a., from 20.03.2011 till 31.05.2014, before which date, the appellant herein was directed to pay the said sum with interest, failing which, the appellant/respondent in the claim petition, will be liable to pay interest at the rate of 15% per annum on the said sum or unpaid portion thereof from 01.06.2014 till the date of actual payment.

16 The appellant/respondent in the claim petition, aggrieved by the said Award dated 20.03.2014, had filed OP.No.441/2014 u/s.34 of the Arbitration Act, to set aside the said Award and following grounds were raised in the Original Petition:-

- The cause of action or right to sue under the Limitation Act with respect to refund of Liquidated Damages commences from the date, the appellant herein had withheld the amount payable towards Liquidated Damages and therefore, the Arbitration Clause ought to have been invoked within three years from the date of withholding the sum.
- The 2nd respondent - Arbitrator had erred in concluding that the right to sue in respect of Claim No.1 is computable from 19.03.2011, i.e., end of the validity period of the Performance Bank Guarantee and it is completely unconnected and irrelevant for the purpose of claim.
- The 2nd respondent - Arbitrator erred in computing the period of limitation from 19.03.2011 - the end of the tenure of the Performance Guarantee of UF Membrane notwithstanding the fact that even as per the Job Completion Report dated 01.10.2007, the 1st respondent/claimant's liability in respect of the treatment plant is only one year and the limitation period commenced when the sum of Rs.1,04,36,120/- was deducted / withheld and the 2nd respondent - Arbitrator had erred in reaching the conclusion that the right to sue does not arise until the Engineer-in-charge gave a decision.

17 The counter statement was filed by the 1st respondent/claimant stating among other things that since the learned Arbitrator, on the basis of the oral and documentary evidence, came to the factual conclusion as to the scope of contract and its performance and that the jurisdiction under section 34 of the Act is only a revisional jurisdiction, the findings recorded by the Arbitrator cannot be interfered with even if any other view is possible on the issue of limitation.

18 The appellant/petitioner in OP.No.441/2014 filed his rejoinder reiterating the stand.

19 The learned Single Judge, after taking into consideration, the materials placed and the points urged in the Original Petition and also upon hearing the arguments advanced by the respective learned counsel appearing for the parties, found that the learned Arbitrator had dealt with the issue relating to limitation in detail and found that the claim as well as the invocation of the Arbitration Clause is not barred by limitation and by placing reliance upon the judgments in Swan Gold Mining Limited Vs. Hindustan Copper Limited reported in 2015 [5] SCC 739 and in Navodaya Mass Entertainment Limited Vs. V.J.M. Combines reported in 2015 [5] SCC 698, found that in the light of the ratio laid down in the said judgments, the scope of interference in respect of the Arbitral Award, is very limited and since the learned Arbitrator had analysed the matter in detail and rendered the findings, the same cannot be interfered with in the absence of any perversity and accordingly, dismissed the Original Petition vide impugned order dated 13.12.2017.

20 The respondent in the Claim Petition / Petitioner in OP.No.441/2014 to set aside the Arbitral Award, aggrieved by the dismissal of the Original Petition filed under section 34 of the Arbitration and Conciliation Act, had preferred the present Original Side Appeal.

21 The learned counsel for the appellant made the following submissions:-

- ➔ Though the scope of interference by this Court under section 34 of the Arbitration and Conciliation Act, is limited, if there is a patent illegality or error apparent on the face of the record, the same is liable to be interfered with and the learned Arbitrator has committed a grave error while deciding the question relating to limitation under Article 113 of the Limitation Act.
- ➔ The learned Judge had failed to appreciate that the dates of expiry of Bank Guarantee for RV and UV membranes [refer

grounds] were totally irrelevant and extraneous to the claim made by the 1st respondent/claimant and also committed a grave error which is apparent on the face of the record, overlooking even the important fact that the refund of Liquidated Damages commences from the date on which, the appellant withheld the amounts payable towards Liquidated Damages and therefore, the arbitration proceedings should have been commenced by invoking the arbitration clause within three years from the date of withholding the claim.

- The period of limitation cannot commence from 19.03.2011 for the reason that even as per the Job Completion Certificate dated 01.10.2007, the liability on the part of the 1st respondent/claimant in respect of the treatment plant is for a period of one year from 01.10.2007 and the Performance Guarantee referred to and relied on by the 2nd respondent - Arbitrator, is only in respect of UF Membrane.
- Admittedly, the 1st respondent/claimant claimed interest from December 2005 and as such, the period of limitation should be computed only from that date and that no Claim Certificate was issued on 03.01.2007 by them and the Job Completion Certificate issued on 01.10.2007 and nearly, after a lapse of five years, the Arbitral Proceedings were commenced only in June 2012, which is hopelessly barred by limitation.
- The learned Judge has not properly appreciated the judgments rendered by the Hon'ble Supreme Court of India as well as the Bombay High Court on Article 113 of the Limitation Act, reported in 2000 [3] CTC 663 [Chief General Manager, State Bank of India Vs. N.Balakrishnan] and 1991 [3] Bombay Civil Reporter 668 [Rupchand Rajaram Sha Vs. Maharashtra State Road Transport Corporation].

22 The learned counsel for the appellant, in support of his submissions, also placed reliance upon the following judgments:-

- [a] AIR 1966 SC 275 [Union of India Vs. Watkins Mayor and Co.] ;
- [b] 1991 [4] SCC 1 [State of Punjab and Others Vs Gurdev Singh and another] ;
- [c] 2004 [2] SCC 747 [Union of India and Others Vs. West Coast Paper Mills Ltd., and Another] ;
- [d] 2004 [6] SCC 254 [Kusum Ingots and Alloys Ltd., Vs. Union of India and Another] ;
- [e] 2007 [11] SCC 335 [Alchemist Ltd., and Another Vs. State Bank of Sikkim and Others] ;
- [f] 2008 [2] SCC 444 [J.C.Budhraj Vs. Chairman, Orissa

Mining Corporation Ltd., and Another] ; and
[g] 2015 [3] SCC 49 [Associate Builders Vs. Delhi
Development Authority].

23 Per contra, Mr. Ramakrishnan Viraraghavan, learned Senior Counsel appearing for the 1st respondent/claimant would submit that the Schedule completion date was on 29.12.2004 and the actual date of completion was on 19.12.2005 and the Reverse Osmosis [RO] Guarantee Period was till 19.03.2005 and so also the UF Membrane till 19.03.2011 and on 05.06.2012, the Arbitration Clause was invoked and if the date was taken as 19.03.2011, the Arbitration claim is still within the time. It is the further submission of the learned Senior Counsel for the 1st respondent/claimant that the nature of contract, accruing of cause of action and ending of the end period of the contract assumes great significance and since the contract between the parties was a single indivisible contract, the limitation period would start after completion of the guarantee period. It is also contended that the payment is to be made on Accounts and the final payment due and payable only after settlement of the entire Accounts and as such, it is not open to the appellant to split the contract and interpret the same by claiming different period of limitation for different phases of the contract. The learned senior counsel for the 1st respondent/claimant drawing the attention of this Court to the contract as well as the findings of the learned Arbitrator would submit that Claims No.2 to 8 are in relation to extra work and therefore, Article 55 of the Limitation Act would have application and the intention was to treat it separately. As to the proof of damages/loss, Clause No.34 of the General Conditions and clause No.58 of the Special Conditions deals with the same and in respect of deduction, for which the claim of the 1st respondent/claimant has been allowed, assuming that they were aware of the deduction, mere knowledge is not enough and there must be an assertion and denial and further pointed out that the deducted sum was not kept in a Suspense Account ; but appropriated it as Liquidated Damages. It was also the submission of the learned Senior Counsel for the 1st respondent/claimant that delay cannot be attributable to the 1st respondent/claimant and the guarantee came to an end on 19.03.2011 and the Arbitration Clause came to be invoked on 05.06.2012 and as such, the claim was well within time. The learned Senior Counsel, by drawing the attention of this Court to the Award passed by the learned Arbitrator - 2nd respondent herein, would submit that the 2nd respondent - Arbitrator was fair enough to reject the other claims excepting refund of 10% withheld by the appellant on the ground of delay and such findings, came to be rendered on correct appreciation of claim statement, counter statement and other documentary evidences and

in the light of the limited jurisdiction available to this Court under section 37 of the Arbitration Act, the Award passed by the learned Arbitrator/2nd respondent herein and the impugned order passed by the learned Single Judge in dismissing the Original Petition in OP.No.441/2014, may not be interfered with and prays for dismissal of the Original Side Appeal.

24 The learned Senior counsel for the 1st respondent/claimant, in support of his submissions, also placed reliance upon the following judgments:-

[a] 1996 [2] SCC 216 [State of Orissa and Another Vs. Damodar Das] ;

[b] 2011 [Suppl.I] Arbitration Law Reporter 256 [Del] [Shree Forwarding Agency Vs. Cement Corporation of India Ltd] ;

[c] 2014 [2] Arbitration Law Reporter 504 [Del] [National Highways Authority of India Vs. Progressive Constructions Ltd] ;

[d] 2015 [3] SCC 49 [Associate Builders Vs. Delhi Development Authority] ; and

[e] 2015 [5] SCC 739 [Swan Gold Mining Limited Vs. Hindustan Copper Limited].

25 This Court paid its anxious consideration and best attention to the rival submissions as well as perused the materials placed before it in the form of typed set of documents.

26 The questions arise for consideration in this appeal are:-

[1] Whether the claim for refund of 10% of the amount withheld by the appellant on the ground of delay is barred by limitation ? And

[2] To what relief the parties are entitled to?

QUESTION No.1:-

27 The appellant invited Tender vide Tender Notification dated 18.07.2003, inviting lump sum price bids under Two Bid System, for the work of 'New Zero Discharge Plant for Effluent Treatment Plant-III' and 11 months time schedule was fixed. It is not in dispute that the 1st respondent/claimant became the successful bidder and an Agreement was also entered into between them. Clause No.25 of the General Conditions of the Contract speaks about the interpretation of the Contract Documents and Clause No.25.1 says among other things that 'Should there be any discrepancy, inconsistency, error or omission in the contract documents or any of them, the matter shall be referred to the Engineer-in-charge for his decision, which shall be final and conclusive and the Contractor shall carry out the works

according to such decisions....''. Clause No.6 defines Engineer-in-Charge and it shall mean, 'the person designated as such by the Owner and shall include those who are expressly authorised by it act for and on its behalf''. Work is defined in Clause No.7 and it means and includes 'all work to be done and all services to be rendered by the Contractor under the Contract''. Contract is defined in Clause No.14 and it shall mean that 'Agreement between the Owner and Contractor for the execution of the works, however, including therein all contract documents.' Clause No.19 defines Completion Certificate and it shall mean 'Certificate to be issued by the Engineer-in-charge when the works have been completed to his satisfaction''. As per Clause No.20, the period of liability in relation to a work means 'specified period from the date of issue of Completion Certificate up to the date of issue of Final Certificate during which the contractor stands responsible for rectifying all the defects, that may appear in the works''. Clause No.30 of the Tender Documents deals with the Special Conditions of the Contract and as per Sub-clause [1], 'Special Conditions of the Contract shall be read in conjunction with the General Conditions of the Contract, specification of work drawings, any other documents forming part of the Contract, wherever the context so requires''. Clauses No.30.2 and 30.3 of the Special Conditions of the Contract are very important in the context of the case.

28 Clause No.30.2 says that 'notwithstanding the subdivision of the document into these separate sequences and volumes every part of each shall be deemed to be supplementary of every other part and shall be read with, and into the contract so far as it may be practicable to do so''. Clause 30.3 reads that 'where any portion of the general conditions of contract is repugnant to or at variance with any provisions of the Special Conditions of contract, then the provisions of the special conditions of the contract shall be deemed to over-ride the provisions of the General conditions of contract and shall be the extent of such repugnancy or variations prevail.' Clause 34 of the Special Conditions is also important and it speaks about compensation for delay and it is relevant to extract the same:-

34.Compensation for delay:-

time allotted for carrying out the work as entered in the tender shall be strictly observed by the Contractor the work shall throughout the stipulated period of the Contract be proceeded with all the diligence [time being deemed to be the essence of the contract] and the Contractor shall pay to the Owner as compensation the

amount equal to 1 percent or such smaller amount as the Engineer-in-Charge whose decision in writing shall be final, may decide on the amount of the estimated cost of the whole work as shown in the tender for every week that the work may remain incomplete as per the time schedule, subject to a maximum compensation of 10 percent of the total cost of the whole work after which period action will be taken by the Engineer-in-Charge under the provisions of the Contract. To ensure good progress during the execution of the work, the contractor shall be bound, in all cases in which the time allowed for any work exceeds one month or complete one-fifth of the work before one-fourth of the time allowed under the contract has elapsed, three-eighths of the work before one-half of such time has elapsed and three-fourth of work before three-fourths of such time has elapsed, in the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount as stipulated above. Compensation amounting to the whole of his security deposit, and the liability of the Contractor for past and future compensation shall remain unaffected in the event of the Oner putting in force either of the powers [a] or [c] vested in him under the proceeding clause he may, if he so desires, take possession of all or any tools, plant materials and stores in or upon the works or the site thereof or belonging to the Contractor or procured by him and intended to be used for the execution of the work or any part thereof paying or allowing for the same in account at the contract rates or in case of these not being applicable at current market rates to be certified by the Engineer-in-Charge whose certificate thereof shall be final, otherwise the Engineer-in-Charge may give notice in writing to the Contractor or his clerk of the works, foreman or other authorised agent, requiring him to remove such tools, plant materials or stores from the premises [within a time to be specified in such notice], and in the event of the Contractor failing to comply with any such requisition, the Engineer-in-Charge may remove them at the Contractor's expenses or sell them by auction or private sale on account of the Contractor and at his risk in all respects without any further notice as to the date, time

and place of sale and the certificate of the Engineer-in-Charge as to the expense of any such removal and the amount of the proceeds and expense of any such sale shall be final and conclusive against the Contractor.''

29 Clause No.70 deals with Alterations in specifications and designs and Extra works and Claim Nos.2 to 8 pertain to the said clause. Clause No.74 speaks about inspection of works by Engineer-in-Charge and gives the said personnel, full power and authority to inspect the works at any time, wherever in progress, either at site or at the Contractor's premises wherever situated, of any person, Firm or Corporation, where work in connection with the contract may be in hand'. Clause No.81 speaks about the period of liability from the date of issue of Completion Certificate and it is relevant to extract the same:-

'81 Period of Liability from the date of issue of Completion Certificate:-

81.1 The Contractor shall guarantee the installation work for a period of 12 months from the date of issue of completion certificate. Any damage or defect that may arise to be undiscovered at the time of issue of completion certificate, connected in any way with the equipment or materials supplied by him or the workmanship, shall be rectified or replaced by the contractor at his own expense as deemed necessary by the Engineer-in-Charge or in default, the Engineer-in-Charge may cause the same to be made good by other workmen and deducted expenses [of which the certificate of shall be final] from any sums that may be then or at any time thereafter, become due to the contractor or from his security deposit or the proceeds of sale thereof, or of a sufficient portion thereof.

81.2 If the contractor feels that any variation in work in quality of materials or proportions would be beneficial or necessary to fulfill the guarantee called for, he shall bring this to the notice of the Engineer-in-Charge in writing.

81.3 The work will not be considered as complete and taken over by the owner until the fill in place at site has been tested and

approved by the Engineer-in-Charge. All tests shall be carried out by the Contractor at his own cost and as directed by the Engineer-in-Charge.''

30 Section 85 of the General Conditions of the Contract deals with Certificates and Payments and Clause No.87 speaks about the payment of Contractor's bill. Clause No.89 speaks about the Running Account Payment to be regarded as Advances and Clause 92 speaks about the Completion Certificate and it is relevant to extract the same:-

92 Completion Certificate:-

92.1 Application for Completion Certificate:-

When the contractor fulfills his obligation under clause 83, he shall be eligible to apply for completion certificates.. The contractor may apply for separate completion certificate in respect of each such portion of the work by submitting the completion documents along with such applicable for completion certificate.

The Engineer-in-Charge shall normally issue to the Contractors the Completion Certificate within one month after receiving an application therefore from the contractor after verifying from the completion document and satisfying himself that the work has been completed in accordance with and as set out in the construction and erection drawings and the contract documents.

The contractor after obtaining the Completion Certificate, is eligible to present the final bill for the work executed by him under the terms of contract.

92.2 Within one month of the completion of the work in all respects, the contractor shall be furnished with a certificate by the Engineer-in-Charge of such completion but no certificate shall be given nor shall the work be deemed to have been executed until all scaffolding surplus materials and rubbish is cleared of the site completely nor until the work shall have been measured by the Engineer-in-Charge whose measurements shall be binding and conclusive. The work will not be considered as complete and taken over by the owner, until

all the temporary works, labour and staff colonies etc., constructed are removed and the work site cleared to the satisfaction of the Engineer-in-Charge.

If the contractor shall fail to comply with the requirements of this clause on or before the date fixed for the completion of the work, the Engineer-in-Charge may at the expenses of the contractor remove the scaffolding, surplus materials, and rubbish and dispose of the same as he thinks fit and clean of the dirt as aforesaid, and the contractor shall forthwith pay the account of all expenses so incurred and shall have not claim in respect of any such scaffolding or surplus materials as aforesaid except for any sum actually realised by the sale thereof.

92.3 Completion Certificate Documents:-

For the purpose of clause 92, the following documents will be deemed to form the completion documents:-

[i] The technical documents according to which the work was carried out.

[ii] Three sets of construction drawings showing therein the modification and corrections made during the course of execution signed by the Engineer-in-Charge.

[iii] Completion certificate for embedded and covered up works.

[iv] Certificates of final levels as set out for various works.

[v] Certificates of tests performed for various works.

[vi] Materials appropriation statement for the materials issued by the Owner for the works and list of surplus materials returned to the Owner's store duly supported by necessary documents.'

31 Clause 93 of the General Conditions deals with the final decision and the Final Certificate and Clause No.94 speaks about the Certificate and Payments and it is relevant to extract

the same:-

'''94 Certificate and Payments, No evidence of completion:-

Except the final certificate, no other certificates or payment against a certificate or on general account shall be taken to be an admission by the Owner of the due performance of the contract or any part thereof or of occupancy or validity of any claim by the Contractor.'

32 Special Conditions of Contract were also put in place and Clause No.58 deals with the Compensation for delay and it is relevant to extract the same:-

''58 Compensation for delay:-

Time allowed for carrying out the work as entered in the tender shall be strictly observed by the Contractor, the work shall throughout the stipulated period of the Contract be proceeded with all the diligence [time being deemed to be the essence of the contract] and the Contractor shall pay to the Owner as compensation, an amount equal to 1 percent or such smaller amount [as the Engineer-in-Charge whose decision in writing shall be final] may decide on the amount of the estimated cost of the whole work as shown in the tender, for every week that the work may remain incomplete as per the Time of Completion, subject to a maximum compensation of 10 percent of the total cost of the whole work after which period, action will be taken by the Engineer-in-Charge under the provision of the Contract. To ensure good progress during the execution of the work, the Contractor shall be bound.

[i] To complete 10% of the work before one fourth of the time allowed under the contract has elapsed or else 1.5% of the Estimated cost of work shall be deducted from the Contractor's bill towards compensation for delay.

[ii] to complete 40% of the work before one-half of the time allowed under the contract has elapsed or else the Contractor shall pay to the owner as compensation, an amount equal to 1% of the Estimated cost of the work for every week that the work is delayed subject to a maximum of the estimated cost of the work [inclusive of the amount deducted as per [i] above].

[iii] To complete 75% of the work before

three-fourth of the time allowed under the contract has elapsed or else the contractor shall pay to the owner as compensation, an amount equal to 1% of the estimated cost of the work for every week that the work is delayed subject to a maximum of 8% of the estimated cost of the work [inclusive of the amount deducted as per [ii] above].

[iv] However, even though the amount towards compensation for delay are deducted at various stages of the work, the total compensation for delay shall be limited to a maximum of 10% of the total cost of the work.

[v] If the contractor complete the entire work within the stipulated time of completion, amount withheld / paid as mentioned above, shall be returned to the contractor.'

33 Clause 65 of the Special Conditions says that ''if the contractor fails to complete the work and the order is cancelled, the amount due to the Contractor on account of work executed, if payable, shall be paid only after due recoveries as per the provisions of the contract and that too after alternative arrangements to complete the work has been made.'' There were Annexures to special conditions of contract and as per Annexure-I, 11 months time schedule was fixed for completion of work. Annexure-IV speaks about the terms of payment and schedule of lumpsum prices.

34 The 1st respondent/claimant also executed the Performance Bank Guarantee marked as Ex.C.95. Under Ex.C.79, dated 31.07.2006, the 1st respondent/claimant has invited the attention of the appellant to the retention of 10% of the contract amount retained by passing RA.Bill No.19 towards penalty and requested them to recommend the waiver of the said penalty, considering the reasons for delay which were beyond their control and also highlighted the major ones. Under Ex.C.83 dated 03.01.2007, the 1st respondent/claimant has given a 'No Claim Certificate' and a perusal of the same would disclose among other things, the schedule completion date was fixed on 30.12.2004 and the actual date of completion was on 19.12.2005 and a Certification was also given by them to the effect that other than the amount not paid equivalent to LD [Rs.1.04 Crores only] and the bill amount mentioned below, no other claim is pending from this Contract and it also speaks about the clarification as mentioned above and the certification was also given to the effect that payment against the following bills, i.e., RA.Bill No.18 [amount held due to non submission of spares] - Rs.29, 45, 060/- and RA.Bill No.19 - Rs.22,73,000/-,

shall be full and final settlement of the work executed against the subject contract. Under Ex.C.84, dated 11.01.2007, the 1st respondent/claimant addressed a letter to the appellant stating about the reasons for delay which were beyond their control and pointed out that ''No Due Certificate'' has already been sent and requesting them to release payments at the earliest. Under Ex.C.86 dated 31.08.2007, the 1st respondent/claimant addressed a letter to the appellant praying for waiver of liquidated damages and it is relevant to extract the same:-

''Subject:-New Zero Discharge Plant for 3 MMTPA Expansion-Waiver of Liquidated damages.

Ref: [1]Work Order No.2003-14/W/003.

[2]Our Letter IEI/DSM/CPCL/052 dated 31.07.2006.

[3]Our Letter IEI/C1020017/CPCL/1234 dated 11.01.2007.

[4]Our Letter KLB / IEI / C1020017 / CPCL/1250 dated 22.02.2007.

[5]Our Letter IEI/C1020017/1255 dated 13.04.2007.

Dear Sir,

This is with reference to the said subject and subsequent letters whose references has been mentioned above we hereby request you to please waive off the liquidated damages for the job executed against order number 2003-14/W/003.

We thank CPCL for giving us the opportunity to be part of the truly Zero Discharge Plant which has ini built latest technologies in the industry and installed equipments/systems are of high standards and quality engineered and supplied as per the requirements of CPCL without whose involvement and suggestions it would have been difficult to have conceived and executed this job. We are sure you too would agree that the plant is giving super results than and you are getting very good quality of water for your beneficial use than what you were getting before it was installed.

We earnestly request you to please consider out plea sympathetically and release our payment held against liquidated damages.

Thanking you and assuring you our best of services at all times we remain.''

35 Under Ex.C.89 dated 18.05.2011, the 1st respondent/claimant expressed their anguish as to the non-responsible attitude on the part of the appellant in respect of the detailed letter dated 01.12.2008 marked as Ex.C.88 and in paragraph No.6, there is also a mention about the extension of time and the release of withheld 10%, amount of Rs.1,04,36,120/- and made a total claim of Rs.5,35,45,504/- which include the release of the withheld 10% of the amount towards compensation for delay and also requested the appellant herein to settle the said claim on or before 18.06.2011, failing which they will invoke the Arbitration Clause as per Clause No.102. Under Ex.C.90 dated 05.06.2012, for invocation of the Arbitration Clause, notice was issued by the 1st respondent/claimant, requesting the appellant herein to nominate an Arbitrator. Under Ex.C.91 dated 05.11.2012, the 1st respondent/claimant has reminded the appellant about the invocation of the Arbitration Clause and requested to appoint an Arbitrator and pointed out that if Arbitrator is not appointed on or before 20.11.2012, they will nominate the Arbitrator. Accordingly the Appointing Authority of the appellant company, vide letter dated 20.12.2012, nominated the Hon'ble Mr. Justice K.Govindarajan, former Judge of this Court, as the Arbitrator in terms of Clause 102 of the General Conditions of the Contract and the claim petition was filed on 14.02.2013, seeking an Award for a sum of Rs.6,74,61,843/- with interest at the rate of 18% per annum on the principal amount of Rs.5,40,18,977/-. The 1st respondent/claimant quantified the claim under 9 Heads. As already pointed out, the learned Arbitrator, vide Award dated 20.03.2014, has rejected Claims No.2 to 8, granted the relief in respect of Claim No.1 and also awarded interest at the rate of 12% per annum between 20.03.2011 and 31.05.2014 and the challenge made to the said Award by the appellant herein by filing OP.No.441/2014 also came to be dismissed vide impugned order dated 13.12.2017 and hence this appeal.

36 The learned Arbitrator, in paragraph No.24[D], has recorded a finding that both the 1st respondent/claimant and the appellant herein [respondent in the claim petition] contributed for the delay in completing the plant and the 1st respondent/claimant alone cannot be blamed for the delay in execution and completion of the project and answered issued No.2 by holding that the appellant herein/respondent is not justified in levying Liquidated Damages on the 1st respondent/claimant. In paragraph No.26 of the Award, the 2nd respondent - learned Arbitrator, recorded the finding that for levying Liquidated Damages, the appellant/respondent has traced the right only under Clause 34 of the General Conditions of 58.0 of the Special Conditions of the Contract. According to the said clauses, the Engineer-in-Charge, has to decide the quantum

of compensation as to whether it is 1% or such smaller amount, as the amount of the estimated cost of the whole work for every week and the said exercise was not done and no document is available to establish that the Engineer-in-Charge has done such an exercise and such decisions, if any, was communicated to the 1st respondent/claimant and that no evidence is available to point out that who fixed the Liquidated damages at 10% before recovering the same from the 1st respondent's/claimant's bill and the appellant has not established that the quantum of the Liquidated Damages at 10% was fixed by the Engineer-in-Charge and it was admitted before the Arbitral Tribunal that no such material is available. Therefore, the 2nd respondent-learned Arbitrator concluded that levy and recovery of Liquidated Damages, without following the procedure contemplated in the Clauses, cannot be sustained.

37 The 2nd respondent - learned Arbitrator dealt with the issue regarding limitation in paragraph No.31 of the Award and extracted the relevant dates and also taken into consideration the Articles 18, 55 and 113 under the Schedule to the Limitation Act, 1963.

38 The submission made before the 2nd respondent-learned Arbitrator by the 1st respondent/claimant was that though the project came to be completed by them on 19.12.2005, the contract came to an end only after their obligation as contemplated under the contract is discharged and guarantee as per the contract came to an end only on 19.03.2011 and the 1st respondent/claimant invoked the Arbitration Clause on 05.06.2012 and therefore, it is well within the period of limitation.

39 The 2nd respondent - learned Arbitrator formulated an incidental question, i.e., when the contract period came to an end - whether on the date of completion, i.e., on 19.12.2005 or whether on the date of expiry of the guarantee period, i.e., on 19.03.2011 [5 years from Performance Guarantee Trial Run which was amended in the Meeting held on 19.03.2006]. The 2nd respondent - learned Arbitrator has also noted that there is no specific clause in the Letter of Acceptance or in the Tender Documents specifically mentioning the date of the end of Contract. The 2nd respondent - learned Arbitrator also took note of Clause No.48.7 which was added in Item No.14, to Annexure - II and recorded a finding that the obligation to maintain such warranty upto 19.03.2011 as per the Letter of Acceptance dated 25.02.2004 and from the above, the contractual obligation of the 1st respondent/claimant under the Contract would come to an end only on 19.03.2011.

40 The 2nd respondent - learned Arbitrator has also taken into consideration Article 113 - Residuary Article and recorded

a finding that as per Clause 58 of the Special Conditions of the Contract, it is for the Engineer-in-Charge to decide and such decision shall be in writing and shall be final and admittedly, no such decision was made by the Engineer-in-Charge and communicated to the 1st respondent/claimant and no document was also produced before the Tribunal and with respect of quantum of Liquidated Damages, the only document made available was Ex.R6 dated 01.10.2007, titled as the Job Completion Certificate and it cannot be taken as the order contemplated under the above said clauses. The 2nd respondent - learned Arbitrator concluded that the right to sue does not accrue till such decision was received from the Engineer-in-Charge and though the 1st respondent/claimant was repeatedly communicating with the appellant as to the refund of the Liquidated Damages under Exs.C.83 to C.89, the appellant never rejected the same, denying the claim for the refund of the amount deducted and no such communication was placed before the Tribunal and in the interregnum, the contract came to an end on 19.03.2011. It was also pointed out by the 2nd respondent - learned Arbitrator that the 1st respondent/claimant vide letters dated 05.06.2012 and 05.11.2012 requested the appellant to initiate Arbitration proceedings and the was well within the period of three years from 19.03.2011 and till such time, the obligation on the part of the 1st respondent/claimant subsists to get refund of the Liquidated Damages and hence, claim No.1 is barred by limitation and accordingly, passed the Award.

41 The learned Single Judge, in the impugned order dated 13.12.2017 made in OP.No.441/2014, found that the Final Completion Certificate has not been issued by the Engineer-in-Charge and technically, as per Clause No.93 of the Contract, there is no completion till such a certificate is issued and further taken into consideration the new Clause in Clause No.48.7-Membrane Guarantee and Replacement and held that the period of five years expired only on 19.03.2011 and reference to arbitration was made on 05.06.2012 and therefore, the claim petition is well within time. The learned Judge has also considered the scope of section 34 of the Arbitration Clause and by placing reliance upon Swan Gold Mining Limited Vs. Hindustan Copper Limited reported in 2015 [5] SCC 739 and Navodaya Mass Entertainment Limited Vs. V.J.M. Combines reported in 2015 [5] SCC 698, has held that the findings rendered by the 2nd respondent - learned Arbitrator cannot said to be perverse and having found no merits in the Original Petition, dismissed the same vide impugned order dated 13.12.2017.

42 The Job completion Certificate is marked as Ex.R.16 and it was issued by the appellant and the contents of the same would disclose that the date of completion was on 30.12.2004 and the date up to which the defect liability is valid is 19.03.2007

and the actual date of completion was on 19.12.2005 [it has been indicated as PGTR 19.03.2006]. It also reads that the period of defect liability of plant is one year ; UF Membrane - 5 years and RO Membrane-3 years and in the remarks column, in Serial No.2, it has been stated that ''the minimum LD 10% of the work order value has been recovered on 18th RA Bill''. Ex.R.16 was signed by the Senior Manager [Projects] on 24.09.2007 ; Engineer-in-Charge on 01.10.2007 and the General Manager [Projects] on 01.10.2007.

43 Under Ex.C.83-No Claim Certificate issued by the 1st respondent/claimant on 03.01.2007, it has been indicated that other than the amount not paid equivalent to LD [Rs.1.04 crores only] and the bill amount mentioned below, no other claim is pending from the Contractor.

44 On behalf of the 1st respondent/claimant, one Thiru T.D.Srinivasan, was examined as C.W.1 and he has also filed his Proof Affidavit and he would state that the plant was commissioned and operational ever since 31.08.2005 and in paragraph No.64, he would state that the plant was operational since 31.08.2005 and the appellant herein was using the water since 31.08.2005. PTR was completed on 19.12.2005 and as per the Job Completion Certificate of the appellant herein dated 01.10.2007, the actual date of completion of the plant was on 19.12.2005. In paragraph No.65, it is stated that the respondent [appellant herein] had deducted and withheld Rs.1.043 Crores amounting to 10% of the contract as compensation for delay and the 1st respondent/claimant is entitled to this sum in December 2005 when the entire plant was completed and however, the appellant/respondent has wrongly deducted and withheld the aforesaid amount and hence, in addition to the payment of the above said amount, the 1st respondent/claimant is entitled to 18% interest per annum on the said amount from December 2005 till the date of payment. Apart from filing proof affidavit, he was cross-examined in lieu of the examination in chief.

45 On behalf of the appellant, Mr.N.Senthil Nathan, Deputy Manager [Project - Instruments] was examined and he has filed his proof affidavit in lieu of chief examination, wherein he would state among other things that they withheld the amount of Rs.1,04,36,120/- towards Liquidated Damages which amounts to 10% of the contract value and it is the maximum amount they are permitted to withheld towards the Liquidated Damages in terms of Clause 34 of the General conditions of the contract. R.W.1 was cross-examined and he would depose that the Performance Test Run for the plant commenced on 17.12.2005, was completed on 19.12.2005 and the total completion of the Performance Test Guarantee was on 19.03.2006.

46 In the decision reported in 1991 [4] SCC 1 [Gurdev Singh's case] [cited supra], the phrase 'right to sue' occurs in Article 113 of the Limitation Act, 1963, came up for consideration and in paragraph No.6, it is held that 'the words 'right to sue' means the right to seek the relief by means of legal proceedings. Generally, the right to sue occurs only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in suit is infringed or when there a clear or unequivocal threat to infringe that right by the defendant against whom the suit is instituted.'

47 The learned counsel for the appellant, by drawing the attention of this Court to the judgments reported in [1] 2004 [6] SCC 254 [Kusum Ingots and Alloys Ltd case] [cited supra], [2] 2007 [11] SCC 335 [Alchemist case] [cited supra], would submit that in the said decisions, the meaning of 'cause of action' was interpreted. While deciding the cause of action, the substance of the matter and not the form thereof, has to be considered and even if a small fraction of the cause of action arises within the jurisdiction of the Court, the Court would have territorial jurisdiction to entertain the suit/petition and the same by itself any not considered to be determinative factor to decide the matter on merits and in appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the Doctrine of Forum Convenience and reiterated the submission that since the project had to be completed on 19.12.2005, the right to sue accrue to the 1st respondent/claimant from December 2005 and the claimant became aware of it under Ex.C.83 dated 01.10.2007 and at least from that date, the limitation has commenced and therefore, the invocation of the Arbitration Clause as well as the claim made before the Arbitral Tribunal is hopelessly barred by limitation.

48 In the decision reported in 2004 [2] SCC 747, [West Coast Paper Mills case] [cited supra], the starting point of limitation contemplated under section 3 came up for consideration as well as the distinction between Articles 58 and 113 of the Limitation Act, 1963 and it is held that in terms of Article 58, the period of limitation would be reckoned from the date on which the cause of action arose first and under Article 113, the period of limitation would be differently computed depending upon the last day when the cause of action therefor arose and despite the rigors of section 3 of the Limitation Act, the provisions therefor are required to be considered in a broad-based liberal manner.

49 It is the submission of the learned counsel for the 1st respondent/claimant that the Performance Guarantee is only for Membranes and since 5 years were given as defect liability, it

expired on 19.03.2011 and as such, invocation of the Arbitration Clause and the filing of claim statement was well within the time and since the cause of action is a bundle of facts, the cause of action accrued to the 1st respondent/claimant only on that date and therefore, the submission made by the learned counsel for the appellant in that regard deserves outright rejection.

50 In the decision reported in 1996 [2] SCC 216 [Damodar Das case] [cited supra], it is held that the cause for arbitration arises as soon as the dispute or difference arises, on an unequivocal denial of claim of one party by the other party, as a result of which, the claimant requires right to refer the dispute to arbitration. It is further held that the claim for arbitration must be raised as soon as the cause of arbitration arises as in the case of the cause of action arising in a civil suit.

51 The relevant clauses in the General Conditions of Contract and the Special Conditions of Contract, as extracted in the previous paragraphs would disclose that the interpretation of contract documents shall be referred to the Engineer-in-Charge whose decision shall be the final conclusion and that the contractor [1st respondent] shall carry out the work in accordance with such decisions and in the absence of agreement and subject to the provisions of sub-clauses 25.2 relating to the omitted particulars the question of any additional payments thereof, shall be referred to in writing to the Engineer-in-Charge under the relevant clauses. The Special Conditions of Contract shall be read in conjunction with the General Conditions of Contract and if there is any variance between those conditions, then the provisions of the Special Conditions of Contract shall deem to over-ride the provisions of the General Conditions of Contract.

52 Clause No.34 and Section 4 of the General Conditions of Contract deals with special obligations and as per Clause 34 [extracted supra], the time allowed for carrying out the work as entered in the tender, shall be strictly followed by the Contractor [1st respondent] throughout the stipulated period of Contract [time being deemed to be the essence of contract]. The contractor shall pay to the owner as compensation the amount equal to 1% or such smaller amount as the Engineer-in-Charge, whose decision in writing shall be the final..... Clause No.92 speaks about the Completion Certificate and as per sub-clause [1], the contractor may apply for a separate Completion Certificate in respect of each such portion of the work by submitting the completion documents along with such application for completion certificate and the Contractor after obtaining the Completion Certificate, is eligible to present the final

bill for the work executed by him under the terms of Contract. Sub-Clause [2] says that the work will not be considered to be completed and taken over by the owner, until all temporary works, labour and staff colonies etc., constructed are removed and the work site cleared to the satisfaction of the Engineer-in-Charge. Clause No.47.3 of the Special Conditions of Contract deals with Performance Guarantee Test and Penalty and Clause 48.6 deals with the process of liabilities. New Clause 48.7 came to be added in the Special Conditions of Contract which deals with the subject of Membrane Guarantee and Replacement and deals with UF Membranes and RO Membranes and for both Membranes, it is stipulated that the Membrane Guarantee will be made from 10% of the Guarantee PPG given by bidders for the entire project for the first year which will be available till the defect liability period. Therefore, incidentally, it has to be decided that what was the defect liability period, as contemplated under the Special Conditions of Contract.

53 As per the Job Completion Certificate dated 01.10.2007, the Senior Manager signed the same on 29.04.2007 ; Engineer-in-Charge [Projects] as well as the General Manager [Projects] signed it on 01.10.2007 and the period of defect liability for plant was mentioned as one year ; for UF Membrane-5 years and for RO Membrane-3 years and the date upto which the defect liability is valid was mentioned as 19.03.2007. Under Ex.C.83 - No Claim Certificate, dated 03.01.2007, signed by the Authorised Signatory of the 1st respondent/claimant and under Ex.C.86 dated 31.08.2007, the 1st respondent/claimant made a request for release of payment held against Liquidated Damages for the job executed against the Order No.2003-14/W/003 and it was followed by another communication under Ex.C.87 dated 01.11.2007, praying for waiver of the Liquidated Damages. Under Ex.C.83, dated 03.01.2007 of the 1st respondent/claimant, other than the amount not paid equivalent to the Liquidated Damages of Rs.1,04,36,120/- [referable to the Liquidated Damages], no other claim is pending from his contract and in the said certificate, the actual date of completion was also indicated as 19.12.2005.

54 The Arbitral claim was in respect of 9 claims and except claim No.1 and partial allowing of claim No.9, the rest of the claims were rejected by the learned Arbitrator - 2nd respondent, for which no challenge has been made. Admittedly, while issuing the No Claim Certificate, the 1st respondent/claimant has indicated about the retention of the Liquidated Damages of Rs.1,04,36,120/- and is followed by Ex.C.84 dated 11.01.2007 as well as Ex.C.86 dated 31.08.2007 wherein the 1st respondent/claimant made a specific request to release the payment held against the Liquidated Damages. The 2nd respondent - learned Arbitrator held that the right to sue as

regards claim No.1, can be computed from 19.03.2011 i.e., end of the validity period of Performance Bank Guarantee of one of the items supplied under the contract. It is pertinent to point out at this juncture that as per the Job Completion Certificate dated 01.10.2007, referred to above, the defect liability period was mentioned as 19.03.2007 and it was also indicated in the remarks column that the maximum Liquidated Damages at the rate of 10% of the work value has been recovered under the 18th RA Bill. No doubt, there is no express communication from the appellant as to the rejection of the said claim ; but the fact remains that the 1st respondent/claimant was persistent and in fact, made repeated request to the appellant to waive the said penalty and release the retained amount right from January 2007. Therefore, the validity period of the Performance Bank Guarantee cannot be construed as the commencement period for limitation for the reason that in the event of non-fulfillment of the obligations, it was open to the appellant to invoke the Bank Guarantee and recover the amount. It is once again to be pointed out at this juncture that Claim Nos.2 to 8 were rejected by the 2nd respondent - learned Arbitrator and the said portion of the Award has also become final.

55 The 1st respondent/claimant under Ex.C.89 dated 18.05.2011, in paragraph No.7, has given the itemwise of the claim as well as the value and 7.6 relates to release of withheld amount towards compensation for delay amounting to a sum of Rs.1.043 Crores and odd and also indicated that if claims are not settled on or before 18.06.2011, they shall invoke the Arbitration Clause as per Clause No.102 and however, they invoked the Arbitration Clause only on 05.06.2012, requiring the appellant to nominate an Arbitrator and accordingly, the 2nd respondent - learned Arbitrator was nominated.

56 Under Residuary Article 113 of the Limitation Act, 1963, where there is no prescribed period provided elsewhere in the suit and the suit for such relief is to be filed and the period of limitation is within three years from the date when the right to sue accrues.

57 In AIR 1930 Privy Council 270 [Mt. Bolo Vs. Mt. Koklan], law has been laid down that ''there can be no right to sue until there is a accrual of the right asserted in the suit and its infringement or at least a clear or unequivocal threat to infringe that right by the defendant against whom the suit is instituted.''

58 The Hon'ble Supreme Court of India, in the decision reported in AIR1960 SC 335 [Mst.Rukhmabai Vs. lala Laxminarayan], while dealing with with Article 120 of the Limitation Act, observed that, ''every threat by a party to such

a right, however, ineffective or innocuous it may be, cannot be construed to be clear and unequivocal threat so as to compel him to file a suit and whether the particular threat gives rise to a compulsory cause of action depends upon the question whether the threat effectively invades or jeopardizes the said right.''

59 The Apex Court, in the decision reported in AIR 1988 SC 1007 [Major Retd. Inder Singh Rakhi Vs. Delhi Development Authority], has held that 'the period of limitation has to be computed from the date of claim is asserted and payment is denied and there is a denial of repudiation of the claim.''

60 Even as per the claim petition, the claim was made under 9 heads and claim No.1 pertains to the present claim and claim No.9 pertains to the interest on the said claim and except Claims No.1 and 9, rest of the claims were rejected by the 2nd respondent - learned Arbitrator. Those claims are divisible and despite rejection of the same, the 2nd respondent - Arbitrator has awarded Claim No.1 and granted interest under Claim No.9. Admittedly, the 1st respondent/claimant has started making claim for release of the withheld amount right from January 2007 and issued the final notice on 18.05.2011 and invoked the Arbitration Clause only on 05.06.2012, which is well beyond the period of limitation period contemplated under Article 113.

61 It is the assertion of the learned Senior Counsel appearing for the 1st respondent/claimant that the scope of interference in the Arbitral Award is very limited and since the learned Single Judge in the well considered order, has dismissed the Original Petition filed by the appellant and thereby, confirmed the Award, this Court, in exercise of its jurisdiction under section 37 of the Arbitration Act, may not interfere with the same. No doubt, the 2nd respondent-learned Arbitrator is well within the jurisdiction to decide as to the construction of the terms of the contract. In Associate Builders Vs. Delhi Development Authority reported in 2015 [3] SCC 49, the Apex Court has held that, 'the contravention of substantive law of India would result in the death knell of an arbitral award and violation of Indian Statutes, ie., the Award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest.' The findings rendered by the 2nd respondent - Arbitrator as to the starting point of limitation given in the Award, in the considered opinion of the Court, is an error apparent on the face of the record, which would also amount to patent illegality for the reason that despite the assertion of the 1st respondent/claimant to release the Liquidated Damages right from January 2007 and despite indicating the same even in the No Claim Certificate dated 03.01.2007, it was not paid and notice under Ex.C.89, raising claim, came to be issued only on 18.05.2011 and though the said

notice requesting the appellant to settle the claim on or before 18.06.2011, the invocation of the Arbitration was made under Ex.C.90, only on 05.06.2012. Therefore, in the considered opinion of the Court, Claim No.1 is hopelessly barred by limitation and since the learned Arbitrator-2nd respondent has awarded the amount under Claim No.1 and granted interest under Claim No.9, the Award is liable to be set aside.

QUESTION No.2:-

62 In the result, the Original Side Appeal is allowed and the impugned order dated 13.12.2017 made in OP.NO.441/2014 as well as the Award dated 20.03.2014 passed by the 2nd respondent-Arbitrator, are set aside and the claim petition is dismissed. However, in the circumstances, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

AP

To

1. The Sub Assistant Registrar,
Original Side Section,
High Court, Madras-104.

+1cc to Mr.R.Senthilkumar, Advocate, S.R.No.89404
+2cc to Mr.G.Sivashandaran, Advocate, S.R.No.89715

O.S.A.No.204/2018

EV (Co)
CS/01/03/2019