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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 16th July, 2018

Date of decision : 30th July, 2018

+ **CS (COMM) 1033/2016 & CC(COMM) 57/2017**

KLA CONSTRUCTION TECHNOLOGIES PVT LTD

..... Plaintiff

Through: Mr. Arjun Dewan, Advocate.
versus

**CHADHA SUGAR AND INDUSTRIES PVT LTD
AND ANOTHER**

..... Defendants

Through: Ms. Biji Rajesh and Mr. Nayar
Dubey, Advocates for Mr. Gaurang
Kanth, Advocate for Defendant No.1

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The Plaintiff- M/s KLA Construction Technology Pvt. Ltd. (*hereinafter 'KLA'*) filed the present suit for recovery of a sum of Rs.22,49,538/- against M/s Chadha Sugar and Industries Pvt. Ltd-Defendant No.1 (*hereinafter 'Chadha'*) and M/s Adie Broswn Breweries Pvt. Ltd.– Defendant No.2 (*hereinafter 'Adie Broswn'*). According to KLA, Adie Broswn wanted to set up a Brewery in Batala, Gurdaspur District, Punjab and it floated a tender on 20th August, 2010. The Plaintiff had submitted a bid for a sum of Rs.13,57,95,046/- in response to the tender. Work order dated 16th September, 2010 was awarded to the Plaintiff for a sum of Rs.12,80,00,256/-. KLA claims that due to the excellent services provided by it, Chadha also decided to award a contract for construction of a Boiler Turbine in May, 2011. On 23rd June, 2011, in respect of the Boiler Turbine contract, Chadha a sum of Rs.29,40,000/- to KLA, which was accepted vide

e-mail dated 23rd June, 2011. Though, no formal work order was released, KLA started execution of the work order however, payments were not made. According to KLA, the terms of this work order for the Boiler Turbine were the same as the earlier work order dated 16th September 2010, which was subsisting between the parties. Vide e-mail dated 11th July, 2011, KLA demanded the payment for the completed work which was not made. Running bills were raised on 30th August, 2011 for a sum of Rs.61,74,285/- for the Boiler Turbine. Three cheques for sum of Rs.4,90,000/- each were issued by Chadha. After crediting the amount of the said cheques, outstanding amount of Rs.17,64,285/- remained unpaid. Further bills were raised on 22nd November, 2011 for a sum of Rs. 4,61,438/-. Meetings were held between the parties, however, payments were not released. Finally, in respect of work order dated 23rd June, 2011, an outstanding amount of Rs.22,49,538/- was not paid which led to the filing of the present suit. KLA also submitted that even in respect of the first work order with Defendant No. 2 for the construction of brewery, the payments were not made in time and arbitration proceedings are pending before a Ld. Sole Arbitrator.

2. The Defendants filed common written statements. They also preferred a counter claim being CC (Comm) 57/2017. In the said counter claim, it was claimed by Chadha that various advance payments were made by it to KLA but the work was wholly unsatisfactory. It is admitted by Chadha that the terms and conditions of the contract dated 16th September, 2010 were applicable even for the Boiler Turbine contract dated 23rd June, 2011. Chadha also claimed that for reasons unknown, KLA discontinued the work in October, 2011 and left the work site, which led to Chadha engaging various other contractors who executed the works. Thus, the argument of

Chadha was that three outside contractors were engaged by it and the total amount paid to them was a sum of Rs.25,66,297/-. The counter claim was filed on the basis that the Boiler Turbine was to be installed for a power plant from where in addition to the existing power plant of Chadha an additional 2 MW of electricity was to be exported. Since the Plaintiff abandoned the work, the loss for 2 MW of power on a daily basis was payable by KLA.

3. Accordingly, a counter claim for a total sum for five months of Rs.2,91,13,600/- was claimed. Thus, the total sum of Rs.3,16,79,897/- was made out as a counter claim by the Defendant No.1. The Plaintiff has thereafter filed the present application under Order VII Rule 11 claiming that the counter claim is barred by limitation.

4. It is the case in the application under Order VII Rule 11 CPC that if the date of abandonment is taken, as claimed by the Defendant No.1 to be October, 2011, the filing of the counter claim on 27th May, 2015 is completely barred. It is submitted that the counter claim is delayed inasmuch as per Article 55 of the Limitation Act prescribes a period of three years and a claim for compensation has to be filed within the said three year period. On the other hand, it is argued by the counter claimant that Article 55 does not apply as there is a continuing cause of action due to breach of contract by KLA. It is submitted by the counter claimant that the cause of action for filing the counter claim arises only after the third party contractors who had been engaged for completing the work, had executed the work and the power plant was commissioned. Since the power plant was commissioned only in April, 2013, the cause of action arises only upon the final execution of the entire work. Thus, the counter claim is within limitation.

5. The facts relevant to the application are not seriously disputed. It is not disputed that KLA left the construction site in October, 2011. It is also not disputed that the power plant was finally commissioned in April, 2013. However, the question that arises for consideration is as to whether the commission of the power plant constitutes a cause of action for filing the counter claim or whether the abandonment by KLA was a complete cause of action itself.

6. The counsel for the Plaintiff has relied on the following judgments in support of his case: *Delta Foundation and Constructions, Kochi and Ors v. State Construction, Corporation Ltd., Ernakulam AIR 2003 KERALA 201*, *M/s Bhajan Singh Hardit Singh & Co. v. Karson Agency (India) & Anr. ILR (1985) II Delhi 779*, *State of Gujarat v. M/s Kothari and Associates Civil Appeal No. 1770 of 2005, Decided on 16/10/2015*, *The Rehabilitation Plantations Ltd. V. P S Ansary 2010 (1) KLJ 70*, *Rajagopala Naidu v. Aiyysawamy Chettiar & Ors. AIR 1965 Madras 532*.

7. On the other hand, counsel for the counter claimant relies upon *T. Arivandandam v. T.V Satyapal & Anr. 1997 (4) SCC 467*, *Popat & Kotecha Property v. SBI Staff Association 2005 (7) SCC 510*, *Mahendra Kumar and Anr v. State of Madhya Pradesh and Ors. AIR 1987 Supreme Court 1395* and *C. Natrajan v. Ashim Bai and Anr. (2007) 14 SCC 183*

8. The first issue is whether the counter claim can be filed after the filing of the written statement. This is settled as per *Mahendra Kumar & Anr. V. State of Madhya Pradesh & Ors. AIR 1987 SC 1395* that the counter claim need not always accompany the written statement.

9. However, insofar as limitation is concerned, the fact that the Defendant was forced to engage third party contractors would not extend the

period of limitation insofar as the Plaintiff is concerned, as the date of abandonment is a complete cause of action in itself. The amounts that the third party contractors may have charged would affect, at best, the quantum of damages/compensation but the same does not change the date when the cause of action arose. In ***Delta Foundation and Constructions, Kochi & Ors. V. State Construction, Corporation Ltd., Ernakulam AIR 2003 KERALA 201*** which was also recently followed by a Single Judge Bench in ***IVRCL Limited vs. Union of India*** [Arbitration Request Nos. 67, 68 and 69 of 2014, Decided on 10.04.2015], a similar issue has arisen wherein the Division Bench of the Kerala High Court held:

“...At the moment breach occurs, time begins to run, and the starting point of limitation for suit for compensation for breach of contract is when the contract is broken. Bench has taken the view that only when the work is re-tendered plaintiff would be able to consider the damages caused. We are of the view that would be going against the law of limitation. The Supreme Court in Essar Constructions v. N. Ramakrishna Reddy (2000) 6 SCC 94 held that statute of limitation assumes the existence of a cause of action and does not define or create one.....”

Thus, as per the Division Bench of Kerala High Court, the re-tendering of the work does not extend the period of limitation.

10. The two judgments relied upon by the counter claimant are to the effect that an application under Order VII Rule 11 should not be entertained or allowed in cases where there is mixed question of both fact and law or if the averments made require any evidence or if the issue of limitation requires a factual ascertainment of events. There is no dispute to these settled prepositions.

11. However, what is important in the present case is that there is no dispute as to the fact that the abandonment took place in October, 2011. The conduct of the counter claimant post the said abandonment is not in the control of KLA, in as much as whether the counter claimant wishes to engage third party contractors or not is purely within its own discretion. When those contracts conclude is purely within the domain of the counter claimant and the third party contractors. The day the site was abandoned, the cause of action arose. A submission has been made that meetings were held between the parties to persuade KLA to conclude the work. The said meeting is claimed to have to have been held on prior to November, 2011. The cause of action paragraph is relevant and set out below:

“21. That the cause of action first arose on or around October, 2011 when the Plaintiff left the construction work relating to the boiler. That it further arose on 02.11.2011 when the Defendant No. 1 gave work order to M/s Satkartar Construction. That the cause of action further arose on 15.06.2011 when the Defendant No. 1 had to give work order to M/s Sadanand Civil Contractor. That the cause of action further arose on 10.09.2012 and continued till April, 2013 till the commissioning of Power Plant could be completed and power supplied to Punjab State Power Corporation Limited. It further arose on 06.09.2013 when the Defendant No.1 gave work order to M/s Om Prakash Associates.”

A perusal of this para shows that on 2nd November, 2011 itself, a work order to a third party was already given by the counter claimant. Thus, there was no hope of resolution of the disputes by then. The date of the meetings has also not been clearly specified. Thus, the meeting cannot extend the cause of action and the period of limitation.

12. The present case is not a case covered under Article 55 where there is a continuing breach. KLA has its own justification for exiting the contract and the counter claimant has its own justification for engaging new contractors. The engagement of new contractors for completing the contract cannot logically extend the limitation period inasmuch as the concept of limitation is not elastic to include conduct of third parties. The conduct of the third party contractors, the matter of their execution of the works, disputes if any that may arise between them and the counter claimant, the period consumed by them for executing the work are all speculative in nature. Those events and facts cannot justify the counter claimant in delaying its claims against KLA or offer justification for filing the suit for compensation beyond the period of three years.

13. Article 55 is clear and contemplates two situations:

- i) three year period begins when the contract is broken;
- ii) three year period begins in the case of successive breaches when the breach ceases to exist.

14. KLA did not commit any successive breach in this case. The breach, if any, as per the cause of action paragraph was when KLA left the construction site of the Boiler Turbine. KLA never visited that premises again, for there to be a successive breach. The engagement of third parties by the counter claimant is not a successive breach by KLA and cannot therefore extend the period of limitation.

15. In ***Bal Krishna Savalram Pujari & Ors. vs. Sh. Dayaneshwar Maharaj Sansthan & Ors.*** AIR 1959 SCC 798, the Supreme Court observed that:

“It is the very essence of a continuing wrong that it is

*an act which creates a continuing source of injury and renders doer of the act responsible and liable for the continuance of the said injury. **If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue.** If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong.”*

The above dictum is clear and categorical. If the breach is complete, the cause of action begins. When KLA exited the site, its breach was complete and there was no continuing cause of action.

16. As held in the ***Delta Foundation case (supra)***, the re-tendering of a contract would not result in limitation getting extended. Applying the aforesaid principles, it is clear that in the present case, no factual evidence is needed to be ascertained at this stage. The stand of the parties is clear. The engagement of third party as contractors to complete the work alleged to have been abandoned by KLA cannot extend the period of limitation. No authority has been filed by the counter claimant in support of the preposition that re-tendering of the work would extend the period of limitation.

17. Under such circumstances, the counter claim is held to be barred by limitation and is rejected. The claim in the suit is only for a sum of Rs.22,49,538/-. The same is transferred to the District Judge, South East Dist., Saket Courts Complex, Delhi for marking the matter to the appropriate ADJ.

18. Let the matter be listed before the concerned ADJ on 23rd August 2018.

PRATHIBA M. SINGH
JUDGE

JULY 30, 2018/Rahul