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

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Pronounced on: 04.07.2018

+ O.M.P. (COMM) 268/2017

M/S COLLAGE ESTATES PVT. LTD. Petitioner

Through Mr.Deepak Biswas & Ms.Ishita Jain,
Advocates.

versus

BLUE STAR LTD. Respondent

Through Mr.Akhil Sibal, Sr.Advocate with
Mr.Yashvardhan, Ms.Smita Kant &
Mr.Ambuj Dixit, Advocates

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act) seeking to impugn the Award dated 06.03.2017. The petitioner Company is said to be working in the real estate sector. The respondent Company is engaged in providing services of central air conditioning.

2. The petitioner invited tenders for installation and commissioning of a HVAC (Heating, Ventilation and Air Conditioning) system in Viva Collage Mall situated at 12 KM Jalandhar-Phagwara Road, Jalandhar, Punjab in 2008. The contract was awarded to the respondent for a total contract price of Rs.12,71,40,000/-. A contract agreement was executed on 08.02.2008. It is contended by the petitioner that as per the contract, the respondent Company had to supply/install, test and commission 4 chillers, 3 imported

centrifugal water cooled chilling machine of 650 TR capacity and 1 Rotary screw water cooled chilling machine of 220 TR capacity. An order dated 11.02.2018 was issued to the respondent.

3. It is also the contention of the petitioner that the respondent Company commissioned 3 out of the 4 machines on 23.04.2010. Out of 3 the chillers of 650 ton, only two chillers were commissioned and one chiller has not been commissioned. However, soon problems arose in the performance of the machines installed by the respondent Company. It is stated that every other day, there were some or other problems arising with the chillers compelling the petitioner Company to send a snag list from time to time to the respondent Company requesting it to resolve the problems. The grievance of the respondent was that despite having completed all the work and having commissioned the project, the petitioner did not pay the respondent a balance sum of Rs.1,78,27,556/-.

4. Disputes having arisen between the parties, the respondent filed a petition under Section 11 of the Arbitration Act before this court. This court appointed an Arbitrator to adjudicate the disputes between the parties.

5. The learned Arbitrator has now given his Award. An Award has been passed in favour of the respondent and against the petitioner for Rs.1,78,27,556/- along with litigation expenses and interest @ 9% per annum w.e.f. 01.09.2010 till realization.

6. The learned Arbitrator framed the following issues:-

"i) Whether the claimant has performed his part of contract and because of the latches on the part of respondent suffered damages amounting to Rs.1,78,27,556/- (Rupees One Crore Seventy Eight Lacs Twenty Seven Thousand Five Hundred and Fifty Six only), if so its effects?

ii) Whether the respondent suffered losses from the breach of contract on the part of claimant and thus suffered losses to the tune of counter claim and whether they are entitled to claim 15% pendent lite and future interest on the amount of damages claimed i.e. a total of Rs.7,71,96,439/- (Rupees Seven Crore Seventy One Lacs Ninety Six Thousand Four Hundred and Thirty Nine Only), if so its effects?

iii) Whether the respondent was at fault on his part for performing his part of contract and thereby liable to pay damages as well cost of the arbitration proceeding along with interest at the rate of 24% per annum with effect from 01.09.2010?

iv) Whether due to claimant's conduct respondent suffered heavy losses and could not honour the commitment agreed on his part towards third parties, if so whether the respondent is entitled to claim damages by of counter claim with interest at the rate of 15% per annum with effect from 01.09.2010?

v) Whether the claimant is entitled to any relief?

vi) Whether the respondent is entitled to claim relief to by the counter claim?"

7. The learned Arbitrator concluded that the respondent had commissioned the imported centrifugal chilling machines. The water cooled machine was also commissioned. The respondent had installed and commissioned four chillers as per the agreement and completed its part under the contract. The learned Arbitrator also noted that the certification was done by Global C who had certified the work done by the respondent. The said Global C was Product Management Consultant and used to check/verify the bills raised by the respondent.

8. The learned Arbitrator also noted the defence of the petitioner that the claim is barred by limitation. The Award notes that a dispute arises when a party claims and the other party denies. Existence of a dispute is essential for appointment of an arbitrator. The learned Arbitrator also noted that at one hand the petitioner claims that as per the respondent, the work was completed on 23.04.2010 and on the same breath, the petitioner gives a long list of defects which as per the petitioner, the respondent did not complete. It also noted that before this court when a petition for appointment of an arbitrator was filed, the petitioner did not raise any objection about the claim being barred by Limitation. The learned Arbitrator concluded that the claim was within the period of limitation as per Article 137 of the Limitation Act. The award also noted that Section 14 of the Limitation Act would be applicable to the present proceedings.

9. Regarding the counter claim filed by the petitioner, the learned Arbitrator noted that the petitioner had not adduced any evidence to establish that there was any problem in the product. In fact the petitioner have admitted that they were facing slow down which had affected the occupancy of the Mall. The learned Arbitrator concluded that the claim for damages by the petitioner was remote. The petitioner were claiming consequential losses. The learned Arbitrator held that if the petitioner could not utilize their mall for business purpose, allegations could not be made against the respondent for consequential damages. Accordingly, the counter claim of the petitioner was rejected.

10. I have heard learned counsel for the parties.

11. Learned counsel for the petitioner has vehemently argued that the claim petition was barred by limitation. He submits that as per the

respondent, the work was completed on 13.04.2010. The final bill was raised on 12.09.2010. The arbitration clause was invoked on 17.03.2015. Based on this, it is strongly pleaded that the claim of the respondent was barred by limitation.

12. Learned counsel for the respondent has pleaded that the refusal of the petitioner to make payment to the respondent was on 07.09.2012 and hence, the limitation would commence from the said date. The respondent had raised a demand on 08.05.2012 which was refused on 07.09.2012.

13. Before the learned Arbitrator the petitioner had pleaded that the claim of the respondent is barred by limitation as it was the case of the respondent itself that it had commissioned three out of the four chillers on 23.4.2010. Reference was also made to a commissioning note dated 4.5.2010 where it is stated that the majority work stood commissioned. Based on this, it was pleaded that as per the respondent the work was completed in 2010 and the arbitration clause was invoked in 2015. Hence, the claims raised by the respondent are barred by limitation. Reliance was placed on Article 137 of the Limitation Act.

14. I may only note that for the purpose of pleading limitation the petitioner seeks to rely upon the averments of the respondent. However, to defend its claims on merits the petitioner has chosen to argue that the work was never fully completed by the respondent.

15. As per the petitioner, as also stated in the present petition, the respondent failed to complete the following work:-

“i. Gas and Oil filling of Chiller Machine no. 2 of capacity of 650 Ton, Model no.19XR55574Q5LFH52, Machine Serial No.XR4H1542 Make CARRIER, Non-Supply and installation of transducer (integral part of chiller), Commissioning of third

chiller (which the Petitioner Company had to get commissioned from a third party, namely G.M. Refrigeration in 27 April 2015), testing and commissioning of 44 numbers of Air Handling Units (hereinafter referred to as AHUs). Further, snagging and de-snagging of almost various items as mentioned in the snag list provided by the Petitioner Company to the Respondent Company.

ii. Overall testing and commissioning of the entire system which was required to be done by the Respondent Company.

iii Preparation of various documents after testing the entire HVAC system, like Air Balancing report, As Built drawings, Chilled Water Balancing for the Chillers and AHUs.

iv. Maintenance of the entire equipment for defect liability period of 12 months which should have been started after handing over the system is not done till date by the Respondent Company.

v. During the operation of entire HVAC system the Respondent Company was required to attend the various faults as per Contract Agreement but tower which had been supplied was later found to be running under capacity. The Respondent Company was called upon to fix the same, via various emails and also verbally, but it is not fixed till date.”

16. The petitioner has not before this Court pleaded as to which particular Article of the Limitation Act is applicable. Article 137 of the Schedule to the Limitation Act reads as follows:-

“137	Any other application for which no period of limitation is provided elsewhere in this Division	3 years	When the right to apply accrues.”
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17. Reference may also be had to Article 18 of the Schedule to the Limitation Act which reads as follows:-

“18	For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment	3 years	When the work is done.”
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18. I may look at some of the judgments dealing with Article 18 above. This court in *Municipal Corporation of Delhi vs. M/s. Gurbachan Singh & Sons, 208 (2014) DLT 177* had noted that in a proceeding for recovery of price for work done, cause of action commences when work is done in terms of Article 18 of the Schedule to the Limitation Act. This court held as follows:-

“3. xxx

Three things, inter-alia, can be culled out from these paragraphs. Firstly ordinarily on the completion of the work, the right to get payment begins. Though Article 18 is not stated, this line is in terms of Article 18 of the Limitation Act. The second aspect is that a dispute arises when there is a claim on one side and its denial/repudiation by the other. The third aspect is that a person cannot postpone the accrual of cause of action by repeatedly writing letters or sending reminders.

16. A summary of the conclusions on reading of the aforesaid relevant clauses of the contract in question and the judgments as dealt with above, bring out the following salient points:

- (i) Limitation commences when the cause of action accrues/arises.
- (ii) Accrual/arising of cause of action necessarily varies as per facts and circumstances of each case and the nature of jural

relationship between the parties viz contractual or otherwise and so on.

(iii) As regards contracts for execution of building work, Article 18 comes into play in that when no specific date for payment is fixed, limitation commences and the cause of action accrues for the purpose of limitation on the completion of work.

(iv) In its application, Article 18 will cause different dates for accrual of causes of action in building works when a time period is fixed for submitting of a bill by the contractor and to which there is no response of the owner. Where a final bill is submitted and liability under the same, even if, in part, is admitted or some payment is made then such actions extend limitation in terms of Section 18 of the Limitation Act.

(v) No fresh period of limitation can arise simply because letters and reminders are written time and again, attempting to keep the claim alive, although the claim by virtue of Article 18 of the Limitation Act, has become clearly time barred.

xxx”

19. Similarly, the Bombay High Court in the case of *State of Maharashtra vs. Hindustan Construction Company Limited (“HCC”)* **MANU/MH/0085/ 2013** held that it is Article 18 of the Limitation Act that would normally apply. The following was noted:-

“19....

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. Perusal of the above quoted Article shows that when a suit is to be instituted for recovery of the price of the work done by the Plaintiff for the Defendant, and when there is no time fixed for payment to be made, the cause of action for instituting the suit arises when the work is completed and the suit has to be instituted within a period of three years from the accrual of cause of action. 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:-

113. 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. Perusal of the above Article makes it clear that this Article comes into play only on a finding that for institution of a suit for the claim which is involved in the present matter, there is no period of limitation provided elsewhere in the schedule. 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 acknowledgement etc.....”

20. In *Arbitration Petition No.466/2006 titled Maharashtra State Power Generation Co.LTd. vs. M/s.Geo Miller Co.Pvt. Ltd. decided on 26.12.2011* the Bombay High Court held as follows:-

“8..... 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.”

21. In *South Eastern Coalfields Ltd. vs. B.S.Agrawal and Ors., MANU/CG/0480/2013* the High Court of Chattisgarh held as follows:-

“9. Article 18 of the Limitation Act, 1963 provides as under:

“18. For the price of work done by the Plaintiff for the defendant in his request where no time has been fixed for payment.	Three Years	when the work is done.”
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10. "Work and Labour" in legal nomenclature is a term of precise legal import. In England, it is the name of one of the common counts in actions of assumpsit being for work and labour done and materials furnished by the plaintiff for the defendant: Black's Law Dictionary 6th Edn. p. 1604. The Courts in India have, therefore, given a wider meaning to the words 'work done' in Article 18 and treated a works contract as coming within its purview. The starting point of limitation

in each case must, however, depend on its own facts and circumstances.

11. In Halsbury's Laws of England 3rd Edn. Vol. 24 p. 218, the meaning of the expression 'work done' is given thus:

"On a general contract for work to be done, the cause of action accrues when the work is done. A contract to do work may, however, contain a condition that the price should be paid out of.....when a certain contingency has happened, and in such a case the cause of action does not arise until the.....Contingency has happened."

12. In Gannon Dunkerley and Co. Ltd. Vs. Union of India MANU/SC/0475/1969 : 1969 (3) SCC 607, the Supreme Court held as under:

"11.In our judgment, there is no right to sue until there is an accrual of the right asserted in the suit, and its infringement, or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted : Bolo v. Kokan and others, 51 IA 325."

13. In Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority MANU/SC/0271/1988 : (1988) 2 SCC 338, the Supreme Court, while considering applicability of Article 137 of the Limitation Act, 1963, held as under:

"It is also true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on February 28, 1983 and there was non-payment, the cause of action arose from that date, that is to say, February 28, 1983. It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action."

14. In National Aluminium Co. Ltd. and another Vs. G.C. Kanungo MANU/SC/0867/2009 : AIR 2009 SC 2928, the Supreme Court held as under:

"5. In other words, there was no finality in the matter and the matter was alive for consideration. If this date i.e. 26-5-1992 is taken into account, the claim made was within the period of three years. That being so, the claim as made was within the period of limitation and the stand of the appellant that the claim was barred by limitation is not tenable.

15.....

16....

17....

18. In M/s. Ashok Construction Company Vs. Union of India MANU/SC/0004/1970 : 1971 (3) SCC 66, the Supreme Court held that question of limitation is not a pure question of law. Para 8 of the report states as under:

"8. The question of limitation was not a pure question of law. Whether the claim was barred by law of limitation depended upon proof of facts. From the date of settlement of claims three years had not lapsed before a notice asking for reference was made. Prima facie, the claim was not barred by the law of limitation."

22. The legal position that follows from the above case law is that normally for work done by a plaintiff for the defendant it is article 18 of the Limitation Act that would apply for the purpose of computing the period of limitation. The period of limitation would normally commence when the work is completed. However, the accrual of cause of action would necessarily vary as per facts and circumstances of each case.

23. It is quite clear from a reading of the stand of the petitioner that as far as the petitioner is concerned, they have been repeatedly seeking to have the

alleged defects in the work done by the respondent rectified. Finally it is on 27.04.2015 that they are said to have got their chillers commissioned through a third party, presumably at the risk and cost of the respondent Company. It is quite clear from the above that it cannot be said that the cause of action for filing of this case first arose in 2010 as is sought to be pleaded by the petitioner.

Perusal of the award shows that it notes that on one hand the petitioner claims that as per the respondent the work was completed in 2010 but in the same breath the petitioner states and pleads a long list of defects which as per the petitioner the respondent did not complete. Based on these facts the learned Arbitrator was of the view that the plea of the petitioner is without merits. The learned arbitrator has concluded on the facts that the claim was within the period of limitation. The view of the learned arbitrator is a plausible view taken in the facts of the case. There are no reasons for this court to take a different view than the one taken by the learned Arbitrator.

24. The legal position regarding section 34 of the Arbitration Act is quite clear. The Supreme Court in *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*, AIR 2003 SC 2629/(MANU/SC/0314/2003), held as follows:

“53. It is true that if the arbitral tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to it for adjudication then the Court would have no jurisdiction to interfere with the award. But, this would depend upon reference made to the arbitrator: (a) If there is a general reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the Court could interfere; (b) It is also settled law that in a case of reasoned award, the Court can set aside the same if it is, on the face of it, erroneous on the proposition of

law or its application; (c) If a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as to permit of its being set aside, unless the Court is satisfied that the arbitrator had proceeded illegally.

54. In the facts of the case, it cannot be disputed that if contractual term, as it is, is to be taken into consideration, the award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the Act. Undisputedly, reference to the arbitral tribunal was not with regard to interpretation of question of law. It was only a general reference with regard to claim of respondent. Hence, if the award is erroneous on the basis of record with regard to proposition of law or its application, the Court will have jurisdiction to interfere with the same.”

In my opinion, there is no erroneous proposition of law in the award to warrant setting it aside.

25. I may note another aspect of the matter. It appears that the respondent Company sent a legal notice under Section 433 and 434 of the Companies Act for winding up of the petitioner Company on 18.04.2013. It appears that a winding up petition was thereafter filed about which no details are forthcoming. The petitioner pleads that the commencement of the winding up petition will not extend the limitation period. The learned Arbitrator has in the Award noted that the provisions of Section 14 of the Limitation Act would also be available to the respondent and hence, even otherwise the claim of the respondent would be well within the limitation period.

26. This finding of the learned Arbitrator that section 14 of the Limitation Act will apply to the facts of the case appears to be erroneous. This court has already held that the time spent in prosecuting a winding up petition, cannot

normally be a subject matter of extension of time under Section 14 of the Limitation Act. Reference in this context may be had to the judgment of this court in *Anil Pratap Singh Chauhan vs. Onida Savak Ltd. etc.*, AIR 2003 Delhi 252 where this court held as follows:-

“17. In view of the foregoing, plaintiff cannot seek any advantage from the decision of the Supreme Court In *Chalisgaon Shri Laxmi Narayan Mills Co. Ltd. v. Armitlal Kalidas, Kanji* (Supra). Reliance had also been placed by the learned counsel for the plaintiff on the observations made by the High Court of Punjab in *Pavan Om Prakash Kejriwal v. Partap Steel Rolling Mills (1935) Ltd.* (supra), wherein the Division Bench while deciding an appeal from a decision of the Company Judge on a petition for winding up had directed that the appellant would be entitled to claim benefit under Section 14 of the Limitation Act for the period during which the petition was pending in the Court. A perusal of the said judgment of the Division Bench of the Punjab High Court shows that there is neither any discussion whatsoever in the said judgment with regard to the satisfaction of the conditions before the benefit under Section 14 of the Limitation Act can be extended nor any legal principle is enunciated based on which the said directions had been given. With respect the aforesaid decision is one which falls under the category of sub silentio and it cannot be treated as a binding precedent. The Supreme Court in *Municipal Corporation of Delhi v. Gurnam Kaur* (1989) 1 SCC 101 had occasioned to deal with the concept of sub silentio. It quoted with the approval the discretion of Professor P.J. Fitzgerald of the concept of sub silentio. "A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind....."

The Court further went on to observe, "Precedents sub silentio and without argument are of no moment. This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and

decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a judge, however, eminent can be treated as an ex cathedra statement having the weight of authority." The judgment of the Division Bench of the Punjab High Court, which has no discussion on as to why the benefit under Section 14 of the Limitation Act is to be given cannot be a binding precedent.

In view of the foregoing discussions, it is held that the plaintiff is not entitled to the benefit of exclusion of time during which the winding up petitions relating to each of the five suits were pending for the purposes of computing the limitation for the suits instituted by the plaintiffs. The essential conditions of Section 14 of the Limitation Act are not fulfilled, as discussed earlier. The winding up petitions having been dismissed on merits and not on account of any defect of jurisdiction or a defect of a like nature. Section 14 cannot be pressed into service. Besides, the nature of the relief in a winding up petition is entirely different and distinct from that in a suit for recovery..."

27. However, I need not dwell further on the above legal proposition. The learned arbitrator has made observations regarding applicability of section 14 of the Limitation Act only as an alternative ground to uphold the contention that the claim is within limitation. The said observations in the award do not in any manner render the award on the merits illegal.

28. The petitioner has failed to show that the Award suffers from any error which is against the public policy of India. There is no error in the Award to persuade this court to set it aside.

29. The petition is accordingly dismissed. All pending applications, if any, also stand disposed of.

JAYANT NATH, J.

JULY 04, 2018/n