

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

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Reserved on: 05th July, 2018
Pronounced on: 16th July, 2018

+ **O.M.P. 510/2015**

DELHI TOURISM & TRANSPORTATION Petitioner
Through : Mr.G.Saikumar, Ms.Sowmya
Saikumar, Mr.Abhimanyu Garg
and Ms.Preety Makkar, Advocates
versus

GAMMON INDIA LIMITED Respondent
Through : Mr.Rajiv Bansal, Sr Advocate with
Ms.Awantika Manohar and
Ms.Fiza Saluja, Advocates

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The petitioner has filed objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act') against the arbitral award dated 09.06.2015 passed against the petitioner and in favour of the respondent.

2. The facts in brief are as under:-

a) on 03.10.2002 the petitioner awarded the contract for construction of flyover from Lajpat Nagar to Srinivaspuri, Ring Road, New Delhi to the respondent against a total consideration of ₹ 42.57 Crores on CPWD 12 (modified) for the completion period of 18 months i.e. on or before 17.04.2004;

- b)* on 18.10.2002 the respondent commenced the work. The petitioner granted the extension of time for completion of work vide letter DTTDC/Engg/LN54(36)/1984 dated 04.07.2005.
- c)* on 12.04.2005 the respondent completed the construction work with delay of almost an year;
- d)* on 20.09.2005 the respondent raised the final bill upon the petitioner to the tune of ₹ 47,84,83,173/- against which on 28.07.2006 the petitioner made the payment of ₹ 42,54,08,660/- to the respondent, which was duly accepted by the respondent;
- e)* on 16.09.2008 after expiry of two years of accepting the payment against the final bill the respondent invoked the arbitration vide letter No.WSS/G/614; and
- f)* on 12.11.2008 the Chief Engineer of the petitioner appointed Shri K.N.Aggarwal, as sole arbitrator, who commenced the arbitral proceedings on 19.12.2008 and passed an impugned arbitral award dated 09.06.2015 against the petitioner, hence the present petition.

3. Admittedly, the completion date of the contract was 12.04.2004 but extension was sought on 04.07.2005 and was acceded to. The time was extended till 12.04.2005 without prejudice to the rights of the Government to recover liquidated damages in accordance with the provisions of clause No.2 of the Agreement No.02/DTTDC/Engn/LN 2002-03. On 17.05.2005 a letter was written by the petitioner to the respondent to get the completion certificate and requested the respondent to submit its

final bill along with final measurements, deviation statements etc to its office immediately in order to process the same. The provisional completion certificate was annexed with the said letter.

4. Though, as per the term of the contract, the final bill was to be submitted within three months but the respondent delayed in filing the final bill but yet the petitioner entertained it and processed the same.

5. The respondent submitted its final bill along with 41 claims. The claims were entertained by the Executive Engineer and some of them were accepted while remaining were rejected vide communications dated 28.11.2004, 18.01.2005, 01.12.2005, 01.03.2006, 05.04.2006, 04.09.2006 etc. Thereafter, vide letter dated 14.11.2006 the petitioner paid security deposit and released the Bank Guarantees for mobilisation advance, as requested by the respondent, vide its letter dated 14.11.2006. However, after two years i.e. on 16.09.2008, the respondent raised demand to the tune of ₹16,17,91,203/- against which payment of ₹2,31,53,000/- was made in the final bill and an amount of ₹13,86,38,203/- was said to be outstanding. Such demand was rejected, hence respondent preferred raising dispute.

6. The petitioner then appointed Shri K.N. Aggarwal, Retired DG (W), CPWD as a sole arbitrator to decide and make his award regarding the claims / disputes raised by the respondent but,

however, *subject to their admissibility under clause 25 of the aforesaid agreement.*

7. It is the case of the petitioner since the procedure for making a dispute arbitrable was never followed by the respondent, the learned arbitrator erred in allowing its claims. He refers to clause 9 and clause 25 of the agreement.

8. Clause No.9 of the contract notes:-

“CLAUSE 9 Payment of final bill

The final bill shall be submitted by the Contractor in the same manner as specified in interim bills within three months of physical completion of the work or within one month of the date of the final certificate of completion furnished by the Engineer-in-charge whichever is earlier. No further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Payments of those items of the bill in respect of which there is no dispute and of items in dispute, for quantities and rates as approved by Engineer-in-charge, will, as far as possible be made within 6 months, the period being reckoned from the date of receipt of the bill by the Engineer-in-charge or his authorised Asstt. Engineer, complete with account of dismantled materials.”

9. Clause No.25 is relevant for deciding the issue and it notes:-

“CLAUSE 25

Settlement of Disputes & Arbitration

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in-before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:-

i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-charge on any matter in connection with or arising out of the contract or carrying out of the work, to be

unacceptable, he shall promptly within 15 days requests the Superintendent Engineer in writing for written instruction or decision. Thereupon, the Superintendent Engineer in writing shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintendent Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintendent Engineer, the contractor may, within 15 days of the receipt of the Superintendent Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from the receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator failing which the said decision shall be final, binding and conclusive and not referable to adjudication by the arbitrator.

ii) Except where the decision has come final, binding and conclusive in terms of Sub Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, DTTDC, in charge of the work or if there be no Chief Engineer, the administrative head of the said DTTDC. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by such Chief Engineer, DTTDC or the administrative head of the DTTDC, as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the DTTDC/Govt. shall be discharged and released of all liabilities under the contract in respect of these claims."

10. The learned counsel for the petitioner also referred to a letter dated 12.11.2016 qua the appointment of the learned arbitrator and it notes:-

"Subject: In the matter of arbitration between M/s Gammon India Ltd. and Delhi Tourism & Transportation Development Corporation Limited, regarding the work "Construction of flyover, ground Level Roads and Pedestrian Subway from Lajpat Nagar to Srinivaspuri Ring Road, New Delhi. Agreement No.- 02/DTTDC/Engg/LN/2002-03.

*Whereas M/s Gammon India Ltd. have written to me vide their letter no. WSS/ G I 614 dated 16.09.08 that certain disputes have arisen between the above noted parties in respect of the above noted work. I, Jose Kurian, Chief Engineer, DTTDC by powers conferred on me under clause 25 of the said Agreement hereby appoint Shd K.N Agrawal, Retired D. G. (W) CPWD as Sole Arbitrator to decide and make his award regarding the claims/disputes by the contractor, if any, as shown in the statements enclosed **subject always, however, to their admissibility under clause 25 of- the aforesaid agreement.***

The amount of the claims in dispute being above Rs.1,00,000/- the Arbitrator shall give reasons for the award.

*-sd-
(Jose Kurian)
Chief Engineer
DTT DC"*

11. Thus, the petitioner argue only those disputes which had gone through the channel of the officials viz an Executive Engineer, Superintending Engineer and then the Chief Engineer, per clause 25 (supra), could only be referred to arbitration.

12. The learned counsel for the petitioner relied upon *Indian Oil Corporation Limited vs ERA Construction (India) Limited* 189(2012) DLT 120 which held:-

"32. This Court is unable to appreciate the approach of the learned Arbitrator in holding that the mere fact that the parties were in correspondence and discussion amounted to a waiver by IOCL of the requirement of compliance by ECIL with the above clauses. There was no question of the clauses merely being "followed in spirit." There is a specific procedure envisaged which has to be followed before such a

claim could be entertained. The learned Arbitrator was in terms of Section 28 of the Act bound to follow the clauses of the contract in determining whether ECIL's counterclaims were arbitrable. This was made explicit in the decision in *M/s. Uttam Singh Duggal & Co. (P) Limited v. Indian Oil Corporation Limited* where these very clauses were examined and in Para 18 it was observed as under:

"18. xxxx **Thus, the parties agreed that before any claim/dispute could be subject matter of arbitration, certain formalities had to be gone into.** Clause 9.0.0.0 which deals with arbitration applies only to disputes and differences arising out of a **notified claim** included in the final bill of the contractor. As noted above, there is no time limit prescribed in clause 9.0.0.0. In these circumstances, it is therefore difficult to see as to how the provisions of S. 37(4) would apply to the requirements of clause 6.6.1.0, assuming that the disputes in the present case are (1) covered under clause 9.0.0.0, and (2) that the contractor did take steps to commence arbitration proceedings within the time fixed by the arbitration agreement. Mr. Watel's argument is that notified claim is nothing but a claim in writing to the Corporation within ten days of the date of occurrence and this claim is to be included separately in the final bill. According to him clauses 6.6.1.0, 6.6.3.0 and 9.0.0.0 are inextricably interlinked and, therefore, the notified claim is merely "some other steps to commence arbitration proceedings" as envisaged in S. 37(4) of the Act."

33. Although the above case arose under the Arbitration Act 1940, the ratio applies on all fours to the case on hand. The inescapable conclusion is that the learned Arbitrator erred in entertaining the counter claims of ECIL despite those claims not being notified claims, not included in the final bill of ECIL and therefore not arbitrable. It is not as if ECIL was without a remedy as regards those counter claims. It could have filed a suit. This was an error of jurisdiction committed by the learned Arbitrator and, therefore, the impugned Award to that extent cannot be sustained in law. However, it is clarified that the Award to the extent it orders the admitted amount to be paid by IOCL to ECIL with interest at 8% per annum from the date ECIL invoked the arbitration clause up to the date of payment, is upheld."

13. *Further International Building and Furnishing Company (Calcutta) Private Limited vs Indian Oil Corporation Limited*
1995 (1) Arb LR 548 (Delhi) (DB) it was held:-

“7. It is, therefore, clear that arbitration at the instance of the contractor is available under clause 9.0.1.0 only in respect of "notified claim". That would mean that the contractor must have gone through the procedure-indicated in clause 6.6.1.0 and 6.6.3.0 and notified his claims to the Engineer-in-Charge and the Site Engineer within the period of ten day of the date of issue of orders or instructions relative to any works for which the contractor was claiming such additional payment or compensation. In such a situation it is obvious that if the claim is not a "notified claim", the arbitration clause cannot be invoked by the contractor.”

14. Further in *Harsha Constructions vs Union of India & Others* (2014) 9 SCC 246 it was held:-

“18. Arbitration arises from a contract and unless there is a specific written contract, a contract with regard to arbitration cannot be presumed. Section 7(3) of the Act clearly specifies that the contract with regard to arbitration must be in writing. Thus, so far as the disputes which have been referred to in Clause 39 of the contract are concerned, it was not open to the Arbitrator to arbitrate upon the said disputes as there was a specific clause whereby the said disputes had been “excepted”. Moreover, when the law specifically makes a provision with regard to formation of a contract in a particular manner, there cannot be any presumption with regard to a contract if the contract is not entered into by the mode prescribed under the Act.

19. If a non-arbitrable dispute is referred to an Arbitrator and even if an issue is framed by the Arbitrator in relation to such a dispute, in our opinion, there cannot be a presumption or a conclusion to the effect that the parties had agreed to refer the issue to the Arbitrator. In the instant case, the respondent authorities had raised an objection relating to the arbitrability of the aforesaid issue before the Arbitrator and yet the Arbitrator had rendered his decision on the said “excepted” dispute. In our opinion, the Arbitrator could not have decided the said “excepted” dispute. We, therefore, hold that it was not open to the Arbitrator to decide the issues which were not arbitrable and the award, so far as it relates to disputes regarding non-arbitrable disputes is concerned, is bad in law and is hereby quashed.”

15. Hence it was argued that the respondent was to adhere to the procedure stated in clause No.9 and clause No.25 of the agreement and the arbitrator also was to look into and adhere to these clauses in passing the judgment as is also held in *UB Engineering Limited*

vs Indian Oil Corporation Limited and Another 2013 (3) RCR (Civil) 487 wherein the Punjab and Haryana High Court held:-

“24. Having heard this contention, clause 6.6.1.0 of the general conditions of the contract between the parties being the creation of the contract between them, the appellant was bound by the terms of the agreement. As per Section 28 of the Arbitration and Conciliation Act, 1996, the arbitrator was to act in accordance with the terms of contract and to adjudicate the dispute accordingly. He had no authority to avoid the terms of contract while sitting with no party could insist upon certain compliance of the terms of the contract as they themselves go by the strict compliance of the certain clauses of the contract. Certain clauses of the contract, which are unreasonable, unconscious, unfair and result of domination may make the claim as an excepted matter but does not extinguish the remedy.”

16. The learned counsel for the petitioner also referred to para No.11 of its statement of defence filed by it before the learned arbitrator and it read:-

“11.0. The Claimants sent notice vide (Exhibit R-36 P-263) under clause no.25, GCC for the settlement of dispute and requested to appoint but the request of claimant for appointment of Sole Arbitrator is contrary to Agreement Clause no.25.”

17. Further the learned counsel for the petitioner argued once the final bill was settled on 28.07.2006 then after two years the respondent was precluded from raising fresh claims as is held in *Cauvery Coffee Traders, Mangalore vs Hornor Resources (International) Company Limited* (2011) 10 SCC 420:-

27. This Court in M/s. P.K. Ramaiah & Company v. Chairman & Managing Director, NTPC, (1994) Supp. 3 SCC 126 considered the ambit of accord and satisfaction by the parties voluntarily entered into and dispute raised thereunder. This Court after considering the entire controversy held that:

"8..... Admittedly the full and final satisfaction was acknowledged by a receipt in writing and the amount was received unconditionally. Thus there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an afterthought and a

devise to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given.... Having acknowledged the settlement and also accepted measurements and having received the amount in full and final settlement of the claim, there is accord and satisfaction. There is no existing arbitrable dispute for reference to the arbitration." (Emphasis added)"

18. The same proposition as laid in *Union of India vs Popular Builders, Calcutta* (2000) 8 SCC 1 and in *Wild Life Institute of India, Dehradun vs Vijay Kumar Garg* (1997) 10 SCC 528.

19. The learned counsel for petitioner then referred to para 1.1 of the award wherein the learned arbitrator himself noted the reference of claims was subject to a proviso qua *the admissibility under clause 25 of the Agreement*, but despite this proviso did not prefer to deal with it.

20. Heard.

21. Now if one looks at order dated 12.10.2015, the petition was admitted entirely on different grounds than what is been argued by the learned counsel for the petitioner; the grounds for admission being:-

"Learned counsel for the petitioner submits that the petitioner made the payment of the final bill to the respondent on 28th July, 2006, whereupon the respondent requested for release of bank guarantees security deposit which were also released. It is further submitted that the respondent raised the claim after two years on 16th September, 2008. It is further submitted that the petitioner raised the objection that the respondent's claim was barred by clause 25 of the contract which provides a limitation period of four months from the date of the intimation of the final bill but the arbitrator has not even cared to discuss this issue in the entire award."

22. Thus, the challenge is qua *limitation* to move the fresh claim and there is no whisper in the pleadings; in the statement of defence or in the written submissions filed by the petitioner before the learned arbitrator; as to what is been argued in this Court.

23. The statement of defence filed by the petitioner in arbitral proceedings is as follows:-

“11.0. The Claimants sent notice vide (Exhibit R-36 P-263) under clause no. 25, GCC for the settlement of dispute and requested to appoint but the request of claimant for appointment of Sole Arbitrator is contrary to Agreement Clause no 25.

xxx

18.0. It is submitted that the Statement of Claim is liable to be dismissed, inter-alia, on the following grounds:-

A. Claims are time barred.

B. Making of Statement of Claim is contrary to Clause 25 of the contract. As the Clause 25 specifically states that if the Claimant does not make any demand for appointment of arbitrator in respect of any claims in writing within 120 days receiving the information from the Engineer-In-charge that final bill is ready for payment, the claim of the Claimant shall be deemed to have been waived and barred and that the Respondent shall be discharged and released of all liabilities under the contract in respect of such claims. Admittedly, request for arbitration has not been made within the stipulated period of 120 days and therefore the Claimant is presumed to have waived all claims resulting in discharge and release of the Respondent of their all liabilities under the contract.

19.3. With reference to the statements made in paragraphs 4.1 to 4.15 it is submitted that the Respondents are not liable to pay to the Claimant any amount in respect of any of the claims. It is further submitted that the claims are vague in nature and contrary to the terms of the contract and furthermore all the claims by now have become time barred in terms of Clause 25, of the contract. Finally, it is submitted that all the sums due and payable under the contract have already been paid to the Claimant as such the Claimant is not entitled to raise any Claim when the account has already been settled.”

GROUND

“a. Because the issue of limitation has serious bearing on the admissibility of the Respondent's claims. The Claims are

contrary to Clause 25 of the contract. As Clause 25 specifically states that if the Respondent does not make any demand for appointment of arbitrator in respect of any claims in writing within **120** days of receiving the information from the Engineer-In-charge that final bill is ready for payment, the claim of the Respondent shall be deemed to have been waived and barred and that the Petitioner shall be discharged and released of all liabilities under the contract in respect of such claims. Admittedly, **request for arbitration has not been made within the stipulated period of 120 days, and therefore, the Respondent is presumed to have waived all claims resulting in discharge and release of the Petitioner of all liabilities under the contract.** The award is therefore patently illegal on this account. The issue of limitation goes to the root of the matter.”

24. The written submissions of the petitioner filed before the Arbitral Tribunal also notes:-

a. Non-speaking Award with respect to maintainability- The Petitioner had submitted their averments through their Statement of Defence, (Pg. 242 243, O.A) before the Ld. Arbitrator that the claims of the Respondent are barred as per Clause 25(iii) of the Contract. However, the Award has been passed, without giving any reasoned order in relation to the jurisdiction of the arbitrator, in relation to Clause 25. The Claims are contrary to Clause 25, since it specifically states that if Respondent does not make any demand for appointment of arbitrator in respect of any claims in writing within 120 days of receiving the information from Engineer-In-charge that final bill is ready for payment, the claim of Respondent shall be deemed to have been waived and barred and that Petitioner shall be discharged and released of all liabilities under the contract in respect of such claims. Admittedly, request for arbitration has not been made within the stipulated period of 120 days, and therefore, Respondent is presumed to have waived the right of arbitration in respect of all claims. The award is non reasoned and non-speaking, and thus, patently illegal.

The Ld. Arbitrator has passed an unreasoned award and has not applied his mind to the objections raised by Petitioner and has illegally passed a non-speaking award in favor of Respondent. Therefore, not only does the arbitral award suffer from patent illegalities but also suffers from jurisdictional error as the Ld. Arbitrator traversed beyond the terms of the contract between the parties.”

25. Hence, the above do show the petitioner had only challenged the *limitation* to file fresh claims per clause No.25 (supra).

26. The petitioner is also harping upon the time limits mentioned in clauses No.9 & 25 (supra) i.e. final bill was to be submitted within three months of the physical completion or one month of the final certificate of completion furnished by Engineer-in-charge, whichever is earlier and the Engineer-in-charge may take six months for finalization and payment of the bills and if any of the party is not satisfied it may approach the arbitrator within *120 days* thereafter.

27. Though the learned counsel for the petitioner has stressed upon the word *subject to admissibility under clause 25* and in various paras viz. No.11, 17, 18(B) and 19.3 of its Statement of Defence has only pleaded the *time limit* for filing fresh claim, as given in clauses No.9 & 25, (supra) but did not ever plead the constitution of the arbitral tribunal was illegal; hence has waived off its right to challenge, per Section 4 of the Act.

28. Section 4 of the Act notes:-

*“4. Waiver of right to object. —A party who knows that—
(a) any provision of this Part from which the parties may derogate, or
(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.”*

29. The aforesaid clearly evinces if the petitioner regarded the procedure prescribed under Clause 25 of the Contract for arbitrability of claims (of referring the claims first to the Engineer-in-Charge, then to the Superintending Engineer and then the Chief

Engineer) was not followed, then it should have raised the said objection before proceeding with the Arbitration without undue delay. However, in the instant case since the petitioner failed to raise any such objection before the learned arbitrator, therefore it is now barred under Section 4 to raise the said plea for the first time before this Court only in oral submissions. Reliance is placed on paragraph 39 of the judgment in *Bharat Sanchar Nigam Limited vs Motorola India Private Limited* (2009) 2 SCC 337.

30. Since the petitioner has neither pleaded nor argued before the learned sole arbitrator about non-compliance of the procedure to be followed for arbitrability of claims under Clause 25 of the Contract, nor pleaded the same before this Court in any of the submissions (Section 34 Petition, Rejoinder and Written Submissions), the same cannot be now considered by this Court, per *Bharat Singh and Others vs. State of Haryana and Others* (1988) 4 SCC 534; refer paragraph 13; and *Ritesh Tiwari and Another vs. State of U.P. & Others*, reported as (2010) 10 SCC 677; refer paragraph 24.

31. The reliance placed by the petitioner on the cases of *Harsha Constructions v. Union of India and Others*, (2014) 9 SCC 246 and *Indian Oil Corporation Limited v. ERA Construction (India) Ltd.*, OMP No.104/2006 in this Court is completely misplaced. The decision in *Harsha Construction* (supra) case clearly provides there is a separate clause being Clause 39 which is an *excepted* matter and hence could not have been adjudicated upon by the

Arbitrator as provided under Clause 63. However, in the instant case the issue of *excepted* matter does not arise. Even assuming without admitting for the sake of argument, that there is a procedure prescribed to be followed for arbitrability of claims, it by no stretch of imagination can mean that it be considered as an *excepted* matter. Hence, reliance on *Harsha Construction* (supra) is completely misplaced.

32. Let me now find how the learned Arbitral Tribunal has dealt with the issue of limitation:-

“1.3.3. The findings/decision of the Arbitrator:

A. A reading of Claimants letter dated 20.09.2005. (Exhibit C-122), through which they submitted their Final Bill to Respondents and Claimants' letter dated 16-09-2008 (Exhibit C-152), invoking arbitration and seeking the appointment of Arbitrator, brings out the following facts:

i) The Final Bill submitted on 20-09-2005, was for a gross amount of Rs.61,15,41,411/- and the net amount of the bill was Rs.16,17,91,203/-. The bill also included Claimants' Claims No.1-41 for an amount of Rs.11,96,17,555/- in the Annexure-E of the Final Bill. The final Bill was passed/paid on 28-07-2006 by the Respondents to the Claimants.

ii) The Claimants in their letter dated 16.09.2008, invoking arbitration, have acknowledged of having received a net payment of Rs.2,31,53,000/- against the net Final Bill amount of Rs.16,17,91,203/- as submitted by them, which being short by an amount of Rs.13,86,38,203/-, was sought to be referred to arbitration.

B. The Chief Engineer/ DTTDC, on 12th November 2008, referred Claims No. 1-41, as were included in the Annexure-E of the Final Bill, totaling to an amount of Rs.11,96,17,555/-; and later another Claim for the 'balance amount of Final Bill' amounting to Rs.1,58,05,820/- was referred on 23rd November 2010, with reference to Claimants' letter dated 3-07-2010.

The total amount referred thus comes to Rs.13,54,23,375/-, which is within the amount of Rs.13,86,38,203/- originally sought to be referred for arbitration by Claimants. Thus essentially both the references arise out of the Claimants'

original request dated 16.09.2008. It is thus noted that claims covered in the two references have arisen because of the gap between the Final Bill as submitted by Claimants on 20-09-2005 and as paid by Respondents on 28-07-2006.

C. The Respondents have referred to Contract Clause 9, as per which no further claims shall be made by the Contractor after submission of the final bill and these shall be deemed to have been waived and/ extinguished. Without going into the merit and legal validity of such a contract provision in view of Section 28 of the Indian Contract Act, it is however evident that the Claims in question are those as were a part of the Final Bill submitted by the Claimants. Thus the Respondents' contention that the claims alleged by Claimants before this arbitral tribunal were never raised or mentioned in the final bill is disproved.

D. Further the Respondents have alleged that the claims were made on 16-09-2008, which is after expiry of more than three years after the date of completion of work, which was 12-04-2005. The argument of Respondents is flawed in as much as the reference point for the purpose of limitation would not be the date of completion of work but the date of payment of the Final Bill which as per the Respondents themselves, was on 28-07-2006. Thus the Claims having been raised by Claimants on 16-09-2008 is well within three years of the payment of Final Bill by Respondents.

E. In fact as per details furnished by Respondents on February 25, 2014 in their Exhibit R-S8, showing the details of various payments released to Claimants, it is noticed that the last payment was released by Respondents on 27-02-2007. If the same is considered as the cut-off date for the purpose of limitation then the Claims have been raised by Claimants even in a lesser period than mentioned above.

F. In view of the above the question of limitation does not arise and the preliminary objection raised by Respondents is found to be without any merit and there appears to be no ground for such an objection. Therefore the objection raised by Respondents is not considered to be sustainable and is accordingly rejected.

1.3.4. Since the preliminary objections raised by Respondents have not been found to be sustainable, the matter is decided on merits as follows."

33. Section 28 of the Indian Contract Act, is also relevant in the context and it read:-

"28 Agreements in restraint of legal proceedings, void. — Every agreement,—

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or (b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent."

34. The clause No.9 of the contract herein relate to Section 28 (b) and clause No.25 of the contract herein relate to Section 28(a) of the Contract Act.

35. To adjudicate upon the issue of limitation it is necessary to consider the relevant portions of Clauses 9 and 25 of the contract between the parties hereto. While Clause 9 provides once the final bill is raised, payments of those items in the bill in respect of which there is no dispute and of items in dispute will as far as possible be made within *six* months. Clause 25 provides that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing within *120* days of receiving the intimation that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Petitioner herein shall be discharged and released of all liabilities under the contract in respect of these claims. Clause 25 inasmuch as it extinguishes claims, much before the prescribed period of limitation under the Limitation Act, is void as per Section 28 of the Contract Act, 1872, as amended. This issue being no longer *res integra*.

36. In *Hindustan Construction Corporation vs Delhi Development Authority* 77 (1999) DLT 165 this Court noted:-

"8. Learned counsel for the petitioner on the other hand has argued that the said clause is hit by an amendment which has been made to Section 28 of the Contract Act (vide Amendment. Act 1 of 1997) whereby clause (b) has been incorporated therein. Section 28 of the Contract Act deals with agreements in restraint of legal proceedings, void. It envisages as under :-

"Every agreement,-

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

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

9. Learned counsel for the petitioner inspired by Section 28(b) alluded to above, has then contended that the said provision of law is very much applicable to the facts and circumstances of the present case. By the incorporation of clause 25 in the agreement his right to claim arbitration came to an end after the expiry of period of 90 days from the date of intimation of the final bill being ready for payment and thus he was deprived of a very valuable right to claim the amount which was due to him from the respondent.

10. A perusal of the impugned award reveals that the claims of the petitioner herein were defeated simply on the ground that the invocation of the arbitration clause was barred by time. Consequently the arbitrator did not decide the claims on merit.

11. In the circumstances stated above the petitioner are entitled to succeed. The objections are hereby allowed. The award dated January 7, 1994 is hereby set aside. The arbitrator is hereby directed to decide the claims of the petitioner on merits. In case the arbitrator who rendered the impugned award is not available in that eventuality a new arbitrator would be appointed by the authorities to go into the claims of the petitioner and to render the award within the statutory period."

37. Further in *Grasim Industries Limited vs State of Kerala* 2017 SCC OnLine SC 877 the Court noted:-

"9. Section 28(b) unequivocally provides, that an agreement which extinguishes the right of a party on the expiry of a specified period, would be void. Therefore, even if a restricted

period for raising an arbitral dispute had actually been provided for (as was determined, in the impugned order), the same would have to be treated as void.

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

'7. It is not actually a decision on the claim made under Annexure-X; but it is a decision of the arbitration clause in the agreement. Apart from that the claim put forward by the applicant in respect of the shortage of supply of raw materials from 1988-89 onwards also is barred by limitation under article 137 of the limitation act. The Supreme Court in Steel Authority of India Limited v. J.C Budharaja [(1999) 8 SCC 122] held that the provisions of art.137 of the limitation act would apply and any action should be brought within three years from the date when the cause of action to recover the amount rose. Thus the request for appointment of arbitrator will have only to be rejected.'

38. In the instant case, the respondent herein had submitted the Final Bill on 20.09.2005 and the Final Bill approved by the Engineer was signed by the respondent on 28.07.2006. The dispute had, therefore, arisen between the parties on 28.07.2006, when the respondent herein came to know about the amounts and claims not approved by the Engineer-in-Charge. Therefore, the Statement of Claims, having been filed on 16.09.2008 by the respondents herein is well within the limitation period of 3 years.

39. A bare perusal of the respondent's letter dated 20.09.2005, through which it had submitted its Final Bill to the petitioner and the respondent's letter dated 16.09.2008 invoking arbitration and seeking appointment of arbitrator makes it evidently clear that the

Final Bill submitted on 20.09.2005 was for a gross amount of ₹61,15,41,411/- and the net amount of the bill was ₹16,17,91,203/- The bill also included the respondent's claim Nos.1-41 for an amount of ₹11,96,17,555/- in the Annexure E of the Final Bill. The Final bill was passed/paid on 28.07.2006 by the petitioner to the respondent. Further, the respondent vide dated 16.09.2008, invoking arbitration, has acknowledged of having received a net payment of ₹2,31,53,000/- against the net Final Bill amount of ₹16,17,91,203/- as submitted by them, which being short by an amount of ₹13,86,38,203/- was sought to be referred to arbitration.

40. The Chief Engineer of the petitioner on 12.11.2008 referred Claims No.1-41, as were included in the Annexure – E of the Final Bill, totaling to an amount of ₹11,96,17,555/- and later another claim for the 'balance amount of Final Bill' amounting to ₹1,58,05,280/- was referred on 23.11.2010, with reference to the respondent's letter dated 03.07.2010. The total amount referred thus comes to ₹13,54,23,275/- which is within the amount of ₹13,86,38,203/- originally sought to be referred for arbitration by the respondent herein. Thus, essentially both the references arise out of the respondent's original request dated 16.09.2008. Thus the claims covered in the two references have arisen because of the gap between the Final Bill as submitted by the respondent herein on 20.09.2005 and as paid by the petitioner herein on 28.07.2006.

41. As per the details furnished by the petitioner showing details of various payments released to the respondent herein, it is noticed

the last payment was released by the petitioner herein on 27.02.2007. If the same is considered to be the cut-off date for the purpose of limitation then the claims have been raised by claimants/respondent herein even in a lesser period than mentioned above.

42. The completion certificate for the works was issued by the petitioner herein on 01.06.2006 stating the actual date of completion as 12.04.2005. Further, Clause 9 of the Contract between the parties hereto provides the Final Bill submitted by the respondent shall include all the amounts due and payable as considered by the claimants. Therefore, from a bare perusal of Clause 9 it is evident the parties had agreed that all the amounts that the respondent considers due and payable, including the disputed amount, has to be included in the Final Bill and the Engineer-in-Charge has to approve the Final Bill within a period of six months. Obviously, only after the receipt of the approval of payment by the Engineer-in-Charge, the dispute, if any, will arise and thereafter the Contractor will be eligible for referring such dispute to arbitration.

43. The contention of the petitioner the limitation period shall commence from the date of completion of the works is not in accordance with the provisions of the contract. Further, the dispute between the parties shall occur only after submission of the bill and approval or rejection.

44. The letter dated 18.10.2006 written by the respondent herein to the Superintending Engineer after rejection of its claim by the Executing Engineer was to ask the superintendent Engineer to reimburse its claims and to look into the merits of the case and impart justice. On 21.02.2007 the Superintending Engineer however rejected the claims and ultimately on 12.11.2007 the claims and disputes were referred to the arbitrator subject to their admissibility under Clause No.25 of the aforesaid agreement. All the three authorities have rejected the claim as such Clause No.25 was duly complied with, even if, the claim was not preferred within *120 days* but was within three years, which per Section 28(a) of the Indian Contract Act, was perfectly justified.

45. A perusal of award would reveal the arbitral tribunal has examined all the documents placed on record, appreciated the evidence led by the parties and made a reasoned award. Thus, there being no infirmity in the award passed by the learned arbitrator, I see no reason why it should be set aside. The law is well settled this Court is not to re-appreciate the evidence produced during arbitral proceedings and it is only for the arbitrator to weigh such evidence and to reach to a conclusion which the learned arbitrator has fairly done in this case. It is a settled law if two views are possible the view taken by the learned arbitrator cannot be interfered with unless it is perverse and shock the conscience of the Court.

46. The jurisdiction of this Court is limited to see if the learned tribunal has transgressed beyond the contract or has not acted in accordance with law or if has applied wrong principles of law. The Court under Section 34 of the Act does not sit in appeal over the award and there is no scope of re-evaluation on merits or reinterpreting the terms of the contract. This position has even been upheld by the Apex Court in *Associate Builders vs. DDA* (2015) 3 SCC 49.

47. The petition is dismissed. No orders as to cost.

YOGESH KHANNA, J

JULY 16, 2018

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