

a structure occupied by tenants/occupants. On 23 September, 2006, the Petitioner (respondent before the arbitrator) and the Respondent herein entered into an agreement titled as "Heads of Agreement" for assignment of the suit property in favour of the former for a sum of Rs.24 crores together with constructed area of 7000 sq.ft. The Petitioner made payment of Rs.6 crores out of this sum of Rs.24 crores to the Respondents around the same time, i.e. September, 2006. The obligations of the Respondents under the agreement included negotiation and settlement with all tenants/occupants including one Ambico Ice Works by getting vacant possession of the property, and demolishing the building standing thereon and making the plot vacant. On the other hand, the obligations of the Petitioner included obtaining of permission from MbPT for redevelopment of the suit property by construction of a commercial building. To enable the Petitioner to do so, the agreement provided for execution of a power of attorney by the Respondents in favour of the Petitioner. The tenure of such power was said to be initially for a period of six months. It was, however, extendable for such further period as might be mutually decided. It was also agreed that the deed of assignment required to be executed in pursuance of the agreement was to be executed after obtaining of consent from MbPT by the Petitioner. On 21 March 2008, the Petitioner addressed a communication to the Respondents *inter alia* conveying their readiness and willingness to complete the transaction as per the agreement and inquiring about the progress in the matter. There was no reply on record on the part of the Respondents. The Respondents' case was that negotiations were thereafter held between the representatives of the Parties. It was claimed that these were held sometime in the year 2009. It was the Respondents' stated case before the arbitrator that in or around

June 2011, the Petitioner's representative had for the first time orally informed the Respondents that it was no longer willing to proceed with the agreement. The Respondents claimed that the Petitioner had thereby refused to perform its obligations under the agreement and made an illegal demand for refund of the amount paid along with an exorbitant rate of interest; and the agreement had accordingly stood rescinded. The Respondents claimed to have incurred damages in the sum of Rs.19.07 crores. This amount was sought to be recovered in the arbitration reference. The cause of action for this claim was said to have arisen in June 2011, when the Petitioner was claimed to have informed the Respondents of its refusal to perform its obligations under the agreement and power of attorney. The Petitioner filed its reply and counterclaim. It was the Petitioner's case in its counter claim that it was always ready and willing to perform its part of the contract. It was submitted that during 2006 to 2010, the Respondents had repeatedly assured the Petitioner of fulfilling their obligations under the agreement; various meetings had taken place including meetings in June 2007, October, 2007, March, 2008, June 2008, January 2009, May 2011 and June 2011 for the purpose of completion of the respective obligations of the parties under the agreement; and there were repeated assurances in these meetings that the Respondents would abide by their obligations under agreement. It was, accordingly, submitted by the Petitioner that the parties had treated the agreement as valid and subsisting. The Petitioner denied having refused to perform its part of the contract in June 2011 or at any time. It was the Petitioner's case that by their letter dated 15 April 2012, the Respondents had refused to perform the agreement. It was the Petitioner's express case before the arbitrator that the cause of action for filing of its counter-claim

arose for the first time on 15 April 2012, when this letter was addressed by the Respondents to the Petitioner. With these pleadings, the parties went to trial before the learned arbitrator.

3 The learned arbitrator dismissed both claims and counterclaims. As noted above, it is the Petitioner, who was the counter-claimant, who has come before this court in challenge. The subject matter of its challenge is rejection of its counterclaims. The only basis on which the counter-claims came to be rejected was the bar of limitation. Curiously, inspite of the parties having expressly pleaded before the arbitrator that the agreement was subsisting at least till June 2011 (the Respondents' case being that the rescission of the agreement on the part of the Petitioner came about in June 2011, whereas, according to the Petitioner, the refusal to perform the agreement came from the Respondents on 15 April 2012), the learned arbitrator came to a conclusion that the agreement was abandoned by both parties in 2007. Apparently, the learned arbitrator came to this conclusion on the basis of his observation that none of the parties took any concrete step after 2007. Not taking of any step, concrete or otherwise, is, to say the least, different from abandoning the contract. It was nobody's case that the contract was abandoned by any party at any point of time, much less in year 2007. As noted above, the Respondents' case was that the agreement was rescinded by the Petitioner in June 2011, whilst the Petitioner's case was that on 15 April 2012, the Respondents had expressed their intent to refuse to perform the agreement. Abandonment of agreement is essentially a question of fact. Any finding on abandonment must be supported by a plea of fact raised in that behalf. Abandonment, like waiver of an existing right, benefit, involves, firstly, full knowledge of the party's right and

secondly, intentional act of giving up in the face of such knowledge. In the face of the pleadings and material referred to above, the learned arbitrator's conclusion of abandonment is clearly an impossible conclusion. It is against the very policy of Indian law. A case of abandonment of contract is essentially a plea of fact or at least a mixed plea of law and fact. Unless such plea is raised and material in support of such plea is produced before the court, the court cannot come to a conclusion of abandonment. In the present case, it being nobody's case that there was an abandonment, the arbitrator could have never rendered a finding of abandonment.

4 Having mistakenly found abandonment of the contract by both parties in year 2007, the arbitrator appears to have engaged into consideration of a plea of limitation with reference to the date of such abandonment. Once again, it is important to note that it was nobody's case that either the claims or the counter-claims were barred by law of limitation by reason of rescission of the contract. (The Respondents' case of limitation was under Article 54 of the Limitation Act, 1963 which provides for a three year period from the date of refusal of performance, the date fixed for performance, namely, 23 April 2007, being the date of accrual of cause of action (read conjunctively as per clauses 7 and 8 of the agreement) or, in the alternative, the date of notice of refusal of performance, which was in November 2006, when, according to the Petitioner, the Respondents failed to take "first step" under the contract. The Petitioner, on the other hand, had no case at all of bar of limitation concerning the Respondents' claims.)

5 The arbitrator was faced with a curious prospect of neither of the parties wanting to submit that the claim was barred by the law of limitation. The arbitrator nevertheless raised the issue of limitation on his own, observing that though no specific issue of limitation was raised in the pleadings of the parties, a judicial body could always raise such issue. The arbitrator claims to have raised such issue in the course of oral submissions of the parties and invited submissions from either sides on the issue. No doubt, under Section 3 of the Limitation Act, the court is enjoined upon to consider the matter of limitation, even if no such issue is specifically raised in the written statement of the defendant. But then, any decision on the issue can only be on the basis of averments of facts, and evidence placed, by the parties before the judicial body. No court can on its own arrive at a factual finding, which is unsupported by any averment in the pleadings or evidence of either side and then consider the question of limitation with reference to such finding. Any date fixed by the court for accrual of the cause of action must have some basis in the pleadings of the parties, though it is another matter that based on such date none of the parties may have specifically pleaded the bar of limitation.

6 Having found the Respondents' claims as barred by the law of limitation on the ground of abandonment of contract by both sides in 2007, the learned arbitrator, by a separate award on the Petitioner's counter-claims, held them to be also barred relying on his finding of abandonment whilst deciding the Respondents' claims, considering the matter to be *res judicata*.

7 In the premises, the impugned award on the Petitioner's counter-claims cannot be sustained. Arbitration Petition No.688 of 2015 is accordingly allowed by setting aside the award so far as it relates to the counter-claims of the Petitioner.

8 In view of the order passed in Arbitration Petition No.688 of 2015, the companion petition, namely, Arbitration Petition No.487 of 2014, does not survive and the same is also disposed of.

(S.C. GUPTE, J.)