

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.06.2019

CORAM

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

Original Petition No.794 of 2003
and Appln.No.8512 of 2018

M/s.Vishal Malleables Ltd.,
Mumbai.

... Petitioner

Vs.

1.M/s.Bharat Heavy Electricals Ltd.,
Ranipet.

2.Shri.T.C.A.Ramanujam,
Presiding Arbitrator.

3.Shri.K.Ramachandran,
Arbitrator.

4.Shri.K.C.Rajappa
Arbitrator.

... Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act,
1996 to set aside the Award dated 15.06.2003.

For Petitioner : Mr.P.J.Rishikesh

For Respondents : M/s.V.V.Sivakumar for R1

ORDER

Challenge has been made to the award dated 15.06.2003 passed by the three member Arbitrators.

2. The dispute was preferred by the claimant on the basis of the agreement dated 13.12.1995. As per the agreement dated 13.12.1995, ten numbers of Wind Mills were to be supplied to the respondent-M/s.Vishal Malleables and the claimant agreed for supply, erection, commissioning, operation and maintenance for one year. The respondent agreed to pay the contract price as per the scheduled payments. Wind electric generator machines were commissioned to the specification of the respondent before 01.07.1996, the respondent did not make the full payments and the payments as per the terms of the contract and there was belated payments. Therefore, the claimant has sent reminders/preferred for recovery of balance amount payable to the 10 Wind Mills supplied by them. The respondent however, raised contentions that there are defects in the Wind Mill and it was verified that the Wind Mills supplied were not up to the mark and not produced energy as guaranteed. Therefore it is the contention of the respondent that their reduction of the money is valid. Besides they also raised the plea of limitation, however the plea of limitation has been given up during Arbitral proceedings. Despite the fact of plea of limitation has been given up, the learned Arbitrator

has gone into the issue of limitation and found that the supply agreement and O & M, shall forms part of the same contract and also taking note of the several correspondence between the parties, came to the conclusion that the claim is not barred by limitation and passed an award. As against the the award the present petition is filed.

3. The learned counsel appearing for the petitioner herein canvassed only two points. The foremost challenging to the award is that the claim is barred by limitation and the second point is that there is no reference as per Section 21 of the Act to decide the issue by Arbitrator. The first notice does not contemplate the recovery of the outstanding due amount based on the supply agreement, but it deals only with O&M, therefore the Arbitrators ought not to have decided the issue beyond the scope of reference.

4. The learned counsel for the 1st respondent/claimant would contend that the plea of limitation is abandoned by the petitioner herein and the plea of limitation is a mixed question of facts and law. If such a plea has not been abandoned, the petitioner herein would have produced the necessary documents and enlightened the nature of dispute between the parties by way of evidence to show that the claim is made well within the period of limitation. Therefore once the plea of limitation is given up and abandoned by

the Petitioner herein, before the Arbitrator the same cannot be pressed into service under Section 34 of the Act while challenging the award. As far as the other contention raised by the learned counsel for the petitioner herein that the award is beyond the scope of reference, it is submitted by the learned counsel that O& M is a part and parcel of the main contract and the same cannot be read as an individual contract and both are connected to each other. He further submitted that the maintenance is inbuilt in the original contract therefore, subsequent contract cannot be segregated to contend that there is no reference at all under such notice. Thus, it is submitted by the learned counsel for the respondent herein/claimant that the Original Petition is liable to be dismissed.

5. The learned counsel for the Petitioner, in support of his contentions, relied on judgment reported in **2011(5) SCC 532** in the case of **Booz Allen and Hamilton Inc. Vs SBI Home Finance Limited and others**, the Hon'ble Apex Court has held in para 34 (iii) that

"Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the

scope of arbitration agreement, will not be “arbitrable” if it is not enumerated in the joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal”.

The above judgment is mainly to show that O & M is not the subject matter of the dispute vis-a-vis the contract does not provide for Arbitration.

6. To buttress his submission, learned counsel for the Petitioner herein has made reliance upon the following decisions:-

(i) In 2017 SCC OnLine Del 7228 in the case of *Alupro Building Systems Pvt. Ltd., Vs. Ozone Overseas Pvt. Ltd.*, paragraph 30 reads as follows:-

“ 30. Considering that the running theme of the Act is the consent or agreement between the parties at every stage, Section 21 performs an important function of forging such consensus on several aspects viz., the scope of the disputes are time barred; of identification of the claims and counter-claims and most importantly, on the choice of arbitrator. Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the claimant invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other

words, without such notice, the arbitration proceedings that are commenced would be unsustainable in law.”

(2) In the decision reported in (2012) 12 SCC 581 in the case of *State of Goa Vs Praveen Enterprises*, paragraph 10 and 11 reads as follows:-

10. “Reference to arbitration” describes various acts. Reference to arbitration can be by parties themselves or by an appointing authority named in the arbitration agreement or by a court on an application by a party to the arbitration agreement. We may elaborate:

(a) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the “reference” contemplated is the act of parties to the arbitration agreement, referring their disputes to an agreed arbitrator to settle the disputes.

(b) If an arbitration agreement provides that in the event of any dispute between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the “reference” contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed by him.

(c) Where the parties fail to concur in the appointment of the arbitrator(s) as required by the arbitration agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to

arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment the disputes between the parties stand referred to such arbitrator in terms of the arbitration agreement.

11. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where "all disputes" are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counterclaim) subject to any limitation placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted certain matters and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes."

(3) In (1988) 2 SCC 338 Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, it is held as follows:-

"3. The question is, whether the High Court was right in upholding that the application under Section 20 of the Act was barred by limitation. In view of the decision of this Court in the case of Kerala State Electricity Board Vs T.P.K.K. Amsom and

Besom, Kerala it is now well settled that Article 137 of the Limitation Act, 1963 would apply to any petition or application filed in a civil court. Sub section (1) of Section 20 of the Act provides as follows:

1. (1977) 1 SCR 996: (1976) 4 SCC 634: AIR 1977 SC 282

20. Application to file in court arbitration agreement.- before the institution of any suit with respect to the subject matter of the agreement or any part of its, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court.

4. Therefore, in order to be entitled to order of reference under Section 20, it is necessary that there should be an arbitration agreement and secondly, difference must arise to which this agreement applied. In this case, there is no dispute that there was an arbitration agreement. There has been an assertion of claim by the appellant and silence as well as refusal in respect of the same by respondent. Therefore, a dispute arise. The High Court proceeded on the basis that the work was completed in 1980 and therefore the appellant became entitled to the payment from that date and the cause of action under Article 137 arose from that date. But in order to be entitled to ask for a reference under Section 20 of the Act there must not only be an entitlement to money but there must be a difference or dispute must arise. It is 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, accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under Arbitration by R.S.Bachawat, first edition page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying not merely inaction of accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case.

5. The application under Section 20 of the Act was filed in court in January 1986, that is to say, within the period of three years therefore the application was within time. The High Court was in error in dismissing the application on the ground of limitation. The judgment and order of the High Court are therefore set aside. The High Court is directed to make an order under Section 20 of the Act and give consequential direction in respect of the same. This costs of this appeal would be costs in the arbitration proceeding. The appeal is thus allowed and disposed of as aforesaid”.

Therefore from the above judgments, it is clear that Article 137 of the Limitation Act will apply to the application filed under Section 20 of the Arbitration Act and the period of three years prescribed under Article 137 would start from the date when the right to apply accrued. Absolutely there is no dispute in the said issue.

7. While answering the next issue i.e., when admittedly the amount has been withheld by the petitioner herein, and the admitted liability as per the contract is Rs.1,52,47,600/- which is not in dispute, the amount has been withheld only on the ground that Wind Mill were not up to the mark and not producing the expected generation. As such, the amount has been withheld only for the reason that there is no expected generation by the Wind Mill as expected by the petitioner, but there is no dispute with regard to admitted liability and the nature of payment payable by the petitioner to the respondent. In fact, without raising any dispute whatsoever as per the contract, payment was finally made on 09.05.1996, thereafter, there were exchange of notice. It is apparent that even after withholding the payments as per the contract, operation and maintenance agreement dated 08.07.1998 came to be executed as per the original contract dated 20.12.1994. The purchase order also makes it clear that the operation and maintenance had to

be undertaken by the supplier. Nevertheless, insofar as operation and maintenance for a period of 12 months from the date of commencing and commercial operation to be done by the supplier, after such period, there was a separate agreement to be entered between the parties as per the original order. Therefore it cannot be said that the subsequent contract for O & M between the petitioner and the respondent is a separate contract and in no way connected with the original contract. In fact, operation and maintenance by the supplier is inbuilt obligation as per the contract and a separate agreement is only necessitated after a period of 12 months from the date of commissioning of the machine. Such being the position, the contention of the learned counsel for the petitioner herein that operation and maintenance agreement is independent and in no way connected with the original contract, cannot be countenanced. In fact, the learned Arbitrators considered the entire materials placed before them and assessed the factual aspects and correspondence between the parties and found that the claim made by the claimant/respondent herein, is not barred by limitation.

8. As rightly pointed out by the learned counsel for the respondent herein/claimant, much after 09.05.1996, when a notice has been issued for the withheld amount, there were series of correspondence between the parties, and at that point of time, there was no dispute with regard to the liability and

further, a separate contract for operation and maintenance also entered into between the parties.

9. When the party to the dispute viz., the petitioner herein acknowledged the liability to pay the certain amount and the dispute for such payment is only on the ground of defect in the machine. Therefore the Arbitrators entertaining such a claim in their Arbitration Proceedings, cannot be faulted with by this court. When the acknowledgement is made in writing with regard to the payment made by the petitioner herein, and the claim has been preferred by the claimant, within a period of three years, it cannot be stated that the claim is barred by limitation. Further, it is to be noted that the plea of limitation can be raised at any time, but the fact remains that the plea of limitation is not necessarily be on a legal issue alone, some times it can be on mixed question of law and facts. Therefore, the question as to whether the claim is barred by limitation or not, can be seen in many cases only by assessing the facts and situation of the given case. If the petitioner has not given up or abandoned such a plea and raised that the issue of limitation before the arbitrators; the respondent would have had an opportunity to place all the materials and facts to show the plea of limitation is not maintainable, the petitioner herein having ample opportunity to raise argument on such a plea, abandoned such a plea thereby prevented the respondent/claimant from

placing the materials, documents and evidences on that aspect, now, cannot take advantage of fact that plea being the legal plea to contend that the claim is barred by limitation. In view of such ground also, the contention of the learned counsel for the petitioner cannot be countenanced. In this regard, it is relevant to look into the judgment of Supreme Court reported in 2006 AIR 2006 SC 2488 in the case of *Hari Shankar Singhania and others Vs Gaur Hari Singhania and others*, wherein, it is held as follows:-

11. We have heard both the parties extensively. We have carefully perused all the letters, annexures and the orders passed by the High Court produced in Court. Letter dated 16th September 1988 is a letter by Shri Hari Shankar Singhania to Shri Gaur Hari Singhania specifically stating that "I request that the distribution of immovable properties is being delayed and I will request you to please make all attempts to expedite the same"

12. Letter dated 4th October, 1988 is a letter by Shri Gaur Hari Singhania to Shri Hari Shankar Singhania stating that "I on my part have given all the information and materials and done everything possible to expedite the distribution. The committee appointed by the partners is seized of the matter. I am equally anxious that the matter should be amicably sorted out as early as possible."

26. In Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority MANU/SC/0271/1988: [1988] 3SCR 351,

this Court holding that the application under Section 20 was filed within time examined 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 the claimant is the accrual of cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim...

There should be a dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or request. Whether in a particular case dispute has arisen or not has to be found out from the facts and circumstances of the case.

27. In the instant case, correspondence was not merely in the nature of reminders but also instruments to resolve the matter and amicably negotiate. Therefore, when the negotiations were taking place between the parties by way of various letters written by both parties the right to apply can be said to accrue when it becomes necessary to apply, that is to say when a dispute in fact arose. Furthermore, the respondent did not ever dispute the claim of the appellants.

28. Learned counsel appearing for the appellants placed reliance on Oriental Building and Furnishing Co.Ltd. Vs. Union of India AIR

1981 Del 293, where the material question was what is the starting point of limitation for moving a petition under Section 20 of the Arbitration Act, 1940. It was held that: Neither party can move the Court without the existence of a difference between them. So, the material question is, when the difference arose between the parties and not when the lease expired, nor when it was entered into. "The court further observed, "...a difference can arise long after some work has been done under a contract. There can be negotiations between the parties and all sorts of correspondence. But it is only when they come to the conclusion that they cannot resolve the dispute between them, it can be said that a difference arises. A difference under the arbitration agreement is a claim made by one party, which is refuted by the other party. At that stage, it is open to the parties or any one of them to go for arbitration to get this difference or differences settled and it is only at this stage it is possible to say that a difference has arisen between the parties.

29. This decision of the Delhi High Court squarely covers the case on hand as a close perusal of the letters exchanged between the parties show clearly that there was intention to arrive at an amicable settlement between the family members with regard to the division of assets in question.

30. It cannot be said that merely because nominees were appointed for working out an arrangement, which could not ultimately be arrived at, a dispute or difference arose way back

in February 1988. In fact, even immediately after this, the correspondence exchanged between the parties reveals a forthcoming attitude and amiable efforts made towards implementing the deed of dissolution.

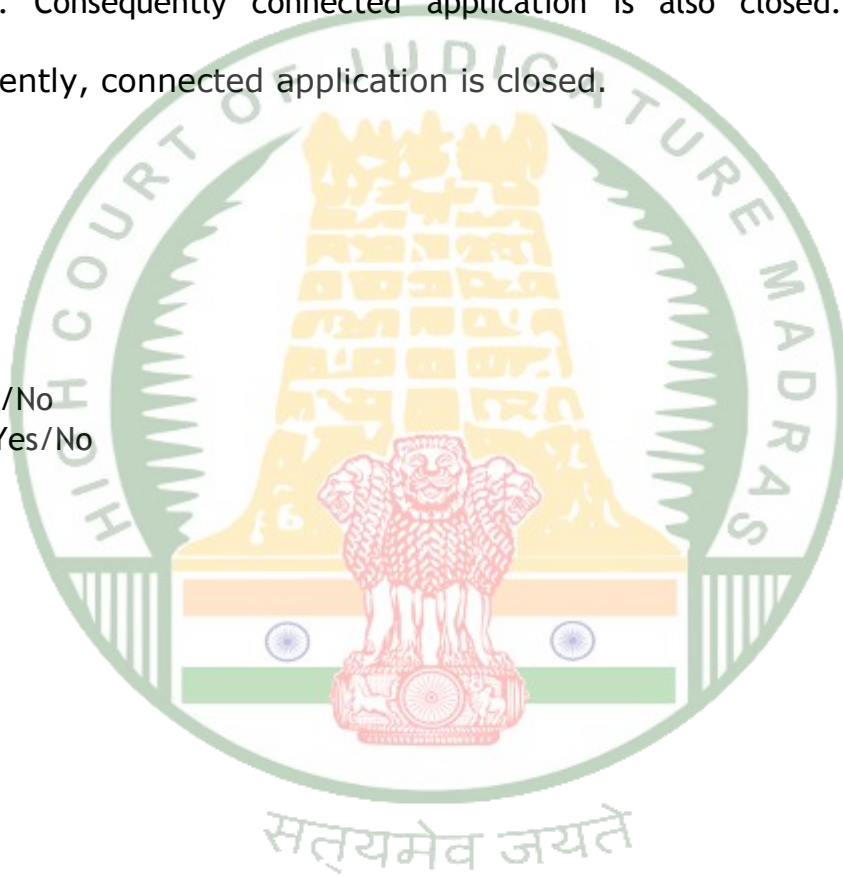
As held by the Hon'ble Apex Court, when correspondence exchanged between the parties which reveals the forthcoming attitude and amiable efforts made_ from the date of commissioning of the wind mill and the contract entered into between them, the issue of limitation raised by the petitioner herein, cannot be agitated before this court.

10. The learned counsel for the claimant brought to the notice of this Court a series of correspondence taken place between the parties viz., Ex.C.8, Ex.C.9, Ex.C10, Ex.C11, Ex.C12, Ex.C14 & Ex.C15 and submitted that when a series of correspondence between the parties exchange and actual amount payable as per the contract has not been denied but only the quality of machines were disputed, the claim filed by the claimant/respondent is well within the period of limitation. This has been rightly assessed by the arbitrators. The learned arbitrators have also analysed the entire materials placed before them and found that such amount is liable to be paid. In view of the same, this Court is not able to appreciate the contention of the learned counsel for the petitioner herein.

11. In view of the above reasonings, none of the grounds made under Section 34 of the Act by the Petitioner is merit acceptance and the impugned award is not liable to be interfered with. Accordingly the original petition is dismissed. Consequently connected application is also closed. No costs. Consequently, connected application is closed.

Index:Yes/No
Internet:Yes/No
dpq

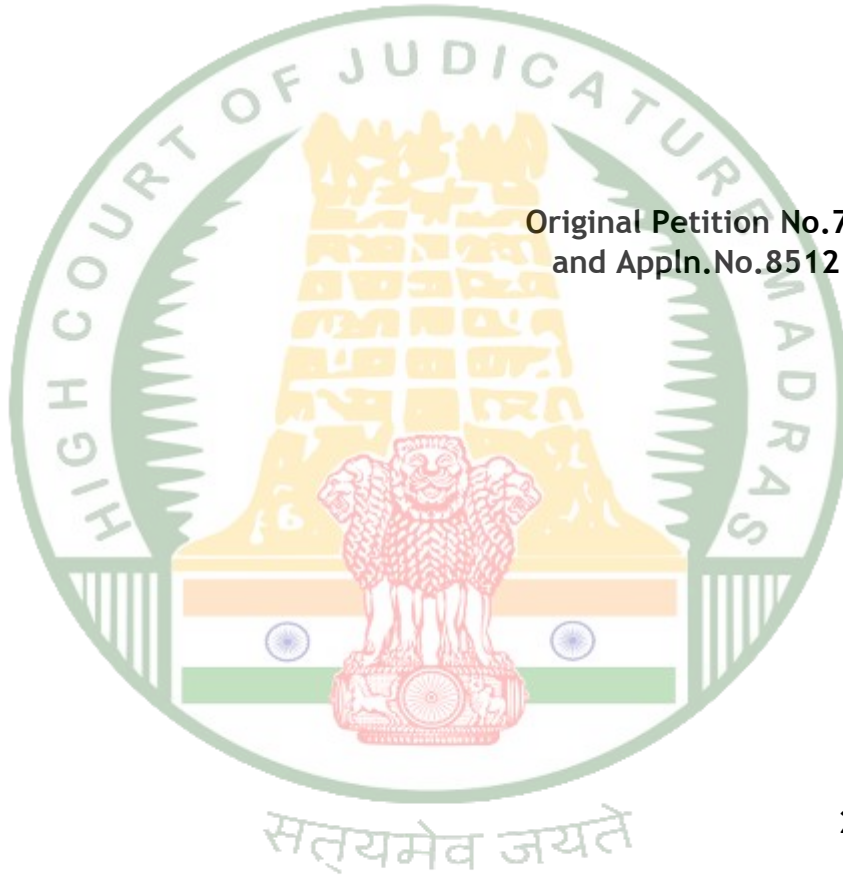
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