

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.04.2019

DATE OF DECISION : 09.04.2019

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.No.535 of 2017

Siemens Limited,
Seethakathi Business Centre,
4th and 5th Floor,
No.272/688, Anna Salai,
Chennai-600 006
rep by its Manager -PD LD Project Management
Mr.Gurubaran Senthurpandian .. Petitioner

Vs.

M/s.Marg Limited,
having its registered office at
"Marg Axis", 4/138,
Rajiv Gandhi Salai,
Kottivakkam,
Chennai-600 041.

सत्यमेव जयते.. Respondent

This original petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking (a) that the impugned Award dated 20.04.2017 be quashed and set aside, (b) to consequently direct the respondent to pay the undisputed sum of Rs.1,42,52,972.00, (c)to direct the respondent to pay further interest @ 18% p.a from the date of award to date of realization; (d) for costs and (e) for such further and other orders as this Hon'ble Court may deem fit and proper in the interest of justice.

For Petitioner : Mr.Jose John
of M/s.King & Partridge

For Respondent : Mr.V.J.Arul Raj

ORDER

Instant 'Original Petition' ('O.P' for brevity) has been filed under section 34 of 'The Arbitration and Conciliation Act, 1996' ('A and C Act' for brevity), assailing an arbitral award dated 20.04.2017 ('impugned award' for brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a Sole Arbitrator, who is a Former Judge of this Hon'ble Court.

2 Mr.Jose John, learned counsel of M/s.King & Partridge (Law Firm) on behalf of petitioner in instant O.P and Mr.V.J.Arul Raj, learned counsel on behalf of sole respondent in instant O.P were before this Court. Petitioner in instant O.P was sole claimant before AT and respondent in instant O.P was lone respondent before AT also. Therefore, petitioner shall be referred to as 'claimant' and sole respondent in the instant O.P shall be referred to as 'respondent' for convenience.

3 The entire matter turns on a very narrow compass. Subject matter of instant O.P is a 110/33 KV outdoor switch yard (hereinafter 'said switch yard' for brevity) for 'Karaikal Port Private Limited' (hereinafter 'Karaikal Port' for brevity). In the light of the narrow compass on which the entire matter turns, it is not necessary to delve into those aspects.

4 Suffice to say that respondent issued one purchase order and two work orders (one work order and an additional work order) for design, manufacture and supply of said switch yard. The work order is dated 02.08.2010, value is Rs.2,01,27,998.01 and it is Ex.C.3 before AT. Purchase order is dated 04.08.2010, value is Rs.3,48,98,313.18 and this purchase order is Ex.C.4 before AT. Additional work order is dated 12.6.2012, value is Rs.5,80,438.00 and this additional work order is Ex.C.5 before AT. There is no dispute or disagreement before this court that this work order, purchase order and additional work order, namely Exs.C.3, C.4 and C.5 respectively constitute the entire agreement between petitioner / claimant and respondent for supply of said switch yard. To be noted, there was an undated contract, which according to the petitioner / claimant, is described to be in February of 2010. It is admitted by both sides that this contract was never signed and therefore, the same may not be looked into. In this view of the matter, it was agreed by both sides that it would be appropriate to refer to aforesaid work order, purchase order and additional work order (Exs.C.3, C.4 and C.5 respectively) collectively as 'said contract' for convenience and clarity. To be noted, wherever necessary and proper, individual and specific reference to these three documents, namely Exs.C.3, C.4 and C.5, will be made.

5 With regard to the manner in which said contract operated, it is submitted without any disagreement by both sides that petitioner / claimant raised 'running account bills' ('RA Bills' for brevity) and that the same were paid from time to time by respondent. There is also no disagreement that staggered payment qua RA Bills was in three parts, namely, 10 % as advance

payable against bank guarantee, 75% against proforma invoice for each of equipments / materials and 15% after completion of supply against performance bank guarantee. The third part of staggered payment, namely 15% is being referred to as 'retention money'.

6 Crux and gravamen of the arbitrable dispute between petitioner claimant and respondent is that petitioner / claimant had raised a total of 16 RA Bills for cumulative value of Rs.5,33,89,246.00, but the respondent had paid only Rs.4,34,73,784.00 leaving a balance of Rs.99,15,462.00. However, it is also the petitioner / claimant's case that out of 16 RA Bills, with regard to RA Bills 1 to 10, respondent had not released retention money and in respect of RA Bills 11 to 16, respondent defaulted in payment of both retention money as well as value payable for supply or execution of work. On this basis, petitioner / claimant raised an arbitrable dispute, AT was constituted, arbitral proceedings commenced and claim statement dated 04.03.2016 was filed by petitioner / claimant before AT, claiming aforesaid Rs.99,15,462.00 with interest at the rate of 18% per annum upto the date of reference. Interest component was Rs.43,37,510.00 and therefore, the total claim was Rs.1,42,52,972.00. There was a prayer for future interest at the rate of 18% per annum, i.e., future interest upto date of realisation also. There was prayer for costs also.

7 Respondent, who entered appearance, filed a statement of defence, raised an issue of limitation. A perusal of the impugned award reveals that respondent's stated position before AT was to the effect that

limitation is the only issue on which claim is being resisted. In other words, the fact regarding 16 RA Bills and payment made against the same were not put in issue.

8 Though learned counsel for respondent before this court attempted to say that claim also was disputed as according to petitioner / claimant, respondent abandoned the work, necessitating deployment of third party contractor, impugned award made by AT makes it clear that respondent's sole plea before AT was limitation. Three articulations in the impugned award of AT are of immense significance in this regard. One is paragraph 4 which contains four issues framed by AT and the same reads as follows :

“4.On the basis of the above pleadings the following issues were framed:

1.Is the claim barred by limitation?

(The issue as framed reads as follows. “Is the claimant barred by limitation?” This is a clerical error and is corrected.)

2.Is the reference to arbitration contrary to the procedure agreed to by the parties?

3.Is the claimant entitled to the reliefs prayed for?

(The issue as framed reads as follows: “Is the claim entitled to the reliefs prayed for?” This is a clerical error and is corrected.)

4.What other reliefs are the parties are entitled to?”

9 Second portion of impugned order is paragraph 6, wherein it has been clearly recorded that respondent restricted itself to the issue of

limitation and that if AT agrees with petitioner's claim, the claim will have to be allowed. Paragraph 6 reads as follows :

“6.The learned counsel for the respondent restricted himself to the issue of limitation. Therefore, if, on the ground of limitation, I hold in favour of the claimant, the claim will have to be allowed.”

10 Issues 1 and 2 were dealt with and answered together. Likewise issues 3 and 4 were dealt with and answered together. After answering issue Nos.1 and 2 against petitioner / claimant, the answer to issue Nos.3 and 4 is contained in one paragraph, namely paragraph 22 and the same reads as follows :

“22.Issues 3 and 4:

In view of the discussion and the finding arrived at above, the claimant is not entitled to any relief, as the claim is time barred. These issues are answered accordingly.”

11 A cogent reading of impugned award made by AT, more particularly paragraphs 4, 6 and 22 which have been extracted supra, will reveal that sole issue before AT was limitation. It is also not in dispute before this Court that respondent has not filed an independent petition assailing the impugned award. In other words, respondent has given compete legal quietus to the impugned award. Considering the limited contours and confines of section 34 of A and C Act, respondent cannot now be heard to contend that the claim of petitioner / claimant is also being resisted on merits on the ground that respondent has abandoned the work, more particularly owing to

the reason that respondent has admittedly not filed an independent petition assailing the impugned award resulting in respondent giving complete legal quietus to impugned award.

12 What follows / flows as a sequittur from this position is that instant O.P turns only on the question of limitation. In other words, if this court agrees with the petitioner / claimant that claim is not barred by limitation, claim of the petitioner / claimant will stand acceded to. It is axiomatic that if this court does not agree with the petitioner / claimant, i.e., if court comes to the conclusion that claim of the petitioner is barred by limitation, the impugned award will be sustained and no further discussion is necessary.

13 As the entire issue turns on limitation, the date of commencement of arbitral proceedings, more particularly, date of commencement of arbitral proceedings within the meaning of section 21 of A and C Act gains immense significance. In this regard, impugned award has taken 29.05.2015 as date of commencement of arbitral proceedings. A reading of impugned award makes it clear that AT has taken 29.05.2015 as the date on which arbitral proceedings commenced, as the petitioner / claimant and respondent agreed that the request, i.e., request for dispute to be referred to arbitration was made on 29.5.2015. Relevant portion of the impugned award reads as follows :

“12. Commencement of arbitral proceedings is as per section 21 of the Arbitration and Conciliation Act which says

that unless or otherwise agreed by the parties, the proceedings commence on the date on which the request for referring to arbitration is received by the respondent. In this case, both the parties agreed that this request is dated 29.5.2015 and therefore, the arbitral proceedings commenced only on that date....”

14 In the considered view of this court, taking the date of communication which is a request for dispute to be referred to arbitration as the date of commencement of arbitral proceedings is incorrect, as the language in which section 21 of A and C Act is couched reads otherwise. Section 21 of A and C Act reads as follows :

“21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

(Underlining made by Court to supply emphasis)

15 In the considered view of this court, a plain reading of the language in which section 21 of A and C Act is couched makes it clear that date of commencement of arbitral proceedings is not the date of communication / request for referring the dispute to arbitration, but the date of commencement of arbitral proceedings is the date on which such communication is received by noticee / addressee, who / which has been described as 'respondent' in section 21. In the instant case, the

communication dated 29.5.2015 in which request for referring the dispute for arbitration was made by petitioner / claimant is as follows :

KING & PARTRIDGE
SINCE 1854

QJ/AE/ 971 By SPAD 29.05.2015

Marg Limited
"Marg Axis", 4/138,
Rajiv Gandhi Salai,
Kottivakkam,
Chennai - 600 041

Sir,

Sub: Work contract consisting of Purchase Order no. 1001262 dated 04.08.2010; Work order no. 1200904 dated 2.8.2010 and amendment Work Order No 1214503 dated 12.06.2012 (Work Order)

We refer to the Work Order for supply, construction, installation, testing and commissioning of 110/33 kV outdoor switchyard at Karaikal Port Project site.

Siemens Limited supplied all the goods/ materials for the above and also installed the equipment in the manner prescribed in the Work Order by 27.02.2012. For the supplies made and the work done, Siemens Limited raised invoices amounting to Rs.533,89,245.00 from time to time. However, a huge balance of Rs.99,15,662.00 is outstanding and due and payable by your company.

Siemens Limited repeatedly requested for payment of the aforesaid balance. However, you have not paid the balance sum of Rs.99,15,662.00 for the work done and supplies made. In view of the same, differences, disputes and claims have arisen against your company.

The Work Orders provide for resolution of disputes and differences and claims by an Arbitral Tribunal comprising a sole arbitrator. Accordingly, we hereby request you to appoint an Arbitrator from out of the three named Judges mentioned below:

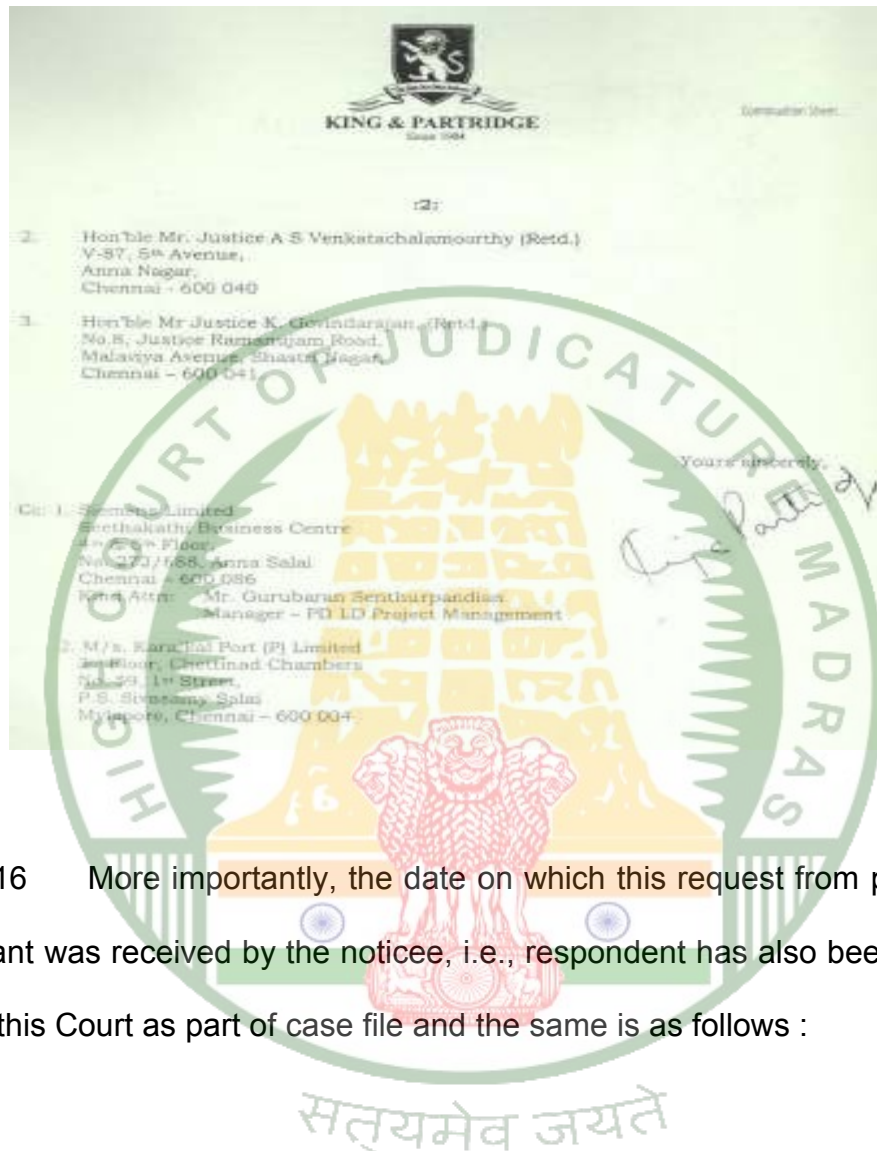
1. Hon'ble Mr. Justice M S Janardhanam (Retd.)
Plot "ANU VILLA", Plot No. 147, D. No. 4/12,
First Floor, Third Main Road, Ramaraj Nagar
Thiruvananthapuram,
Chennai - 600 041

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सत्यमेव जयते

WEB COPY

KING & PARTRIDGE, 100, South Bridge Road, Singapore 058100 - Chartered Accountants & Solicitors
King & Partridge, Chennai, 100, South Bridge Road, Chennai, India. Tel: 044-23333333, Fax: 044-23333333
E: k.p@kingpartridge.com, www.kingpartridge.com



16 More importantly, the date on which this request from petitioner / claimant was received by the noticee, i.e., respondent has also been placed before this Court as part of case file and the same is as follows :

Our Ref. JD/05/27/15

ACKNOWLEDGEMENT
(To be returned to office of Posting for Delivery to sender)

Received & registered
Addressed to (Name)
** Insured for rupees
Signature of addressee
Date of delivery

MARCH 10
MANG AXIS 4/138
Rajiv Gandhi Salai
Karachi Port (P) Limited
Chennai - 600 004

.... Write here "Letter", "Post Card", "Packet", as the case may be, preceded by the word "Insured", if the article is insured
** To filled up only the case of insured article and to be signed out in the case of other articles

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CHENNAI

17 Both counsel before me are not in disagreement that aforesaid request dated 29.5.2015 and acknowledgement which have been scanned and reproduced supra were placed before AT. A perusal of aforesaid scanned reproduction reveals that the request for reference of dispute to arbitration from petitioner / claimant was received by respondent on 03.06.2015. Therefore, by operation of section 21 of A and C Act, the date of commencement of arbitral proceedings in the instant O.P is 3.6.2015 and it is not 29.5.2015 as held by AT. However, this by itself does not vitiate the impugned award and therefore, this court proceeds to test the impugned award by taking the date of commencement of arbitral proceedings as 3.6.2015.

18 Aforesaid discussion and view of this court regarding commencement of arbitral proceedings within the meaning of section 21 of A and C Act has become necessary, as the entire matter turns on limitation as alluded to supra. When the entire matter turns on limitation, the date of commencement of arbitral proceedings assumes immense significance and this date is all too crucial and critical. In other words, the date being 3.6.2015 (not 29.5.2015 as held by AT) may ultimately not have any real impact on limitation, but as the impugned award is being tested on limitation and as the entire matter turns on sole issue of limitation, aforesaid discussion has become necessary.

19 In this regard, it is to be noticed that section 3 of the Limitation Act, 1963 (hereinafter 'LA Act' for brevity) which deals with bar of limitation,

talks about date of 'institution of suit', i.e., date of 'presentation of a plaint', but it does not specify or speak about the date of institution of arbitration proceedings.

20 Under aforesaid circumstances, after analysing section 21 of A and C Act and section 3 of LA Act, Hon'ble Supreme Court, in *Praveen Enterprises* judgment, namely ***State of Goa Vs. Praveen Enterprises*** reported in **(2012) 12 SCC 581** held that section 21 of A and C Act supplies the omission in section 3 of LA Act.

21 In other words, in very simple terms, ***Praveen Enterprises*** principle is to the effect that whenever an issue of limitation is raised in arbitral proceedings, the date of commencement of arbitral proceeding within the meaning of section 21 of A and C Act will be the reckoning date for testing the limitation issue. In this regard, paragraph 18 of ***Praveen Enterprises*** very pithily and lucidly lays down the principle. This Court deems it appropriate to extract and reproduce paragraph 18 of ***Praveen Enterprises***, which reads as follows :

“18. In regard to a claim which is sought to be enforced by filing a civil suit, the question whether the suit is within the period of limitation is decided with reference to the date of institution of the suit, that is, the date of presentation of a plaint. As the Limitation Act, 1963 is made applicable to arbitrations, there is a need to specify the date on which the arbitration is deemed to be instituted or commenced as that will decide whether the proceedings are barred by limitation or not. Section 3 of the Limitation Act, 1963 specifies the date of institution for suit, but does not specify the date of “institution” for arbitration proceedings. Section 21 of the Act supplies the

omission. But for Section 21 there would be considerable confusion as to what would be the date of “institution” in regard to the arbitration proceedings. It will be possible for the respondent in an arbitration to argue that the limitation has to be calculated as on the date on which statement of claim was filed, or the date on which the arbitrator entered upon the reference, or the date on which the arbitrator was appointed by the court, or the date on which the application was filed under Section 11 of the Act. In view of Section 21 of the Act providing that the arbitration proceedings shall be deemed to commence on the date on which “a request for that dispute to be referred to arbitration is received by the respondent” the said confusion is cleared. Therefore, the purpose of Section 21 of the Act is to determine the date of commencement of the arbitration proceedings, relevant mainly for deciding whether the claims of the claimant are barred by limitation or not. “

22 This now takes us to the crucial question as to when cause of action arose in instant case.

23 As mentioned supra, said contract operated between petitioner / claimant and respondent by way of RA Bills and there is no dispute or disagreement that the last of RA Bill is dated 12.12.2012. According to learned counsel for petitioner / claimant, this date of last RA Bill cannot be taken as the reckoning date. Learned counsel went on to submit that cause of action arose only on 22.01.2015, as according to learned counsel that is the date on which petitioner / claimant made a claim.

24 Responding to this, learned counsel for respondent submitted that on the date of last RA Bill, petitioner / claimant was clearly aware that the

sum claimed now remains unpaid and therefore, commencement of arbitral proceedings should have been triggered within the prescribed period of limitation by computing the same from 12.12.2012. As alluded to supra, learned counsel for respondent submitted that on merits, respondent is entitled to retention money, has rightly held back retention money and other portions of 16 RA Bills, which remain unpaid as alluded to supra owing to petitioner / claimant abandoning said switch yard work. As already mentioned supra, in the light of paragraphs 4, 6 and 22 of the impugned award, which capture the stated position of respondent before AT, it is not open to respondent to canvass this aspect now much less in instant O.P which is under section 34 of A and C Act.

25 This takes us to the question as to what is the period of limitation. It was pointed out that period of limitation is six months and it has been clearly set out in the work order dated 2.8.2010, namely Ex.C.3. Relevant clause reads as follows :

“19ARBITRATION: All disputes, doubts, differences claims (whether admitted or not) arising out of or in relation to this work order (whether before or after its expiry or termination) shall be referred to arbitration within six months from the date on which such disputes, doubts, differences, claims arose or shall be deemed to have been arisen and shall be decided by sole arbitrator to be appointed mutually by both the parties. The provisions of the arbitration and conciliation act of 1996 shall apply.”

26 It was also pointed out that purchase order which also forms part of said contract being purchase order dated 4.8.2010 does not contain six months limitation period and therefore, period of limitation computed in accordance with purchase order is three years.

27 It was further contended by petitioner / claimant that work order by its very nature is such that reckoning date should be the date of completion of work and therefore, it cannot be date of the last of the 16 RA Bills.

28 This takes us to how the AT has dealt with limitation issue.

29 As mentioned supra, limitation is issue No.1. AT has dealt with issue Nos.1 and 2 together and discussion in this is contained in paragraphs 12 to 21 of impugned award. Considering the significance and considering the position that the entire matter turns on limitation, this court deems it appropriate to extract paragraphs 12 to 21 of impugned award which read as follows :

"12.Issue No.1 & 2:

The clause on which the respondent bases his case is Clause 19 of Ex.C3 and Clause 19 of Ex.C5. They are both identical. They read as follows:

"All disputes, doubts, differences, claims (whether admitted or not) arising out of or in relation to this work order (whether before or after its expiry or termination) shall be referred to arbitration within six months from the date on

which such disputes, doubts, differences, claims arose or shall be deemed to have arisen and shall be decided by sole arbitrator to be appointed mutually by both the parties. The provisions of Arbitration and Conciliation Act 1996 shall apply”.

Commencement of arbitral proceedings is as per section 21 of the Arbitration and Conciliation Act which says that unless or otherwise agreed by the parties, the proceedings commence on the date on which the request for referring to arbitration is received by the respondent. In this case, both the parties agreed that this request is dated 29.5.2015 and therefore, the arbitral proceedings commenced only on that date. I am not here concerned with the purchase order (Ex.C 4) which is dated 4.8.2010 and any claim in respect of that is clearly barred by 2013. I am referring to this because, the arbitration clause in the purchase order does not contain a clause similar to clause 19 and the both the counsel also did not refer to contract. Section 43(3) of the Arbitration and Conciliation Act reads as follows:

“43. Limitations:

(1) xxx

(2) xxx

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any as the justice of the case may require, extend the time for such period as it thinks proper”.

13. Now, I will examine the emails that have been produced before me. There was no denial of any document. Every document produced before is taken as admitted. There is an email DATED 23.8.2012. This email clearly mentions that there were discussion claiming retention payment, overdue debtors payment in respect of Ex.C4 and C3. On December 11, 2012 there was an email from the claimant to the respondent which refers to discussion had in the respondent office on 30.11.2012 and that there was no positive response for the long pending payment dues. The last RA bill is 12.12.2012. So even before this bill was raised there had been claims for payment of retention amounts and other outstandings.

14. The clause-19 which I have referred to above is worded widely and it speaks of disputes, doubts differences and claims. So, this email is clearly a claim made for a long pending payment for which pressure is put by the claimant's management. An identical email is found to have been sent on April 9, 2013 which contains the invoice details for which amount is payable. These are relating to Running Account Bill Nos.13 to 16. On 5th September, 2013 there was an email from Captain Raman to Bharath Vakhade of Siemens which clearly says that "the payments are to be claimed from MARG. At KPPL we can only try to facilitate." There is no reply from the respondent. This mail is also evidence that KPPL cannot make any commitment on behalf of the Respondent and did not in fact make any such commitment. This series of emails is captioned MARG Karaikal Project outstanding payments. In 13.05.2013 there was a mail from Sarkunan Sateesh that "We have huge pressure from our management for collecting the payments from M/s.Marg which are overdue already." **This clearly is covered by the term "All disputes, doubts, differences, claims (whether admitted or not)" found in Cl.19.** This mail is sent at the instance of a mail from Bharath Vakhade giving the details of outstandings (dated April 09.2013) Then

there is another series of emails. There, there is a mail from Satheesh Babu (28h May 2014) where it is suggested to have a meeting on May 30, 2014 to "discuss the way forward.". There is a request in the mail dated June 2 2014 where the points raised in the meeting dated 30.05.2014 is referred and there is a request to release the retention payment of Rs.50,12,121/- along with RA Bill Nos.13, 15 and 16 totaling to Rs.67,85,488/-. This is dated June 2, 2014. On August 6, 2014 a sum of Rs.5 lakhs was released. This mail merely says, "payment of Rs.5 lakhs is made today and Please find UTR number." Then, there is a letter dated 27.8.2014 written by the Claimant to KPPL, where the details of outstanding payment are given under various heads as follows:

"Normal outstanding against supply and services: overdue since December, 2012,
 Supply retention : due from August, 2014.
 Installation retention : not due since commissioning is pending
 Civil retention : Due from February, 2014,
 and WCT, LC discounting charges and TDS: overdue".

15.Both the Minutes of the meetings between KPPL and the claimant dated June 13, 2014 and Sept 11, 2014, do not indicate any acknowledgment of liability on behalf of the respondent. In the June meeting the only reference to the respondent is Item 4, which says that "an appropriate decision on release of retention payment will be taken in consultation with MARG." In the September meeting, the Respondent is mentioned only in Item No.3 which states that "an appropriate decision on release of retention payment will be taken in consultation with MARG in due course during the progress of work at site as the Purchase Order and Work Order are issued by MARG". I do not see either of these statements as amounting to an acknowledgement of liability on behalf of the respondent. In fact, in the notice of suspension

dated 22.1.2015 the claimant clearly says “despite of repeated requests and reminders by way of various emails, telephone calls and letters to you and upon your instructions to the end customer you have neither responded nor paid any of the aforementioned dues”. Therefore even as per the claimant's own statement the disputes, doubts, differences and claims whether admitted or not, arose much earlier when the respondent failed to reply to any of the request made by the claimant to settle their dues. When that is the case it is not open to the Claimant to argue that the dispute arose only when it suspended activities. The Claimant suspended activities because the disputes, doubts, differences, and claims had arisen much earlier. The claimant ought to have made the claim before the arbitrator within six months of the disputes, doubts, differences, claims. It is only then that the arbitrator can decide such disputes, doubts, differences, claims. The time to refer to arbitration had expired even before the notice of suspension was given.

16. Now, the decisions given by the claimants are as follows:

(i) Pandit Construction Company vs. Delhi Development Authority & Anr. (2007 (98) DRJ 96).

In this, the point taken was the arbitration was commenced beyond 90 days of the final bill and it was held as under :

“55. In my considered view, it is not open for defendant no.2 to contend that if any suit or claim is not filed within one month of the expiry of the bank guarantee, the right of the plaintiff to institute any legal proceedings itself is extinguished. Such a plea would fly in the face of the amended Section 28 as defendant no. 2 cannot be discharged from the liability nor can the rights of the plaintiff be extinguished by inclusion of the clause providing so. I am thus of the considered view that to the extent there is restriction on any suit or claim being filed by the plaintiff

beyond a period of one month from the expiry of the bank guarantee, the said clause would not prohibit the plaintiff from instituting the suit as it would be barred by the provisions of the amended Section of the Contract Act.”

(ii)Bindra Builders v. Delhi Development Authority (2012 SCC OnLine Del 3975 : (2012) 192 DLT 565.

The claimant has relied on this for the purpose of showing that Article 18 of the Limitation Act would come into play with regard to contract where the date of payment is not fixed.

(iii)State of Rajasthan vs. Ram Kishan (1977 SCC OnLine Raj 9 : AIR 1997 Raj 165 (FB) : 1977 RLW 281)

This may not be useful to us since the 1996 Act contains the Section 43(3) which specifically deals with how the clause for limitation has to be construed.

(iv)Inder Singh Rekhi vs. D.D.A. [(1988) 2 SCC 338]

This is also a matter that arose under the old Arbitration Act.

(v)Union of India vs. Popular Construction Co. [(2001) 8 SCC 470].

This is a case where the question whether section 5 of the Limitation Act was applicable to the application challenging the award. This is not applicable to this case.

17.The decisions cited by the respondent are as follows:-

(i)J.c.Budhreja vs. Chairman, Orissa Mining Corporation Ltd. & Anr. [(2008) 2 SCC 444]

This was relied on by the respondent to show what would amount to acknowledgment of liability. “An acknowledgment of liability must involve an admission of subsisting liability of the parties with regard to an existing debt. It says that if the defendant merely says that it would like to examine the claim or the account, it may

not amount to acknowledgment. It would depend upon the tenor of the document. In the present case there are no such acknowledgements. Even if there was one, it may not help the Claimant in view of Cl.19 of the Contracts between the parties.

(ii)Avalon Investment Private Limited vs. Mukesh Brokerage & Financial Limited [(2012 (114) 5 Bom.L.R. 2716].

In this case, the clause for reference to arbitration was similar to this case and the party who had claims, difference or disputes had to file their reference for arbitration within six months from the date when they arose. The claim and the counter claim were filed after the expiry of six months and they were held to be barred by limitation. The respondent succeeded in getting the claim dismissed as it was beyond time. But he pressed the counter claim. The Division Bench of Bombay High Court held that they had to apply the same test of limitation to the claim of respondent as the claim includes counter claim. The respondent gave several events of subsequent dates. The Bombay High Court held that it will not extend the period of limitation. The Division Bench held that the exchange of correspondence does not extend the period of limitation and the period of limitation can only be extended when a party against whom a cause of action has arisen admits the liability and seeks time to make payment or makes part payment, thereby admitting the liability. In the present proceedings too, nowhere has the respondent admitted any liability. There is no reply by the respondent to any of the letters written by the claimant. They were just ignored. The mails written by Claimant again and again will not extend the period of 6 months imposed by Cl.19 of the Contracts.

18.In Consolidation Engineering vs. Prl. Secretary Irrigation Department and Others [(2008) 7 SCC 169], the Supreme Court held that it is section 43 which makes the provision of Limitation Act applicable to the proceedings both in court and in arbitration

under the Arbitration and Conciliation Act. Otherwise, the Limitation Act will not be applicable to proceedings before the Tribunal under the Arbitration and Conciliation Act. The Supreme Court observed that though there is no express exclusion of application of any provision of the Limitation Act to proceedings under Arbitration and Conciliation Act, yet there is some departure from the general provisions of Limitation Act, as for example, the proviso to section 34(3) and sub sections (2) to (4) of Section 43 of the Act. This means that even if we apply the Limitation Act it has to be construed within the provisions of the Arbitration and Conciliation Act. As per S.43(3), if any arbitration agreement provides that any claim shall be barred unless steps to commence arbitration are taken within a time fixed by the agreement, then the Court can extend such time taking to account any undue hardship, on terms as the justice of the case requires. So clauses which fix a time limit are valid, they are the condition precedent to commence arbitration and the rigour of this time limit is alleviated by the court having the discretion to extend the time. The claimant had not applied to the court to extend the time as per S.43(3).

19. In Pandit Construction Company vs. Delhi Development Authority & Anr. (2007 (98) DRJ 96), the Court says “agreements which do not seek to curtail the time for enforcement of the right but which provide for forfeiture or waiver of a right itself if no action is commenced within the period stipulated by the agreement and such a clause would not fall within the mischief of Section 28 of the Act”. Further, it refers to extracts from Explore Computers Pvt Ltd vs. CALS Ltd. & Anr. (131 (2006) DLT 477 : 2006 (90) DRJ 480) where the following observation is found: “... to put it differently, curtailment of the period of limitation is not permissible in view of section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced”. The clause 19 in the work orders on hand are clauses which stipulate that the right shall be exercised within 6 months of

the dispute, difference, claims etc. Therefore this decision actually comes to the aid of the respondent.

20. The Bombay High Court in Avalon Investment Private Limited vs. Mukesh Brokerage & Financial Limited [(2012 (114) 5 Bom.L.R. 2716], has upheld this clause and dismissed the counter claim. In that case, the arbitrator had dismissed the claim on the basis of a clause similar to clause 19. Having secured this favourable order, the respondent appealed against the dismissal of his counter claim. The Court said those who live by sword must also be ready to perish by sword. This decision also supports the respondent.

21. It is clear from the aforesaid judgments that the respondent's stand is correct. The claim shall be filed within six months of the disputes, doubts, differences or claims, failing which they shall be dismissed. The disputes/claims regarding "outstanding dues" arose even in 2012, and definitely by April 09, 2013 when the email was sent with invoice details. There was no response to these claims from the respondent. The response if any, are phrased in terms like "to discuss the way forward". The responses from KPPL do not indicate any acknowledgment of liability. The Minutes dated September 11, 2014 merely records that "an appropriate decision will be taken in consultation with MARG in due course". Even in the email dated September 25, 2014 the KPPL representative Prabu Ananth has only offered to arrange a tripartite meeting to discuss with MARG. The entities are distinct and as the learned counsel for the respondent contended, writing to KPPL or reply from KPPL will not amount to writing to the Respondent or a reply from the respondent. Even assuming the worst, the terms used by KPPL do not amount to acknowledgment. Even the payment of Rs.5 lakhs is not accompanied by any words which indicate that it is towards outstanding dues. The Claimant requested KPPL to furnish a no objection declaration from the respondent and it was furnished. In

view of S.43(3), I am doubtful even if any acknowledgement of liability would have helped the Claimant. C.19 fixes the 6 month period even for admitted claims if they give rise to disputes. In this case there is no such admission. The arbitrator shall enter upon the reference, only if the reference is made within the 6 months of the dispute/difference/claim/ doubt etc. The power to extend the 6 month period for reference to arbitration comes only in accordance with S.43(3) and not otherwise. The time to refer to arbitration had long expired when finally the claimant issued the letter dated 29.5.2015 (Ex.C-16). The notice of suspension will not create a fresh period of 6 months, from the date of the disputes, doubts, differences, claims (whether admitted or not) As per the Contract between the parties, the right to refer to arbitration had been extinguished. Accordingly, the Issues 1 and 2 are answered against the claimant.”

30 Referring to aforesaid finding rendered by AT, it was contended by petitioner / claimant that six months stipulated in the work order ought not to have been taken as period of limitation. In response, it was pointed out by learned counsel for respondent on demurrer that even if three years is taken as period of limitation, claim of petitioner / claimant is clearly hit by limitation. In an attempt to buttress this submission, learned counsel for respondent pressed into service a judgment of Hon'ble Supreme Court in **Consolidated Engineering Enterprises Vs. The Principal Secretary (Irrigation Department)** case being a judgment made in Civil Appeal No.2461 of 2008 on 03.04.2008. A perusal of this judgment reveals that it does not help the respondent as **Consolidated Engineering Enterprises** is an authority for the proposition that while limitation prescribed under section 34(3) of A and C Act

pertains to proceedings relating to arbitral proceedings, limitation under section 43 pertains to arbitral proceedings itself.

31 Though respondent's counsel placed before this Court a compilation consisting of three judgments, only **Consolidated Engineering Enterprises** case was pressed into service.

32 On the side of petitioner / claimant, counsel for petitioner / claimant fairly submitted that **Pandit Construction Company** case [**Pandit Construction Company Vs. Delhi Development Authority** reported in **2007 (98) DRJ 96**] though pressed into service before AT, does not apply to instant case and it does not help the petitioner / claimant to further his case. In other words, petitioner / claimant's counsel submitted that **Pandit Construction Company** case though pressed into service before AT is not being relied on in the instant case.

33 Learned counsel pressed into service a judgment made by a learned Single Judge of Delhi High Court in **Bindra Builders Vs. Delhi Development Authority** reported in **2012 SCC OnLine Del 3975**. Learned counsel referred to paragraph 13 of the said judgment which reads as follows:

“13. An analysis of the above clauses reveals that while RA bills are required to be raised by the Contractor as and when the work is part complete, and the payments made against these are treated as advance payments, for the purposes of the final bill, two dates are relevant. One is “the date fixed for completion of the work” or such extended date as the case may be. The other is the “date of the certificate of completion” which has to be issued by the EIC. In both events it is clear from Clause 7 that it is the Contractor which

has to prepare the final bill. Mr. Kapur urged that in practice it was the DDA which invariably prepares the final bill and no Contractor actually prepares it. Although this was disputed by Mr. Narula, the wording of Clause 7 does not envisage preparation of the final bill by the DDA but only the Contractor. The absence of the words “whichever is later” qualifying the two dates mentioned is significant. It means that the limitation for submission of final bills would begin to run from the “the date fixed for completion of the work”, even where the EIC has not issued a certificate of completion. It would not be open to the Contractor to contend in such case that till such time the EIC did not issue the certificate of completion, the Contractor was not obliged to submit a final bill. Sometimes a provisional certificate could be issued and the defects required to be rectified pointed out by DDA. It might be possible to argue that in such case the limitation for submission of final bill would not arise till a final completion certificate is issued by the EIC after verifying if the defects pointed out have been rectified. However, the position that emerges is that where DDA is in default by not issuing a provisional certificate or final certificate, and the date for completion of work has expired, the limitation for the Contractor to submit his bill would begin running from the date fixed for completion. “सत्यमेव जयते”

34 Paragraph 13 turns on factual aspects of that case, the elucidation with regard to limitation has been very lucidly laid down by the learned Single Judge of Delhi High Court as five bullet points, this is contained in paragraph 19 and the same reads as follows :

“(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."

35 However, a perusal of paragraph 13 reveals that facts of **Bindra Builders** case are clearly distinguishable. That is a case where no specific date for payment was fixed and Article 18 of the Limitation Act, 1963 came into play. In the instant case, though it is not the case of specific date for payment, staggered payment in three parts has been clearly laid down and the same has been alluded to supra. Relevant portion of this staggered payment is contained in the purchase order and the relevant clause reads as follows :

“7)PAYMENT TERMS: 10% advance payable against Bank Guarantee for equivalent value. 75% payment against Proforma Invoice for each equipments/materials. 15% after completion of supply against Performance Bank Guarantee.”

36 A judgment of a Full Bench of Rajasthan High Court being ***State of Rajasthan Vs. Ram Kishan*** reported in **1977 SCC OnLine Raj 9** was referred to for saying that 'completion' in terms of contract means the date on which the work is actually completed. This Court refrains from expressing any view regarding the Full Bench judgment of Rajasthan High Court as it was on reference and more facts become necessary to examine if said judgment would apply to the instant case. However, on the facts of the instant case, even if the date of completion is taken as the reckoning date, it comes to light that it does not help the petitioner / claimant owing to its own statement. In paragraph 5 of the claim statement, petitioner / claimant has clearly mentioned that supply and works was completed on 27.02.2012. Paragraph 5 of claim statement reads as follows :

“5.The supply and works was completed on 27.02.2012 except for energisation and commissioning of the switch Yard.”

37 It was pointed out that it is except energisation and commissioning of said switch yard and therefore, 27.02.2012 is not the reckoning date. However, it is nobody's case that petitioner / claimant completed energisation and commissioning of said switch yard. There is no

dispute that it was ultimately energised and commissioned by respondent by engaging third parties. This stated position of respondent in this regard is set out in the claim statement by petitioner / claimant itself and relevant portion is paragraph 17, which reads as follows :

“.... However, the Respondent and Karaikal Port appear to have engaged third parties and completed the works in violation of the agreements of the parties.....”

38 This Court is not going into the question of who is responsible. What comes out very clearly is the petitioner / claimant did not do energisation and commissioning of said switch yard. Therefore, as it is the admitted position of petitioner / claimant that it completed supply and works on 27.02.2012, the same has to be taken as date of completion of work. On a demurrer, even if this date, i.e., date of completion of work is taken as reckoning date, the arbitral proceedings commenced only on 03.06.2015 and therefore, it is hit by limitation. To be noted, it is hit by limitation even if three years period (not six months period stipulated in the work order) is taken.

39 Therefore, if limitation is tested even on the basis of stated position of petitioner / claimant and even on a demurrer, assuming period of limitation to be three years and not six months, the claim of the petitioner / claimant is clearly barred by limitation.

40 Therefore, petitioner / claimant has not made out any ground for judicial intervention with regard to findings rendered by AT qua limitation, i.e., finding that claim is barred by limitation.

41 As the claimant / petitioner has not made out any case for judicial intervention with impugned award made by AT, instant O.P fails and the same is dismissed. Considering the nature of the matter and trajectory of hearing, this court deems it appropriate to leave the parties to bear their respective costs.

09.04.2019

Speaking order

Index : Yes

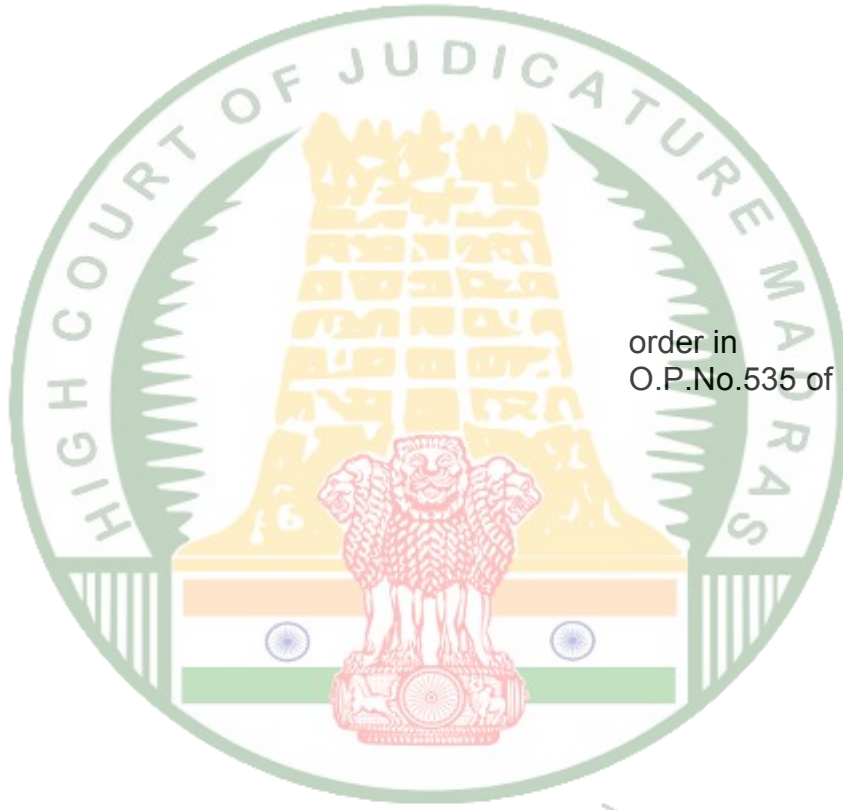
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M.SUNDAR, J.

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order in
O.P.No.535 of 2017

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