

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.04.2019

DATE OF DECISION : 30.04.2019

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

O.P.No.942 of 2018
and
A.No.8508 of 2018

Ion Exchange India Limited,
represented by its Authorized Signatory,
Mr.Rudra Das
Associate Vice President,
Tiecion House, Dr.E.Moses Road,
Mahalaxmi,
Mumbai-500 011.

.. Petitioner

Vs.

Angeripalayam Common Effluent
Treatment Plant Limited,
SF No.88, Garden, Kanjampalayam,
Pitchampalayam,
Pudur (PO),
Tirupur, 641 603.

.. Respondent

This original petition is preferred under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to set aside the Arbitral Award dated 18.04.2018 (received on 20.04.2018) passed by the Arbitral Tribunal with costs and pass such further and other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioner : Mr.Ramakrishnan Viraraghavan,
Senior counsel
for Mr.G.Sivashankaran

For Respondent : Mr.M.S.Krishnan, Senior counsel
for Ms.Sadhana V.Shankar
for M/s.Ramani & Shankar

ORDER

There is a sole petitioner and a lone respondent in the instant original petition (hereinafter 'O.P' for brevity).

2 Sole petitioner and lone respondent in the instant O.P are juristic persons, i.e., Companies incorporated in India and both are public limited companies. Petitioner company which goes by the name 'Ion Exchange India Limited' shall be referred to as 'IEL' and respondent Company which goes by the name 'Angeripalayam Common Effluent Treatment Plant Limited' shall be referred to as 'ACL', both for the sake of brevity.

3 Instant O.P has been filed under section 34 of 'The Arbitration and Conciliation Act, 1996' ('A and C Act' for brevity) assailing an Arbitral award dated 18.04.2018 made by a 'Arbitral Tribunal' ('AT' for brevity) constituted by three members. This award dated 18.04.2018 made by AT which is being assailed and which is being sought to be set aside in the instant O.P shall hereinafter be referred to as 'impugned award' for the sake of brevity, clarity and convenience.

4 In the scheme of A and C Act, Section 34 is slotted under Chapter VII captioned 'RECOURSE AGAINST ARBITRAL AWARD'. A

perusal of Section 34 also reveals that recourse to a Court against an arbitral award under section 34 of A and C Act may be made only by an 'application'. Also to be noted, caption to section 34 itself reads 'APPLICATION FOR SETTING ASIDE ARBITRAL AWARD'. Be that as it may, with regard to a legal proceeding which is in the nature of recourse against an arbitral award, the same is being assigned the nomenclature 'Original Petition' in the Registry of this Court and therefore, instant proceeding is being referred to as 'O.P', for the sake of convenience and clarity.

5 Minimum facts which are absolutely essential (sans other particulars and details) for understanding and appreciating this order shall be set out infra under the caption 'Precise of Facts'.

6 **Precise of Facts :**

(a) IEL and ACL entered into a memorandum of agreement dated 22.04.2006 followed by supplementary memoranda of agreements dated 12.09.2006, 19.06.2008 and 18.12.2009. IEL and ACL before me submitted that the aforesaid memorandum of agreement together with three supplementary memoranda of agreements collectively constitute the governing contract between the parties and that this governing contract is the epicentre of the lis before AT. Therefore, for the sake of convenience and clarity, the aforementioned memorandum of agreement together with three supplementary memoranda of agreements shall collectively be referred to as 'said contract'.

(b) Said contract is for supply of 'Effluent Treatment Plant' ('ETP' for brevity) with reject management systems incorporating certain specific technologies, one of which is nano filtration. Arbitral disputes between IEL and ACL are that IEL supplied an ETP which is only 3 MLD capacity, though said contract was for 10 MLD capacity. According to ACL, said contract was for supply of ETP of 10 MLD capacity. To be noted, this court is informed that 'MLD' stands for 'Million of Litres Per Day'. ETP ultimately supplied by IEL did not meet the specifications adumbrated in said contract, is the second limb of complaint. These two limbs of arbitral disputes, namely, one touching upon capacity of ETP and the other pertaining to specifications of ETP can be described as the crux and gravamen of arbitral disputes between IEL and ACL.

(c) It is also not in dispute before this Court that arbitration agreement between parties to the instant O.P is in the form of a clause in the said contract. As would be evident from the narration thus far, said contract is constituted by memorandum of agreement dated 22.04.2006 and three supplementary memoranda of agreements. For the sake of specificity, it is to be mentioned that arbitration agreement between parties is in the form of clause 11 in the memorandum of agreement dated 22.04.2006. In other words, arbitration clause qua said contract is clause 11 of memorandum of agreement dated 22.4.2006. Considering the importance and significance of the arbitration agreement between the parties (in this case, owing to nature of arguments advanced), clause 11 is extracted and reproduced infra. Clause 11 reads as follows :

“11.ARBITRATION

a.If any dispute arises between the parties hereto during the subsistence or thereafter, in any provision of this agreement, the same is shall first be resolved amicably and the minutes recorded in writing and mutually signed by both parties before any party opts for arbitration, there shall be a panel of three arbitrators to resolve the dispute.

b.The party wishing to invoke arbitration (hereinafter referred to “Party invoking Arbitration”) shall give a written notice of thirty (30) days to the other Party (hereinafter referred to as “Arbitration Notice naming therein its nominee arbitrator.

c.Within the said period of thirty (30) days thereafter, the party(ies) against whom any claim has been made (hereinafter referred to as “Party(ies) to the Dispute”) shall appoint its/their nominee arbitrator.

d.So appointed arbitrators will chose the third arbitrator, who shall be the Presiding arbitrator.

e.On the failure of the Party(ies) to the dispute to appoint its/their nominee arbitrator within the stipulated period of thirty (30) days, the arbitrator appointed by the Party invoking Arbitration shall be the sole arbitrator and shall constitute a valid arbitration tribunal and proceed to decide the reference.

f.The Arbitration proceedings shall be governed by the Arbitration & Conciliation Act 1996 or any statutory modification or re-enactment thereof for the time being in force.

g.The Arbitration proceedings shall be held in Tirupur/Chennai and the proceedings of arbitration shall be in English language.

h.The costs and expenses of such arbitration shall be shared equally between the parties.”

(d) Though obvious, for the sake of specificity, it is clarified that reference to arbitration agreement between the parties is a reference to arbitration agreement within the meaning of section 7 of A and C Act and therefore, arbitration agreement between parties to instant O.P is in the form of a clause in the said contract, the details of which have been alluded to supra.

(e) In the light of arbitrable disputes which have been broadly set out supra, first tier of aforesaid clause 11 was triggered vide notices dated 21.12.2010 and 08.02.2011 (Ex.C.40 and Ex.C.41 before AT) for amicably resolving the disputes and differences. Thereafter, it is not in dispute that there was a meeting between parties to instant O.P on 16.7.2011. Minutes of this meeting is Ex.C.50 before AT. Pursuant to the meeting on 16.7.2011, IEL prepared what is described as an action plan dated 20.8.2011 for rectification and this action plan dated 20.8.2011 is Ex.C.57 before AT. As aforesaid meeting and action plan did not lead to the disputes and differences being amicably resolved, ACL sent a communication dated 17.03.2014 (Ex.C.68 before AT) invoking arbitration, i.e., tier 2 of clause 11 and requested that dispute be referred to arbitration. ACL had also proposed the name of one Arbitrator. Vide this notice, ACL called upon IEL to name their choice of arbitrator within 30 days from the date of receipt of this notice. This notice dated 17.03.2014 was despatched on 25.03.2014 and the same was received by IEL on 28.03.2014. Thereafter, AT came to be constituted and AT entered upon reference. Parties to this lis participated in the arbitrable proceedings before AT.

(f) ACL as claimant before AT made claims under four heads and the same as can be culled out from the impugned award reads as follows :

I.Capital costs said to be required for carrying out modifications and upgradation to the plant so as to achieve the originally rated installed and designed capacity	Rs.241400000
II.Individual member unit losses said To be direct loss of production to member Units due to (a) closure of the unit owing to Pipeline change, closure (b) closure order of TNPCB owing to alleged failure of plant etc.	Rs.1045479465
III.Direct loss of production to member Unit due to alleged not achieving of Rated capacity of 10 MLD and achieving Only rated capacity of 3 MLD and	Rs.1309237824
IV.Operational costs loss alleged to have been incurred for the period of shut-down and for actual operational costs claimed to be of 3 MLD said to be leading to 70% of the operational costs alleged to have been lost	Rs.427566155.10

(g) IEL responded by filing its statement of defence, in which IEL made a counter claim under five heads and the counter claim as can be culled out from the impugned award reads as follows :

1.Outstandings receivable	Rs.70,00,000
2.Interest recoverable on account of delayed payment, including interest on the outstanding	Rs.33936261
3.Amounts due for running ETP	Rs.4846892
4.Expenses incurred due to steep increase in raw material prices on account of delayed procurement activities	Rs.2500030
5.Expenses incurred on account of extended stay, repeated demobilization, remobilization at site, frequent travel of Executives, Engineers and Officers	Rs.5200000

(h) The claim statement of ACL is dated 26.6.2014, Statement of Defence (along with counter claim) made by IEL is dated 31.10.2014. As there was a counter claim, ACL filed a rejoinder statement as well as defence to the counter claim and this rejoinder / defence to counter claim is dated 13.01.2015. IEL had also filed a reply dated 25.2.2015. This completed the pleadings. In this pleadings, AT framed 10 issues on 03.04.2015 and the 10 issues framed by AT as can be culled out from the impugned award reads as follows :

“5.The issues framed for trial on 03.04.2015 are as follows:

(1)Whether the claim has been properly instituted and maintainable?

(2)Whether any or all claims made by the Claimant or the counter claims of the Respondent are barred by limitation?

(3)Whether the common effluent treatment plant, designed, installed and commissioned by the Respondent is in conformity with the proclaimed norms and needs and the contracted parameters and requirements of the Claimant under the contract?

(4)Whether the plant, as constructed and commissioned by the Respondent suffered any deficiencies in the contracted norms, terms and standards and working capacities and in contravention of the terms & conditions agreed to between parties, under the Contract?

(5)Whether the Respondent committed any delay or lapses or violations in the construction and commissioning of the plant resulting any loss, damage to the Claimant or its constituent members?

(6)Whether the Claimant was at fault or committed any lapse, delays, violations and breaches in performing its obligations and thereby contributed in any manner to the delay in execution, defect in installation or effective functioning of the plant?

(7)Whether the Claimant is entitled to all or any of the claims made

towards capital investment costs or the individual member units' losses for the past and future periods and if so, to what extent from the Respondent?

(8) Whether the Respondent is entitled to all or any of the claims made against the Claimant? If so, to what extent?

(9) Whether the parties on either side are entitled to interest on the amounts respectively claimed by them and if so, on what amount and at what rate and for what period?

(10) To what other reliefs are the parties on either side entitled to against the other, including costs of this Arbitral proceedings?"

(i) Oral, documentary evidence was let in and ultimately, the impugned award came to be passed, wherein ACL was awarded a sum of Rs.13 Crores with future interest at the rate of 9% from the date of award till the date of realisation. To be noted, this Rs.13 Crores was awarded with regard to the first head of claim made by ACL being moneys claimed for carrying out modification and upgradation to ETP. To be noted, as would be evident from the four heads of claim extracted and set out supra, ACL had claimed Rs.24,14,00,000/- (Rs.24.14 Crores) under this head. As against this claim of ACL for Rs.24.14 Crores, Rs.13 Crores with future interest at 9% per annum has been awarded vide impugned award. Heads 2, 3 and 4 came to be rejected / dismissed. As far as counter claim of IEL is concerned, all five heads of counter claim came to be rejected / dismissed. In other words, the entire counter claim made by IEL came to be rejected. Parties were directed to bear their costs and expenses of arbitrable proceedings equally.

(j) Assailing the impugned award, instant OP has been filed by IEL under section 34 of A and C Act and the specific grounds on which impugned

award is assailed and discussions on the same shall be set out infra under the caption 'Discussion and Dispositive Reasoning'. To be noted, it was submitted on behalf of ACL on instructions that ACL has not filed any O.P under section 34 of A and C Act though one head of claim was only partly allowed and three other heads of claim were rejected.

7 Discussion and Dispositive Reasoning :

(a) Though the caption to instant O.P reads 'PETITION FILED UNDER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT 1996 TO SET ASIDE THE AWARD', learned senior counsel appearing on behalf of counsel on record for IEL which is the petitioner before me, submitted that specific ground on which impugned award is being assailed in instant O.P can be neatly and snugly fitted into the pigeon hole compartments under section 34 as according to learned senior counsel, legal grounds on which instant O.P is predicated, translates as follows :

“(i) Impugned award is in conflict with public policy of India owing to it being in contravention of Fundamental policy of India and owing to it being in conflict with the most basic notions of justice.

(ii) Impugned award is vitiated by patent illegality appearing on the face of it.”

(b) In the instant case, arbitral proceedings commenced on 28.03.2014, impugned award came to be passed on 18.04.2018 and instant

O.P has been presented in this Court on 18.6.2018. The question as to whether section 34 as it existed prior to 23.10.2015 will apply or as it exists post 23.10.2015 will apply in such a scenario is left open. The reason for leaving this open is, both 'public policy' and 'patent illegality' grounds are available both prior to 23.10.2015 and post 23.10.2015. Prior to 23.10.2015, public policy was not explained, whereas it is now explained. While testing conflict with public policy on the ground of contravention of fundamental policy of Indian law, there shall be no review on merits of the dispute, is the present post 23.10.2015 position. Likewise, patent illegality was also available as a ground of challenge, (though not statutorily) by way of a judgment, i.e., **ONGC Ltd. Vs. Saw Pipes Ltd.**, reported in **(2003) 5 SCC 705**. Now, though patent illegality has found statutory expression in sub section (2-A) of section 34 of A and C Act, the test has been circumscribed by saying that a mere erroneous application of law cannot lead to patent illegality and while testing patent illegality, there shall be no reappraisal of evidence. To put it differently, both public policy and patent illegality were available as grounds in the pre 23.10.2015 regime also and only the manner in which tests are to be applied have been circumscribed in the post 23.10.2015 regime. As that does not present a problem in the instant case, this question is left open.

(c) Elaborating on aforesaid two grounds of attack, learned senior counsel for IEL submitted that there is absolutely no basis for awarding Rs.13 Crores with regard to first head of claim made by ACL, which according to ACL is towards costs said to have been incurred by ACL for modification and upgradation of ETP for achieving the originally rated installed and design

capacity. Learned senior counsel submitted that it is clearly in complete contravention of public policy and fundamental policy of Indian law. According to learned senior counsel, three determinants as can be culled out from Section 73 of the Indian Contract Act, 1872, are identification of breach and extent, fixing the responsibility and quantification of loss. Learned senior counsel submitted that these three determinants which constitute section 73 of the Indian Contract Act, 1872 clearly form part of the core fundamental policy of the Indian law qua contract and all three determinants according to learned senior counsel are absent in the impugned award.

(d) It is also submitted that there is patent illegality which can be seen by a mere reading of impugned award as according to learned senior counsel, it is obvious / conspicuous and therefore, it is patent illegality appearing on the face of the impugned award.

(e) The second ground on which the impugned award is assailed is limitation. According to learned senior counsel, it is an undisputed position in this lis that the ETP which forms subject matter of instant lis was commissioned on 06.03.2010. Elaborating on this, this Court was taken through the deposition of two witnesses on behalf of IEL. While the first witness on behalf of IEL, R.W.1, Krishna Mohan, in his chief examination vide proof affidavit dated 30.01.2016 submitted that ETP was commissioned in February 2010, R.W.2, S.Sankararaman, in cross examination stated that the ETP was commissioned on 06.03.2010. It was submitted that this dispute was not dislodged.

(f) On behalf of IEL, it was submitted that limitation being a ground of attack, the argument will be premised by taking 06.03.2010 as the date on which ETP was commissioned. It was submitted that if 06.03.2010 is taken as reckoning date on which ETP was commissioned, the limitation would expire on 05.03.2013 in the light of Article 55 of the Limitation Act, 1963. It was pointed out on behalf of IEL that the date of commencement of arbitrable proceedings is 28.03.2014, which is the date on which 17.03.2014 notice from ACL invoking arbitration clause (Ex.C.68) was received by IEL. On this basis, it was submitted that the claim is clearly time barred and impugned award erred in taking the date of communication, namely 21.12.2010 (Ex.C.40) as the reckoning date, besides referring to the meeting on 16.7.2011 (minutes Ex.C.50) and action plan dated 20.8.2011 (Ex.C.57) as documents which go to show that the claim has been kept alive.

(g) Considering the nature of submissions, this Court considers it appropriate to deal with the grounds in the order in which they were made.

(h) Claim No.1 made by ACL has been dealt with and conclusion that ACL will be entitled to Rs.13 Crores (though it had claimed Rs.24.14 Crores) has been articulated in paragraph 15 of the impugned award. To be noted, paragraph 15 of impugned award consists of three sub paragraphs, i.e., 15.1, 15.2 and 15.3. To avoid prolixity and to avoid this order becoming unnecessarily verbose, this Court refrains from burdening this order with extraction and reproduction of entire paragraph 15 and the three sub paragraphs therein.

(i) Taking this court through paragraph 15, it was submitted on behalf of IEL that a perusal of the same reveals that a sum of Rs.13 Crores has been arrived at without any specific identification of breach, fixing of responsibility or quantification of loss. This specific and pointed case of IEL is predicated on the ground that it has been done by adopting equitable and good principle. In other words, it is based on the latin maxim '*ex aequo et bono*'. It was submitted that this principle of '*ex aequo et bono*' can be applied for acceding to a claim only if the parties to the arbitration agreement had expressly agreed and authorised the AT to do so. This is clearly mandated in section 28(2) of A and C Act which reads as follows :

“28.Rules applicable to substance of dispute.--

(1) x x x x

(2)The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.”

(j) Learned counsel pressed into service P.Ramanatha Aiyar's Advanced Law Lexicon, besides commentaries of Justice R.S.Bachawat's Law of Arbitration and Conciliation, 6th Edition and another English Commentary on this '*ex aequo et bono*'

(k) Responding to aforesaid argument, Mr.M.S.Krishnan, learned senior counsel appearing on behalf of counsel on record for ACL which is respondent before me submitted that it cannot be gainsaid that the sum of Rs.13 Crores has been arrived at by adopting '*ex aequo et bono*' principle. Learned senior counsel submitted that there are a series of technical reports,

which have been marked as Exs.C.63, C.62 and C.77 and this form the basis for the impugned award. It was pointed out that Ex.C.63 is a report of Engineers from an internationally acclaimed entity which goes by the name 'TORAY', Ex.C.62 is a report from Anna University and Ex.C.77 is a report of a one member Committee appointed by this Court with regard to ETP.

(l) A careful perusal of the impugned award and materials which were placed before AT reveals that there was enough and more materials before AT to arrive at this conclusion. To be noted, there is a clear reference to Ex.C.62. This Court has borne in mind *Hodgkinson* principle. *Hodgkinson* principle is a time honoured principle and it is to the effect that AT is the best judge of both quality and quantity of evidence before it. To be noted, this *Hodgkinson* principle has been referred to by Hon'ble Supreme Court in the oft-quoted and celebrated *Associate Builders* case being ***Associate Builders Vs. Delhi Development Authority*** reported in **(2015) 3 SCC 49**. Going by *Hodgkinson* principle, AT is the best judge of quantity and quality of evidence before it. Therefore, this ground does not qualify as one that renders the impugned award being in conflict with public policy in India or being in contravention with fundamental policy of Indian law or being in conflict with the most basic notions of justice.

(m) This takes us to the limitation plea. As far as limitation plea is concerned, the same has been dealt with in the impugned award in paragraph 14. To be noted, it is also issue No.2 before AT. Issue No.2 before AT reads as follows :

“(2)Whether any or all claims made by the Claimant or the counter claims of the Respondent are barred by limitation?”

(n) To be noted, paragraph 14 consists of 10 sub paragraphs. In other words, paragraph 14 consists of sub paragraphs 14.1 to 14.10. Considering the importance of this ground, this Court deems it appropriate to extract entire paragraph 14 which reads as follows :

“14.Now we deal with the Second Issue first.

Whether any or all of the claims made by the Claimant or the Counter Claims of the Respondent are barred by limitation?

14.1 Before dealing with the facts which are relevant to deal with this issue, it is appropriate to set out the relevant provisions. Section 43 of the Arbitration and Conciliation Act, 1996 deals with limitation. Sub Sections 1 & 2, which are relevant for the present purpose read as follows:

“(1)The Limitation Act, 1963, shall apply to arbitrations as it applies to proceedings in court.

(2)For the purpose of this Section and Limitation Act, 1963, the arbitration shall be deemed to have commenced on the date referred in Section 21”

14.2. Section 21, which deals with commencing of arbitral proceedings, reads as follows:

“Unless otherwise agreed by the parties, arbitral proceedings in respect of a particular dispute commenced on the date on which a request for that dispute to be referred to arbitration as received by the Respondent”

14.3 Only if it is established that the cause of action arose within three years on the date on which a request of the dispute to be referred to Arbitrators is received by the Respondent, the

dispute can be adjudicated.

14.4. On the basis of the above, we have to decide the issue under consideration, which was framed at the instance of both the Claimant and the Respondent. According to the Respondent, the Claim made by the Claimant are barred by limitation. For the purpose of calculating the period of limitation, the Respondents relied on 4 dates viz (1) the date of Commissioning of the Plant (2) Proposed date of Commissioning (3) 12 Months from the date of commissioning (on the basis of Table 7) and 18 months from the date of dispatch (on the basis of Table-8). The promised date of commencement even according to the Respondent was in January, 2010. As deposed by RW1, the date of commencement was on 06-03-2010. As per Table 7, the 12 month period has to be added from March, 2010, and so under Category 3, for the purpose of limitation, it has to be calculated from March, 2011. The last dispatch as per the list Ex R34, was on 31.07.2007 and so the date under the 4th Category was in January, 2009. So from the above, the Claimant would have raised the dispute for the purpose of Section 21 of Arbitration and Conciliation Act 1996, on or before 05.03.2011.

14.5. The Learned Senior Counsel for the Respondent referring to the Notice dated 17.03.2014 (Ex C68) issued on behalf of the Claimant, nominating the Arbitrator, submitted that the same was issued, after the period of 3 years from the date of Cause of action and so the Claims are barred by Limitation. The Learned Counsel for the Claimant, referring to the earlier Notice dated 21.12.2010 (Ex C40), has submitted that the Arbitration Clause was invoked in the said Notice and so it cannot be said that the Claims are barred by Limitation.

14.6. While defending the same, the Learned Senior Counsel, referring to Clause 11(a) & (b) of the Contract, submitted that

only the Notice given under Clause 11(b) alone can be taken for the purpose of reckoning the period of limitation and the notice dated 17.03.2014 issued as per Clause 11(b) has to be taken for calculating the period of limitation.

14.7. So, to appreciate this, the said Clause 11 has to be dealt with, which is extracted hereunder

11.Arbitration :-

(a) If any dispute arises between the parties hereto during the subsistence or thereafter, in any provision of the agreement, the same is shall first be resolved amicably and the minutes recorded in writing and mutually signed by both parties before any party opts for arbitration, there shall be a panel of three arbitrators to resolve the dispute,

(b) The party wishing to invoke arbitration (hereinafter referred to "Party invoking Arbitration") shall give a written notice of thirty (30) days to the other Party (hereinafter referred to as "Arbitration Notice naming therein its nominee arbitrator.

14.8. According to the Learned Senior Counsel, in the notice dated 21.12.2010 (Ex C40) issued by the Claimant's Advocate, only the details of the disputes between the parties have mentioned and asked the Respondent to settle the demand made therein, failing which it is further stated that the Claimant would proceed to appoint an Arbitrator and so it is compliance Clause 11(a) of the Contract. According to him, only the notice dated 17.03.2014 (Ex C68) is in compliance with Clause 11(a). On perusal of clause 11 and the notices Ex C40 and Ex C68, we are of the opinion that the stand taken on behalf of the Respondent is sustainable. In the notice dated 21.12.2010 (Ex C40), the Claimant did not invoke the arbitration clause, but it is mentioned that if the Respondent was not complying with their demand, the Claimant will proceed with arbitration proceeding by appointing Arbitrator. So it cannot be said that the notice dated

21.12.2010 was issued invoking the Arbitration Clause.

14.9. But on that basis alone, it cannot be held that the Claims are barred by limitation. The subsequent conduct of the parties clearly shows that the arbitration had been invoked well within time. Pursuant to the notice dated 21.12.2010 (Ex C40), the Parties met and discussed. As found in Ex C50, a Meeting was also held on 16.07.2011. As agreed by the Respondent, it had submitted Action Plan on 20.08.2011 (Ex C57) and the Claimant in the E-mail dated 31.10.2011 (Ex 61) informed the Respondent that the terms of the Action Plan were not acceptable for them. So the Parties kept alive the differences that arose between them, with a view to settle the same, at least till 20.08.2011 when the Respondent submitted the Action Plan. So the stand taken by the Respondent that the Arbitration clause was invoked after the period of limitation, cannot be accepted and hence the same is rejected.

14.10. With respect to the case of the Claimant that the counter claims are barred by limitation, the same are dealt with under the respective Counter Claims.”

(o) A perusal of paragraph 14 reveals that clause 11 of said contract which is the arbitration agreement between parties has not been fully extracted. Clause 11 of said contract which is the arbitration agreement between parties consists of as many as 8 sub clauses. In other words, it consists of sub clauses (a) to (h). To be noted, the entire clause 11 has already been extracted and reproduced supra in this order.

(p) A reading of clause 11 in its entirety which has been extracted and reproduced supra will reveal that it is clearly a tiered arbitration

agreement as rightly submitted by learned senior counsel for IEL. It is a two tiered arbitration clause. While sub clause (a) of clause 11 is first tier, sub clause (b) is second tier and sub clauses (c) to (h) are adumbration of other terms of arbitration agreement between the parties. It is also to be noted that parties cannot directly invoke arbitration by resorting to clause (b) without exhausting clause (a). A mere reading of clauses (a) and (b) of clause 11 makes this unambiguously clear. To be noted, sub clause (a) very clearly says that there shall first be an endeavour to resolve amicably the dispute between parties and minutes of the same should be recorded in writing and mutually signed by both parties before any party opts for arbitration. In other words, such meeting and endeavour to resolve disputes amicably in the meeting is a condition precedent for invoking arbitration. It is not part of arbitration. As it is a condition precedent for arbitration, notices dated 21.12.2010 (Ex.C.40) and 08.02.2011 (Ex.C.41) which have been issued by IEL calling upon ACL for meeting to try and resolve amicably disputes between parties can certainly not be considered as arbitration clause being invoked.

(q) What constitutes arbitration clause being invoked more so, for the purpose of limitation has been clearly set out in section 21 of A and C Act, that section 21 is for the purpose of testing limitation, that section 21 is a clear litmus test for testing any issue on limitation comes out very clearly from combined and harmonious reading of section 21 and sub sections (1) and (2) of section 43 of A and C Act. This Court deems it appropriate to extract

sections 21 and 43(1) and (2) of A and C Act which read as follows :

Section 21 :

“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.”

Section 43 (1) and (2) :

“43.Limitations.--(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court.

(2)For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.”

(r) Therefore, the date of receipt of notice requesting that disputes be referred to arbitration is the reckoning date. In the instant case, from the undisputed facts before this Court, it comes out clearly that notice within the meaning of section 21 is notice dated 17.03.2014 (Ex.C.68), but there is no dispute or disagreement that this notice dated 17.03.2014 which emanates from ACL was received by IEL on 28.03.2014. Therefore, 28.03.2014 is the date on which arbitral proceedings commenced. This is clearly mandated in sub section (2) of section 43 read with section 21 of A and C Act. Therefore, limitation in the instant case has to be tested on the basis that the arbitration commenced on 28.03.2014.

(s) There is no dispute or disagreement in law that limitation applicable to instant case is under Article 55 of the Limitation Act, 1963, it is three years and therefore, as pointed out by learned senior counsel for IEL,

even if latter date being 6.3.2010 is taken as date on which the ETP was commissioned, the limitation expired on 05.03.2013. Therefore, the claim of ACL is clearly barred by limitation and the remedy is barred.

(t) A perusal of paragraph 14 of impugned award reveals that the AT has taken dates of pre-arbitration notices being notices dated 21.12.2010 and 8.2.2011 (Ex.C.40 and C.41), meeting that followed on 16.7.2011 (Ex.C.50) and action plan dated 20.8.2011 (Ex.C.57) as basis for testing limitation. It has been held that parties had kept the differences alive. Be that as it may, this does not bring an end to the limitation issue to a conclusion, because there is a specific provision under A and C Act with regard to tiered arbitration agreements, more particularly two tiered arbitration agreement like in the instant case, where pre arbitration resolution meeting is contemplated. To be noted, in the instant case, it is not a mere contemplation of pre arbitration meeting, but it is a case where pre arbitration resolution meeting is a condition precedent for invoking arbitration. In other words, arbitration agreement cannot be invoked by parties to said contract without resorting to pre arbitration procedure for amicably resolving the dispute by way of meetings when there is such a situation and when a party is faced with threat of its remedy being bared by limitation, a contracting party qua arbitration agreement should necessarily resort to sub section (3) of section 43.

(u) Before extracting section 43(3), it is necessary to clearly set out that in cases of this nature where limitation hits a party to lis, the right is not extinguished, but remedy is barred and no further elucidation is required in this regard as it is a principle which is well settled.

(v) Be that as it may, section 43(3) reads as follows :

“(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.”

(w) In the instant case, IEL and ACL are parties to said contract. It is necessary to look at the arbitration agreement between IEL and ACL, i.e., arbitration agreement within the meaning of section 7 of A and C Act. Arbitration agreement between IEL and ACL within the meaning of section 7 of A and C Act is in the form of a clause in said contract and it is clause 11 which has already been extracted and reproduced supra.

(x) On a careful reading of clause 11 supra, which is the arbitration agreement between parties, this court is unable to persuade itself to believe that arbitration agreement between parties in the instant case falls under section 43(3) of A and C Act. Section 43(3) of A and C Act has already been extracted supra. A close and careful reading of section 43(3) and the language in which it is couched brings to light that it will apply to a case where arbitration agreement provides that an arbitral claim shall be barred unless some steps to commence arbitral proceedings is taken within a time fixed therein. The expression 'commence arbitral proceedings' occurring in

section 43(3) should necessarily be given the meaning of commencement of arbitral proceedings within the meaning of section 21 of A and C Act. Therefore, the arbitration agreement between parties should fix the time limit and say that the arbitral claim will be barred if some specified step is not taken within this time limit.

(y) For an illustration, there may be an arbitration agreement which says that a party complaining of breach should get a technical report from a pre agreed entity within six months from the date of commissioning and serve a copy of the same on the other contracting party. The arbitration agreement may say that any arbitral claim will be barred if such technical report is not obtained from a pre agreed specified entity and served on the other party within six months from the date of agreement. To be noted, in such a case, the period of limitation is not extended. The period of limitation (assuming Article 55 of the Limitation Act applies to this illustration) continues to be three years from the date of breach (further assuming that breaking of contract does not arise and it is not a case of continuing breach). In such a case, if party complaining of breach wants to commence arbitral proceedings without getting a technical report and serving the same on the other party within six months, it can approach the Court and the Court at its discretion after applying the ingredients of section 43(3) extend the six months period.

(z) In the considered opinion of this Court, the arbitration agreement in the instant case does not qualify as one under section 43(3), as no time limit has been prescribed for any specified step to be taken to commence arbitral proceedings.

(aa) As this Court has come to the conclusion that arbitration agreement between parties in the instant case does not qualify as one under section 43(3) of A and C Act, this Court does not refer to ***Dr.E.Muralidharan Vs. Venkataraman and Company*** case reported in ***(2009) 2 MLJ 1009*** which was pressed into service. To be noted, *Dr.E.Muralidharan* case dealt with a case under section 43(3).

(ab) Therefore, sub-sections (1) and (2) of section 43 gain immense significance. Sub-section (1) makes it clear that Limitation Act will apply as if it applies to proceedings in Court. Sub-section (2) makes it clear that for the purpose of the Limitation Act, commencement of arbitration is the date within the meaning of section 21. In ***State of Goa Vs. Praveen Enterprises*** reported in ***(2012) 12 SCC 581***, Hon'ble Supreme Court has categorically held that date of commencement of arbitral proceedings for the purpose of Limitation Act shall be the date within the meaning of section 21.

(ac) In this regard, learned senior counsel for ACL made a submission that 'cause of action' and 'cause of arbitration' are two different expressions. For this purpose, ***Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta*** reported in ***(1993) 4 SCC 338***, ***Hari Shankar Singhania and others Vs. Gaur Hari Singhania and others*** reported in ***(2006) 4 SCC 658*** and ***Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd.*** reported in ***(2007) 4 SCC 599***, were relied on.

(ad) In *Shree Ram Mills Ltd.* case, a careful reading of the judgment of Hon'ble Supreme Court, particularly, paragraph 31 makes it clear that Hon'ble Supreme Court had left the question of limitation also open for the

arbitral tribunal to decide. Therefore, this does not help the case of ACL. In *Hari Shankar Singhania* case, the question was when the cause of action arose. *Hari Shankar Singhania* case is clearly distinguishable on facts as it is more in the nature of a partition suit where limitation pales into insignificance.

(ae) In *Panchu Gopal Bose* case, Hon'ble Supreme Court has held that period of limitation for commencement of arbitration runs from the date on which cause of action would have accrued, if there had been no arbitration clause. This is articulated in paragraph 11 which reads as follows :

“11. Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued. “

(af) This takes us back to the impugned award. A perusal of paragraph 14.4 of the impugned award reveals that four different scenarios for the starting point of commencement of limitation had been projected before AT and AT after analysing the documentary and oral evidence before it, it came to the conclusion that ACL ought to have commenced arbitral proceedings within the meaning of section 21 of A and C Act on or before 05.03.2011. Learned senior counsel for ACL in his usual fairness submitted that this is not happily worded and that one has to place reliance on

paragraph 14.9 of the impugned award, wherein AT has returned a finding that parties had kept the issue alive till 20.8.2011 vide Ex.C.57 when an action plan was submitted by IEL.

(ag) As the date of commissioning has been taken as 6.3.2010 by AT by appreciation of oral evidence, i.e., deposition of R.W.1, this Court would not go into it, as the instant O.P is under section 34. In other words, going into that would mean that there is reappraisal of evidence in the absence of perversity plea. Therefore, the only sequitur that follows is that the date of breach itself is 20.8.2011 when IEL submitted the action plan vide Ex.C.57. Therefore, commencement of arbitral proceedings on 28.03.2014 is within three years. If IEL had not submitted the action plan and if IEL had taken a stand that commissioning of the plant done on 6.3.2010 is in order, the dynamics and dimensions of this entire lis would have taken a different drift and the trajectory may well have been very different. Therefore, without delving into the issues of cause of action and cause of arbitration, as AT has returned a factual finding that the submission of action plan by IEL on 20.8.2011 (Ex.C.57) which was unacceptable to ACL (to be noted, ACL did communicate that it is unacceptable vide email dated 02.11.2011 Ex.C.61), this Court goes by the factual finding returned by AT. In other words, sub-sections (1) and (2) of section 43 makes the Limitation Act applicable and notice within the meaning of section 21 is clearly the date of commencement of Limitation Act. Therefore, this court is unable to convince itself that impugned award made by AT calls for judicial intervention on the ground of having entertaining a stale claim barred by limitation.

8 Conclusion :

In the light of the narrative supra and owing to all that have been set out supra, this Court is unable to come to the conclusion that petitioner has made out a case for judicial intervention.

9 Decision :

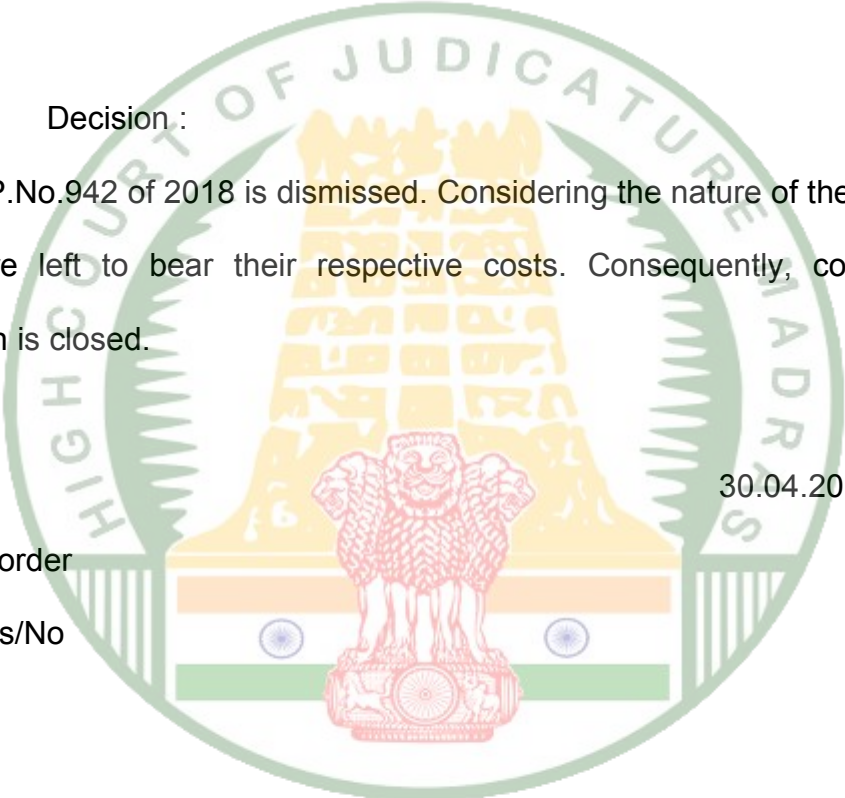
O.P.No.942 of 2018 is dismissed. Considering the nature of the matter, parties are left to bear their respective costs. Consequently, connected application is closed.

30.04.2019

Speaking order

Index : Yes/No

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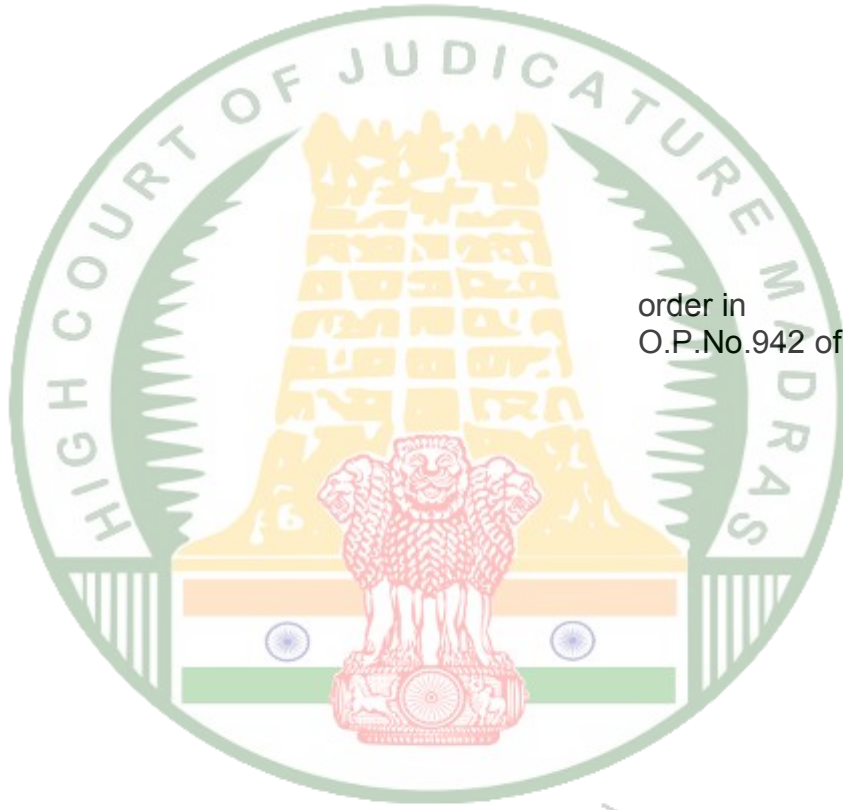


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M.SUNDAR, J.

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order in
O.P.No.942 of 2018

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30.04.2019

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