

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
24~06~2019	10 ~07~2019

CORAM

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

Original Petition Nos.881 & 899 of 2018

O.P.No.881 of 2018

M/s.NAPC Limited
having its Registered Office at
184/214, Royapettah High Road,
MMPDA Tower 2nd Floor
Royapettah
Chennai 600014.

... Petitioner/Claimant

Vs

1. The Superintending Engineer,
National Highways,
TNSCC Complex, Jai Nagar,
206/N, Jawarlal Nahru Salai,
Opp.Mofussil Bus Stand
Chennai 600106.

2. K.Srinivasan ,
Sole Arbitrator,
C2 Block 1, Mayfair Apts.
2A LIC Colony Road
Velacherry,
Chennai – 600 042.

... Respondents/sole Arbitrator

O.P.No.899 of 2018

The Superintending Engineer,
National Highways,
TNSCC Complex, Jai Nagar,
206/N, Jawarlal Nahru Salai,
Opp.Mofussil Bus Stand
Chennai 600106.

... Petitioner/Respondent

Vs.

M/s.NAPC Limited
having its Registered Office at
184/214, Royapettah High Road,
MMPDA Tower 2nd Floor
Royapettah
Chennai 600014.

... Respondent/Claimant

Prayer in O.P.No.881 of 2018 :- This Original Petition has been filed under section 34 of the Arbitration and Conciliation Act to set aside the award dated 23.05.2018 of the Arbitral Tribunal with respect to Claim-B only.

Prayer in O.P.No.899 of 2018 :- This Original Petition has been filed under section 34 of the Arbitration and Conciliation Act to set aside the award dated 23.05.2018 passed by the learned Arbitrator and direct the registry to number the same for passing further order.

For Petitioner in O.P.No.881 of 2018 & : Mr.Arun C. Mohan
For Respondent in O.P.No.899 of 2018

For Respondent in O.P.No.881 of 2018 & : Mr.Vijay Narayanan
For Petitioner in O.P.No.899 of 2018 Assisted by
Mr. Sricharan Rangarajan
Special Govt. Pleader(CS)

COMMON ORDER

O.P.No.881 of 2018 has been filed by the Claimant to set aside the award passed in respect of Claim-B and O.P.No.899 of 2018 has been filed by the Respondent against rejection of entire claim. Since both the Original Petitions are arising out of the same Award, this Court is inclined to dispose of the same in a common order.

2(a) The respondent invited bids for executing the road work of Construction of Two Lane Road including construction of Major Bridge at KM2/10-3/4. In response to the notice, the Claimant submitted its offer for Rs.46,82,59,435.89 on 29.10.2009. The Respondent vide its letter Ex.C-3 informed the claimant that the claimant has not given the consent letter reducing the quoted rates in the tender dated 29.10.2009 as assured during the negotiation held on 09.12.2009. In response to that letter the claimant offered a rebate of 13.5% on each and every item quoted value of Rs.46,82,59,435.89, duly indicating that the claimant is not in a position to reduce their rates further due to following reasons:

- Kancheepuram town is located very near to Chennai city. Hence, the cost of labour is very high.

- Huge quantity of earthwork is involved in this work. The required earth is not available in and around. The earth has to be transported from a distant place and they have to pay royalty charges for the earth to the Government.
- The working season is only 9 months in one year and hence machineries have to remain idle for 3 months which leads to additional overhead charges.
- Further, the transportation of material cost is high.

The claimant reconfirmed their revised price as Rs.40,50,44,412.04 as a result of 13.5% rebater offered, vide letter dated 18.12.2009. Thereafter, the claimant agreed a total rebate of 15.22% vide their letter dated 11.1.2010 and the same was accepted by the Government of Tamil Nadu on 21.01.2010 accepting the negotiated tender value of rs.39,69,90,350/- Finally, the claimant entered into contract agreement with the Respondent on 19.4.2010 and both the parties mutually agreed to complete the entire work in 18 months instead of 24 months.

2(b) The claimant had commenced the work by marking centerline for the entire road and bridge and sought the Respondent's approval on 10.5.2010. Further the claimant had requested the

respondent to approve the design mix for concrete vide letter dated 15.5.2010. The contract was in the form of a work contract wherein the claimant was employed by the respondent to execute work corresponding to a pre-determined scope.

2(c) During the course of execution of the work, there were number of delay events occurred beyond the control of claimant which had severely affected the rate of progress, thereby resulting in delay in completion of works beyond the agreed date of completion of 18 months. It is a fact that on account of the inability of the respondent to meet its specific contractual obligations which were in the form of reciprocal promises/obligations, the claimant has been prevented from achieving contractual objectives on time. All the delay events were brought to the notice of the Engineer as well as the respondent at regular intervals by the claimant. The entire site to be made available to the Claimant by the Respondent free from any kind of encumbrances for execution of all works contemplated in the contract. Accordingly, the claimant had considered the time related costs to be incurred only over a period of 18 months. Any increase in the cost during the 18 months period would have to be compensated through price adjustment mechanism as provided in the contract agreement.

With the mutual agreement of completion of the entire work within 18 months the negotiated price offered by the claimant is all the more competitive and it is the Respondent's responsibility to facilitate the completion of Project by 18 months.

2(d) Clause 49 of GCC of Agreement provides for granting of extension of time for completion on certain grounds and caused. Any extension to the contract period automatically involves cost which should be compensated by the Respondent as per the law of the country and as per the contract Act provisions. At the start of the works, the Claimant had mobilized adequate Plant and Machinery along with other requisite Resources so as to complete the whole work in 18 months in the manner intended in the work programme. However, right from the commencement, the execution of works was delayed inordinately due to a number of delay events, which were beyond the control of the claimant and which could not be reasonably foreseeable at the time of submission of bids. Such delay events not attributable to the Claimant had led to the slippage in the planned progress of work. This resulted in delay in completion of the whole of the works.

2(e) As a consequent of the delays attributable to Respondent

only, the claimant was prevented from completion of the project by the scheduled completion date of 18.10.2011. The following were some of such major delay events which hampered the planned execution of the work with resultant prolongation of execution of the work to the extended periods of contract.

- a) Delay due to non-handing over of site
- b) delay due to presence of utilities including EB poles, trees, structures, etc, that affected the gainful possession of site
- c) Delay in finalization of alignment
- d) Delay due to objections/interruptions by local publication
- e) delay on account of redesigning of retaining wall, non-availability of formation level and cross sections.

2(f) These delay have impacted the entire construction programme. The said delay events did not allow the work to get completed within the original time of 18 months. The claimant had been repeatedly submitted interim application for extension of time and had all along been notifying idling the Resources and reiterating the right to get compensation of costs. There is no dispute with respect to the existence of delay factors attributable to Respondents

only that impeded completion of work as scheduled. In fact, the Respondent was granting extension of time from time to time duly considering the factual delay but finally rejected the claim of the claimant. Hence the claimant proceeded to arbitration.

3. The subject matter of the arbitration is with regard to the claim made in respect of extended period of contract. Total amount of claim is Rs.10,85,72,753/- in which Arbitrator awarded Rs.2,98,14,000/- and in respect of claim-B the Arbitrator rejected the claim. However, interest of Rs.1,14,09,000/- and cost of Rs.9,35,000/- have been awarded. In total, the claim is allowed for a sum of Rs.4,21,58,000/-. The above award was challenged mainly on the ground that the Award is violative of public policy and the arbitration clause was invoked beyond the period of statutory period of limitation and also contractual limitation period.

4. The learned Advocate General mainly contended that originally the agreement was entered for completion of work within 24 months. The agreement was expired on 19.4.2012. On 9.1.2012 the respondent made a claim Ex.C.43A which was rejected by the Department. Thereafter, second representation made 4 months later,

that was also rejected. Once the claim rejected the arbitration ought to have been invoked from the date of rejection. Whereas identical cause of action pleaded to make a second claim on the ground that the claimant is entitled for amount for the extended period of contract. It is the contention of the learned Advocate General that the Arbitrator has no jurisdiction in view of the existence of G.O.Ms.No.1545 r/w Clause 108.02 of P.S. to S.S.R.B. That binds the parties to the contract in respect of all laws and orders of the State read with Clause 4.2(c) of the Agreement. Disputes in respect of matters having pecuniary value above Rs.2,00,000/- shall be decided by the Civil court of competent jurisdiction. The question of law regarding jurisdiction can be raised by the Petitioner even at the time of oral submissions. Therefore, he submitted that the entire award is a nullity in view of lack of jurisdiction before Arbitration.

5. It is his further contention that the claim by the respondent are barred by limitation both statutory as well as contractual. Clause 50 of the agreement states that where the contractor has not invoked arbitration post the employer rejecting his claims, the decision of the employer shall remain binding post the 30 days period. Thereby meaning that his right to invoke arbitration in terms of Section 21 of

the Act, if not exercised within 30 days shall be extinguished. Hence, it is his contention that the extinction of the right itself unless exercised within a specified time is permissible and can be enforced. The Respondent raised various claims for the first time on 09.01.2012 and the same was rejected on 9.3.2012. For the same issues, the Respondent once again raised claim on 27.07.2012 and the same was rejected on 07.09.2012 as the claims arose out of the same cause of action and mere repetition does not postpone the cause of action. Section 22 of the Limitation Act 1963 for fresh cause of action due to continuing breach cannot be made applicable. Notice as per Section 21 ought to have been sent within 3 years from 09.03.2012, where right to sue accrues. Whereas the notice of arbitration within the meaning of Section 21 was sent on 14.08.2015 and received by the Petitioner on 31.08.2015. Therefore, the claims deserve to be dismissed in limine for the reason that they are barred by law of limitation.

6. It is his further contention that when the arbitrator rejected the claim on the ground of the plant and machinery deployed by the Respondent are excessive and unnecessary, the Claim A could not be awarded. It is his further contention that when the contractor

requested for extension of time without making any claims against the employer, he loses the right to claim against the employer at a later stage and it is his further contention that once the contractor has accepted payment in full and final settlement of the contract, the contractor is estopped from making any subsequent claims in respect of the same contract. Hence it is his contention that the Award is liable to be set aside.

7. In support of his contention he relied upon the following judgments.

1. *State of Andhra Pradesh v. Obulu Reddy*
[(2001) 10 SCC 30]

2. *State of Madhya Pradesh v. Lion Engineering* **[(2018) 16 SCC 758]**

3. *National Insurance Co.Ltd., v. Sujir Ganesh Nayak* **[(1997) 4 SCC 366]**

4. *Balakrishna Savalram v. Shree Dhanyeshwar Maharaj* **[1959 Supp(2) SCR 476]**

5. *Raja Ram Maize Products v. Industrial Court of MP* **[(2001) 4 SCC 493]**

6. *Panchu Gopal Bose v. Board of Trustees*

[(1993) 4 SCC 338]

7. *General Manager Northern Railway v. Sarvesh Chopra* [(2002) 4 SCC 45]

8. *P.K.Ramaiah v. Chairman NTPC*, [(1994) Supp(3) SCC 126]

9. *Cauvery Coffee Traders v. Hornor Resources* [(2011) 10 SCC 420]

8. Whereas it is the contention of the learned counsel for the Respondent that the first claim dated 9.01.2012 made during the contractual period. In fact the Arbitral Tribunal did not consider his claim holding that the claim relate to the contractual period of 24 months and therefore, the same is irrelevant for the purpose of determining the limitation period. The second claim is wholly a new claim towards additional cost incurred on account of resources deployed by the respondent during the extended period i.e., November 2011 – May 2012. The said claim was also rejected by the Arbitrator. Third claim was made towards additional cost incurred on account of resources deployed by the Respondent during the extended period i.e., November 2011 – April 2013. The petitioner did not reply to the said claim until the date of invocation of arbitration vide letter dated

14.08.2015 and thereafter the petitioner replied vide letter dated 08.10.2015 merely rejected the claim. The Arbitral Tribunal taking into account that completion date as 19.4.2012, considered the claim only for the extended period i.e., 20.04.2012 till 18.04.2013 partially rejected the amount as claimed by the respondent based on the finding of Completion Date in favour of the petitioner. Standard guidelines were applied for the costs for the extended period. The delay in handing over of the project land has been accepted by the petitioner during oral examination and consequently recorded in the impugned order. There is no challenge to the said finding. There also no counter claim, claim for liquidated damages. It is his further contention that Arbitral Tribunal considered the differences in the claims and the time period, has rightly held that the cause of action for statutory limitation period of three years shall commence at best only from the date of rejection of second claim i.e., on 07.09.2012.

9. Clause 50 of the General conditions of contract states as follows:

"If the employer shall fail to give notice of his decision, as aforesaid, or if the contractor be dissatisfied with any such decision, then and in such case the contractor within thirty days after the expiration of the first named period of thirty days, as

the case may be required that the matter or matters in dispute be referred to Superintending Engineer (NH) Madurai who is the arbitrator."

The said clause merely curtails the limitation time period within which the Respondent has to invoke arbitration and it does not extinguish the right of the respondent to arbitrate *per se*. There is no reference whatsoever in the clause as to the extinguishment of right to arbitrate. The above said clause to the extent of limiting the time period to 30 days is void as per section 28 of the Indian Contract Act 1872. Hence, submitted that the petition has to be dismissed. In respect of the Claim-B the Arbitrator ought to have allowed the claim.

10. In support of his contention he relied upon the following judgments:

1. *Associate Builders v. Delhi Development Authority [(2015) 3 SCC 49]*

2. *Oil and Natural Gas Corporation Limited v. Western Geco International Limited [(2014) 9 SCC 263]*

3. *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta [(1993) 4 SCC 338]*

4. *P.K.Ramaiah & Co. v. National Thermal Power Corporation* [**1994 Supp (3) SCC 126**]

5. *Cauvery Coffee Traders, Mangalore v. Hornor Resources* [(**2011**) **10 SCC 420**]

6. *Steel Authority of India Ltd., v. J.C.Budharaja, Government and Mining Contractor* [(**1999**) **8 SCC 122**]

7. *Balakrishna Savalram v. Shree Dhanyeshwar Maharaj* [**1959 Supp.(2) SCR 476**]

8. *Raja Ram Maize Products v. Industrial Court of MP* [(**2001**) **4 SCC 492**]

9. *National Insurance Co. Ltd., v. Sujir Ganesh Nayak and Co.* [(**1997**) **4 SCC 366**]

10. *Himachal Pradesh State Forest Company Ltd., v. United India Insurance Co. Ltd.,* [(**2009**) **2 SCC 252**]

11. *State of Rajasthan v. Ferro Concrete Construction* [(**2009**) **12 SCC 1**]

12. *Bharat Coking Coal v. L.K. Ahuja* [(**2004**) **5 SCC 109**]

13. *General Manager Northern Railways and*

Ors. v. Sarvesh Chopra [(2002) 4 SCC 45]

14. Ramachandra Reddy and Ors. v. State of Andhra Pradesh & Ors. [AIR 2001 SC 1523]

15. Ramnath International Construction P Ltd., v. Union of India [(2007) 2 SCC 453]

11. The contract was originally entered into between the Respondent and claimant for the construction of two lane bye-pass around Kancheepuram connecting NH4 and Kancheepuram-Vandavasi Road including construction of major bridge at KM 2/10-3/4. It is not in dispute that within the period of contract first claim was submitted on 09.01.2012 as additional cost for the work. The claim of the claimant was rejected by the National Highways by letter dated 09.03.2012. Again on 02.04.2012 the claimant has requested to reconsider the order of the respondent. Thereafter on 17.04.2012 extension was granted and time was extended to complete the work till 18.10.2012 and also made clear that penal action will be taken if the work is delayed as per the revised schedule and also it was made clear that the contractor should show the progress of the work in appreciable manner and lapse should be avoided. Thereafter, on 27.07.2012 Second Claim submitted by the claimant to the

Superintending Engineer for additional costs incurred in the extended period of November – May 2012. On 07.09.2012 the above claim was rejected. Thereafter on 5.10.2012 for second extension of time request was made by the claimant and the same was granted by the respondent from 19.10.2012 to 18.04.2013. Thereafter, third extension of time was also granted on 17.04.2013 upto 18.10.2013. On 30.01.2014 Third Claim was submitted and on 12.03.2014 the claim petition was rejected. Thereafter notice was issued for reference on 14.08.2015. These are all the admitted facts.

12. It is to be noted that even if an objection not raised under Section 16 of the Act, the same can be raised at the time of petition under Section 34 of the Act. In this regard the Honourable Supreme Court in ***State of Madhya Pradesh v. Lion Engineering [(2018) 16 SCC 758]*** has held as follows:

3. Learned Advocate General for the State of M.P. submitted that the amendment sought is formal. Legal plea arising on undisputed facts is not precluded by Section 34(2)(b) of the Act. Even if an objection to jurisdiction is not raised under Section 16 of the Act, the same can be raised under Section 34 of the Act. It is not even necessary to consider the application for amendment as it is a legal plea, on admitted facts, which can be raised in any case. He thus submits the amendment being unnecessary is not

pressed. Learned Advocate General also submitted that observations in M/s MSP Infrastructure Ltd. [(2015) 13 SCC 713], particularly in Paragraphs 16 and 17 do not laid down correct law.

4. We find merit in the contentions raised on behalf of the State. We proceed on the footing that the amendment being beyond limitation is not to be allowed as the amendment is not pressed. We do not see any bar to plea of jurisdiction being raised by way of an objection under Section 34 of the Act even if no such objection was raised under Section 16.

13. Clause 4.2 of the General Conditions of Contract reads as follows:

4.2 LAWS GOVERNING CONTRACT OBSERVANCE
OF LAWS:

Local regulations and attachments

a) The law to which the contract is to be subject and according to which the contract is to be constructed shall be the law for the time being in force in the Union of India and State of Tamil Nadu.

b) The contractor shall conform to all laws of the land, and the regulations and bylaws of any local authority, and of any after or lighting companies with whose systems the structure is proposed to be connected. He shall, before making any variations from the drawings or specification that may be necessitated for so

conforming give to the Engineer written notice, specifying the variations proposed to be made and the reasons for making them, and apply for instructions thereon. In case the contractor shall not receive such instructions within seven days, he shall proceed with the work conforming to the provisions, regulations or by-laws in question and any variations in the drawings or specifications so necessitated shall be dealt with under Clause 27. The contractor shall give all notice required by the said Acts, regulations or by-laws and pay all fees in connection therewith. He shall also ensure that no attachments are made against all claims or liabilities arising from or based on the violation of such laws ordinances, regulations, by-laws, decrees or attachments by him or by his employees.

c) P.S.to S.S.R.B. is inseparable part of this contract.

Clause (a) of 4.2. makes it clear that the law to which the contract is to be subject and according to which the contract is to be constructed shall be the law for the time being in force in the Union of India and State of Tamilnadu. In this regard it is useful to refer the relevant portion of the G.O.Ms.No.1545 dated 26.07.1990 which stipulates that any claim more than Rs.2,00,000/- be referred to the Civil Court only and not to the Arbitrator, which is as under:

"In the circumstances stated above the Government

approved the following procedure to be followed in respect of Highways and Rural Works Department:

(i) The existing system of referring the dispute between the contractor and the Department to the Arbitrator may be continued.

(ii) Claims upto the value of Rs. 2 lakhs be referred to Departmental arbitration.

(iii) Claims above the value of Rs. 2 lakhs be referred to the Court.

(iv) If both the parties agree to the award passed by the Arbitrator there is no need to file it in the Court and obtain a decree on it.

(v) If the parties move the Court, under the [Arbitration Act, 1940](#) ([Central Act X of 1948](#)) then the provisions of the said Act have to be followed and the judgment of the Court shall be final.

(vi) In the case of Tamil Nadu State Construction Corporation Limited the Commissioner and Secretary to Government, Public Works Department will be the arbitrator in disputes between the Corporation and the Highways and Rural Works Department. The orders issued in GO.Ms. No. 1344, Finance (CFC) dated 2

7.09.1979 in this regard may be followed scrupulously."

14. In this case first claim dated 9.1.2012 the claimant has explained the delay due to non acquisition of site, removal of utilities including EB poles, objection by locals, presence of trees, presence of structures etc, this claim was rejected on 9.3.2012. Therefore subsequent second claim for extended period was made. In fact the claim made are overlapping. The Arbitrator in his Award held that there is a distinct difference between the claim made in C-43A dated 09.01.2012 and the claims made in C-51 dated 27.7.2012. The difference is that the first set of claims pertained to the contractual period i.e., for the period ending October 2011. He further held that while the claims made in C-51 dated 27.7.2012 and subsequently, were for the prolongation period beyond October 2011. Learned Arbitrator further held that the claim made in C-51 dated 27.7.2012 was for the period October 2011 to May 2012 and the Claim made in C-69 dated 30.1.2014 was for the period October 2011 to April 2013. Thus the dispute before the Tribunal was first raised before the respondents in C-51 dated 27.7.2012 was rejected on 7.9.2012 and the limitation was started only from 7.9.12.

15. Clause 50 of the General conditions of contract states as follows:

50. SETTLEMENT OF DISPUTES:

If any, dispute of difference of any kind whatsoever shall arise between the Employer and the Contractor in connection with, or arising out of the contractor of the execution of the works, whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the contract, if shall, in the first place, be referred to and settled by the Engineer who shall, within a period of thirty days after being requested by the contractor to do so, give written notice of his decision to the contractor. Upon receipt of the written notice of decision of the Engineer the contractor shall promptly proceed without delay to comply with such notices of decision.

If the Engineer fails to give notice of his decision in writing within a period of thirty days after being requested, or if the contractor is dissatisfied with the notice of decision of the Engineer, the contractor may within thirty days after receiving the notice of decision appeal to the Employer who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal. Subject to the arbitration, as hereinafter provided, such

decision of the Employer in respect of every matter so referred shall be final and binding upon the contractor and shall forthwith be given effect, to by the contractor, who shall proceed with the execution of the works with all due diligence whether he requires arbitration, as hereinafter provided, or not. If the Employer has given written notice of his decision to the contractor and no claim to arbitration has been communicated to him by the contractor within a period of thirty days from receipt of such notice, the said decision shall remain final and binding upon the contractor. If the Employer shall fail to give notice of this decision, as aforesaid, within a period of thirty days after being requested as aforesaid, or if the Contractor be dissatisfied with any such decision, then and in such case the contractor within thirty days after the expiration of the first named period of thirty days, as the case may be required that the matter or matters in dispute be referred to Superintending Engineer (NH), Madurai who is the Arbitrator.

The first claim was rejected on 09.03.2012. In that case reference should have been made prior to 09.03.2012. whereas notice for arbitration was sent on 04.12.2015.

16. In ***State of Andhra Pradesh and Another v. Obulu Reddy [(2001)10 SCC 30]*** three Judges Bench of the Honourable

Apex Court has held that the G.O.Ms.No.430 stipulated that claims of a value greater than Rs.50,000/- were to be decided in a civil court and not by an arbitrator and under the said Government Order question of deciding claims above Rs.50,000/- by way of arbitration does not arise.

17. In a judgment in ***National Insurance Co. Ltd., vs. Sujir Ganesh Nayak and Co. and Another*** [(1997) 4 Supreme Court Cases 366] it is held as follows:-

"10. The clause meant nothing more than this, namely, if the suit is not filed within three months of rejection of the claim, the rights under the policy will be forfeited. The Bombay High Court following certain English decisions held that the contract was not hit by Section 28 of the Contract Act as the clause did not restrict the limitation but merely extinguished the right."

सत्यमेव जयते

In the above judgment the Honourable Supreme Court has held that when the agreement which does not seek to curtail the time for enforcement of the right but which provide for forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement, such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act. The Apex Court further

held that the curtailment of the period of limitation is not permissible in view of Section 28 but extinction of right itself unless exercised within a specified time is permissible and can be enforced.

18. In ***Himachal Pradesh State Forest Company Ltd. Vs. United India Insurance Co. Ltd., [(2009) 2 SCC 252]*** the Honourable Supreme Court has also followed the above ***Sujir Ganesh Nayak and Co. case*** (supra)

19. Learned counsel appearing for the respondent also placed reliance of the judgment of this Court in ***M/s.Apex Buildsys Limited v. KALS Breweries Pvt.Ltd., [O.P.No.657 of 2017 dated 14.03.2018]*** in which the learned single judge referring the judgment of the Apex Court reported in ***Grasim Industries Ltd. v. State of Kerala [2017 SCC online SC 877]*** wherein the Honourable Apex Court has held that invoking the provisions of section 28 of the Contract Act held that an agreement which extinguishes the right of a party on the expiry of specified period, would be void. Even if a restricted period for raising an arbitral dispute had actually been provided for, the same would have to be treated as void. This court has also followed the above judgment.

20. The fact remains that earlier larger bench consisting of three jundes of the Apex Court in ***Sujir Ganesh Nayak and Company's case*** (supra) was not brought to the notice of the Apex Court which deciding subsequent judgment. Whereas ***Sujir Ganesh Nayak and company's*** case the Honourable Apex court had drawn a distinction held that the extinction of the right itself unless exercised within a specific time is permissible and can be enforced.

21. Be that as it may. Even assuming that any time limit which restricts the right as stated by the latest Apex Court judgment in Grasim Industries Limited case is void. The fact remains that the contract particularly Section 4.2 makes it very clear that the G.O.and P.S.to S.S.R.B. are inseparable part of contract. The G.O. makes it very clear that any claim more than Rs.2,00,000/- should be referred to the civil court only and not to the Arbitration.

22. As already referred, the claim in respect of work raised for the contractual period was rejected on 09.03.2012. the second claim is made only in the name of additional cost for the post contractual period. The claim made as early as 9.1.2012 and rejected is also

overlapping in the subsequent claim. The Arbitrator having found factually that the plant and machinery with regard to the respondent plant is excessive and unnecessary and thereby he could have deployed some other side there was no loss suffered by him and rejected the claim. Whereas he has awarded claim A without any proper evidence reasoning. Of course, this Court cannot sit as appellate authority to re-appreciate the entire evidence. Admittedly the claims have been made post contractual period after several extension of period were granted. In a judgment of the Apex Court in **General Manager, Northern Railway and Another v. Sarvesh Chopra [2002(4) SCC 45]** the Apex Court has held as follows:

"15. In our country question of delay in performance of contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is "of the essence" of an obligation, Chitty on Contracts (Twenty-Eighth Edition, 1999, at p.1106, para 22-015) states

"a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract- breaker on the basis that he has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the contract ("damages for loss of the whole transaction")."

If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party, i.e. the contractor, cannot claim compensation for any loss occasioned by the non- performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under [Section 55](#) of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental

agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms."

Further, above judgment makes it clear that the contractor without putting the employer on terms or without making his intention to claim compensation the compensation is not automatic.

23. In ***Ramachandra Reddy and Ors. v. State of Andhra Pradesh & Ors. [AIR 2001 SC 1523]*** the Apex Court has held that mere extension of time will not in any way make the contractor eligible for any extra claim due to escalation in rates of labour and materials or due to any other reasons under any circumstances.

24. In ***Ramnath International Construction P Ltd., v. Union of India [(2007) 2 SCC 453]*** the Honourable Supreme Court has held that for extension period clause of the claim the contractor cannot claim any compensation.

25. No dispute with regard to the law emerged in the judgments cited by the learned counsel for the Respondent. In the case on hand, entire Award is passed beyond the terms of contract and also barred by limitation, besides, as per the judgments referred above, Arbitrator has no jurisdiction. When the award itself beyond to the terms of contract between the parties and the contract stipulate that the G.O. is binding on the parties at any amount more than 2 lakhs should be referred only to the Civil suit. In view of the same the Award passed by the Arbitrator is set aside in view of the specific clause governing the parties in the contract and the respondent is also given liberty to proceed as per law.

26. In the result O.P.No.899 of 2018 is allowed. Award is set aside. O.P.No.881 of 2018 is dismissed. No cost.

सत्यमेव जयते

10.07.2019

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Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order

ggs

N.SATHISH KUMAR, J.

ggs



**Common Order in
Original Petition Nos.881 & 899 of 2018**

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10.07.2019