THE HONOURABLE SRI JUSTICE RAGHVENDRA SINGH CHAUHAN

AND

THE HONOURABLE SRI JUSTICE T.AMARNATH GOUD

C.M.A.NO.898 OF 2016

JUDGMENT: {Per the Hon'ble Sri Justice Raghvendra Singh Chauhan}

The petitioner, the Union of India, has challenged the legality of Order, dated 31.07.2015, passed by the learned I Additional Chief Judge, City Civil Court, Secunderabad, whereby the learned Judge has allowed Arbitration O.P.No.120 of 2011 filed by respondent No.1, Mr.Rajender Kumar, under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act'), has set aside the Award dated 03.09.2010, and remanded the case back to the learned Arbitral Tribunal for fresh decision.

Briefly, the facts of the case are that, the appellant had issued a tender notice for deep screening of ballast between KMs.366.86 to 376.20 and between KMs. 377.60 to 389.00 upline between KZJ-CLE, for a quantity of 20,028 rmt. On 16.06.1986, the respondent No.1 had submitted his tender. On 22.09.1986, the said tender was accepted by the appellant. According to the work contract, the work was to be completed within a period of one year from 22.09.1986. Thus, the work had to be completed by 21.09.1987. However, due to administrative reasons, the work could not be completed within the stipulated period of one year. Therefore, by executing a subsidiary agreement, dated 28.09.1987, between the appellant and respondent No.1, the due date for completion of the work was extended upto 30.04.1988. The period was further extended upto 15.06.1988. However, in May, 1987, the concerned AEN advised the respondent No.1 to stop the work.

The work was restarted from 10.06.1987 by the respondent No.1. Due to the delay in execution of the work, by letter dated 18.09.1987, the respondent No.1 requested the appellant to enhance the existing rates against the work agreement at par with the prevailing rates. It also expressed its inability to execute the balance work on the original rates. After due negotiations, the rates were duly enhanced, and the work recommenced in the second week of October, 1987. Eventually the work was completed in June, 1988. Having completed the work, the respondent No.1 was entitled to receive Rs.3,10,049/- as full and final payment. However, the same was never paid.

This began a long series of correspondence between the respondent No.1 and the appellant. On 25.04.1988, the respondent No.1 raised a claim for payment of the final amount. However, the said letter went unheeded. Thus, a dispute arose between the parties with regard to payment of final amount. On 05.10.2006, the respondent No.1 filed a claim before the Chief Engineer, Rail Nilayam. Eventually, the Arbitrator was appointed on 02.04.2009. Therefore, the learned Arbitral Tribunal had a claim before it on 02.04.2009. Thus, the issue that arise before the Arbitral Tribunal was whether the claim was hit by limitation or not. For, according to item No.18 in the schedule attached to the Limitation Act, a suit or arbitrary proceeding have to be commenced within a period of three (3) years from the date when the work was done by the plaintiff for the defendant. By award dated 03.09.2010, the learned Tribunal dismissed the claim filed by the respondent No.1, *inter alia*, on the ground that the claim was hit by limitation as it was lodged beyond the period of three (3) years from the date of completing the project or even from the date of raising the claim for full and final claim.

Since the respondent No.1 was aggrieved by the said award had filed an Arbitration O.P.No.120 of 2011 under Section 34 of the Act. By the impugned order dated 31.07.2015, the learned Judge set aside the impugned award and *suo motu* remanded the case back to the Arbitral Tribunal for fresh consideration. Hence, this appeal before this Court.

Mr. Javed Razack, the learned counsel for the appellant, has raised the following contentions before this Court:-

Firstly, relying on the case of **Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority**[1], the learned counsel has pleaded that the period of limitation has to be computed from the date the claim is asserted and payment is denied. According to the respondent No.1, he had asserted his claim on 25.04.1988 for the final payment of the amount. Therefore, the period of limitation commenced from the said date. Therefore, the learned Court was not justified in concluding that the claim is not hit by limitation.

Secondly, the learned Court has relied on letter dated 03.02.2004 in order to conclude that the appellant had impliedly accepted his liability. Therefore, the period of limitation would commence from the date of acknowledging the liability. According to the learned counsel, there is no indication in the said letter whereby it can be implied that the appellant had, indeed, accepted his liability.

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[1] **AIR 1988 SC 1007**

Thirdly, relying on the case of **Kinnari Mullick and Ors. V. Ghanshyam Das Damani**[2], the learned counsel has pleaded that under Section 34(4) of the Act, it is only upon a request of a party that the case can be remanded back to the learned Arbitrary Tribunal. However, in the present case, no such request was made by the respondent No.1. Thus, the learned Judge was not justified in *suo motu* remanding the case back to the learned Arbitral Tribunal. Therefore, according to the learned counsel, the impugned judgment deserves to be set aside by this Court.

On the other hand, Mr. Pratap Narayan Sanghi, the learned counsel for the respondent No.1, pleads that by letter dated 03.02.2004, the appellant had not only sought for the return of the records pertaining to the respondent No.1, but had also communicated that the record is needed for finalizing the claim of the respondent No.1. Thus, impliedly it had accepted its liability. Hence, the learned Judge has justified in concluding that the period of limitation would commence from 03.02.2004. Since the claim was filed before the Chief Engineer on 05.10.2006, the claim was lodged well within the limitation period of three (3) years.

Secondly, relying on the case of **M/s. Indian Farmers Fertilizer Co-operative Limited v. M/s. Bhadra Products**[3], the learned counsel has pleaded that whether the award was based on the question of limitation and the claim was dismissed on the said ground, the award in fact, is an interim award which has to be treated as a final award. Therefore, the learned Judge is justified in setting aside the said award and remanding the case back to the

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[2] **(2018)11 SCC 328**
[3] **AIR 2018 SC 627**

learned Arbitral Tribunal. Therefore, the learned counsel has supported the impugned judgment.

Heard the learned counsel for the parties, perused the impugned judgment, examined the record, and considered the case law submitted at the Bar.

In the case of **Popat and Kotecha Property v. State Bank of India Staff Association**[4], the Apex Court has dealt with concept of limitation as embodied in the Limitation act and has opined as under:-

> *"The period of limitation is founded on public policy, its aim being to secure the quiet of the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. The statute i.e. the Limitation Act is founded on the most salutary principle of general and public policy and incorporates a principle of great benefit to the community. It has, with great propriety, been termed a statute of repose, peace and justice. The statute discourages litation by burying in one common receptacle all the accumulations of past times which are unexplained and have not from lapse of time become inexplicable. It has been said by John Voet, with singular felicity, that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal. (Also see **France B. Martins v. Mafalda Maria Teresa Rodrigues**[5])*
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> *Bar of limitation does not obstruct the execution. It bars the remedy. (See **V. Subba Rao v. Secy. To Govt. Panchayat Raj and Rural Development, Govt. of A.P.**[6])*
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> *Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the Courts. So, a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded remedy must be kept alive for legislatively fixed period of time. (See **N.Balakrishnan v. M. Krishnamurthy**[7])"*

Similarly in the case of **Punjab National Bank and Others v. Surendra Prasad Sinha**[8], the Apex Court has clearly opined

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[4] **(2005)7 SCC 510**
[5] **(1999) 6 SCC 627**
[6] **(1996) 7 SCC 626**
[7] **(1998) 7 SCC 123**
[8] **1993 Supp.(1) SCC 499**

that "*the Limitation Act merely bars only the remedy of a suit, appeal or application but does not extinguish the right to which the remedy relates. However, judicial process should not be used as an instrument of oppression and harassment*".

Therefore, these salutary principles will have to be kept in mind while deciding the appeal.

In the case of **Major (Retd.) Inder Singh Rekhi**[1], the Apex Court dealt with the case where the Delhi Development Authority had accepted a tender submitted by the appellant for construction of 240 Janta Houses at the estimated cost of Rs.24,49,262/-. The work was to commence from 15.10.1976 and was to be completed by 14.07.1977. But subsequently, the deadline of completion of the project was extended upto 02.04.1980. Between February 1983 to December 1985, the appellant sent several letters to the Delhi Development Authority for finalizing the bills. First of such letter was written on 28.02.1983 but the Delhi Development Authority failed to pay the amount so due. Therefore, the appellant filed an application under Section 20 of the Act seeking a direction from the Court that the respondent be directed to file the arbitration agreement in the Court and the dispute be referred to the arbitration. However, the learned Single Judge of the Delhi High Court dismissed the application as barred by time. Even the Division Bench of the Hon'ble High Court of Delhi upheld the decision of the learned Single Judge. In the said case, the Apex Court has opined that "*the issue before the Court is as to when did the dispute arise*"? According to the Apex Court, "*the dispute arose when the assertion of claim was made on 25.04.1988 and there was non-payment. Thus, the cause of action arose on the said* *date*". The Apex Court also opined that "*a party cannot postpone the accrual of cause of action by raising reminders or sending reminders*".

In the present case, the respondent No.1 had written on 25.04.1988 to the concerned authority for the full and final payment of the amount. However, the said letter was never replied to. But nonetheless the cause of action arose from 25.04.1988. Therefore, the endless correspondence made by the respondent No.1 "*would not postpone the accrual of cause of action*". Admittedly, the claim was not filed before the Chief Engineer, Rail Nilayam till 05.10.2006. Thus, the claim was filed after an inordinate delay of eighteen (18) years. Therefore, the learned Tribunal was certainly justified in concluding that the claim was hit by limitation.

The letter dated 03.02.2004 is as under:-

SOUTH CENTRAL RAILWAY

Office of the Divl.Railway Manager,
Works Branch, 3rd Floor,
Sanchalan Bhavan,
Secunderabad.

No.CW.148/WV/S/204/S/Ltd *Dt.3.2.04*

To

RSO.CBI.SC

Sub:- Deep screening of Ballast between Kms.366.86 to 376.20 between kms.377.06 to 389 Up line between KZJ-WL. Agt. No.24 dt.16.10.86.
Ref:- this office letters even No.dt.28-4-92, 5-5-97, 21-7-99 and 19-3-2001.

Your attention is drawn to the above cited letters, wherein you were requested to return the records received in connection with the above work. The records are not yet returned to this office and the contractor is pressing for early finalization of the agreement. In the absence of records from you end, further action could not be taken in the matter. An early action in this regard is therefore requested.

(SIMON)
Sr.DEN/Sough/SC

A bare perusal of the letter dated 03.02.2004 clearly reveals that the tenor of the letter is that the record should be returned as expeditiously as possible. However, there is no admission, expressly or impliedly, with regard to the full and final payment to be made to the respondent No.1. Thus, there is no admission of the liability of making payment to the respondent No.1. Therefore, the learned Judge is unjustified in concluding that since the appellant has "*impliedly admitted its liability*," the period of limitation would begin from 03.02.2004.

In the case of **Kinnari Mullick and Ors.**[2], the issue before the Hon'ble Supreme Court was "*whether Section 34(4) of the Act empowers the Court to relegate the parties before the Arbitral Tribunal after having set aside the arbitral award in question and more so suo motu in the absence of any application made by the party in their behalf to the arbitration proceedings*". After noticing the provisions of Section 34 of the Act, the Hon'ble Supreme Court clearly opined as under:-

> "*On a bare reading of this provision, it is amply clear that the Court can defer the hearing of the application filed Under Section 34 for setting aside the award on a written request made by a party to the arbitration proceedings to facilitate the Arbitral Tribunal by resuming the arbitral proceedings or to take such other action as in the opinion of Arbitral tribunal will eliminate the grounds for setting aside the arbitral award. The quintessence for exercising power under this provision is that the arbitral award has not been set aside. Further, the challenge to the said award has been set up under Section 34 about the deficiencies in the arbitral award which may be curable by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award. No power has been invested by the Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in Sub-Section 4 of Section 34. This legal position has been expounded in the case of* ***McDermott International Inc. v. Burn Standard Ltd.***[9]. *In paragraph 8 of the said decision, the Court observed thus:*
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> *8……parliament has not conferred any power of remand to the Court to remit the matter to the arbitral tribunal except to adjourn the proceedings as provided under Sub-section (4) of Section 34 of the Act. The object of Sub-section (4) of Section 34 of the Act is to give an*

[9] **(2006) 11 SCC 181**

opportunity to the arbitral tribunal to resume the arbitral proceedings or to enable it to take such other action which will eliminate the grounds for setting aside the arbitral award.

(Emphasis supplied)

In any case, the limited discretion available to the Court Under Section 34(4) can be exercised only upon a written application made in that behalf by a party to the arbitration proceedings. It is crystal clear that the Court cannot exercise this limited power of deferring the proceedings before it suo moto. Moreover, before formally setting aside the award, if the party to the arbitration proceedings fails to request the Court to defer the proceedings pending before it, then it is not open to the party to move an application Under Section 34(4) of the Act. For, consequent to disposal of the main proceedings Under Section 34 of the Act by the Court, it would become functus officio. In other words, the limited remedy available Under Section 34(4) is required to be invoked by the party to the arbitral proceedings before the award is set aside by the Court."

(Emphasis added)

In the present case, admittedly, the respondent No.1 never requested, either orally or in writing, to the learned Judge to remand the case back to the learned Arbitral Tribunal. Therefore, the learned Judge has *suo motu* remanded the case after setting aside the arbitral award. However, such a power is not vested in the learned Judge. Therefore, the learned Judge has exercised a power ultra vires under Section 34(4) of the Act. Therefore, the portion of the impugned judgment, remanding the case back to the learned Arbitral Tribunal, is clearly unsustainable.

For the reasons stated above, this appeal is, hereby, allowed. The impugned judgment dated 31.07.2015 is set aside. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand closed.

(RAGHVENDRA SINGH CHAUHAN, J)

(T.AMARNATH GOUD, J)

5th February 2019
RRB