

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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I.P.A. 1/2019 & IA No. 1324/2019

ANCIENT INFRA-TECH (PVT.) LTD.

..... Petitioner

Through: Mr. Tarun Vaid, Advocate with Mr.
Vishal K Panwar, Advocate.

versus

NATIONAL BUILDINGS CONSTRUCTION CORPORATION
LTD & Ors.

.....Respondents

Through: Mr. Sanjeev Mahajan, Advocate for
D-1 and D-2.

ORDER
09.04.2019

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SANJEEV NARULA, J

I.A. 1322-1323/2019 (Exemption)

1. Exemption allowed, subject to all just exceptions.

IA No. 1321/2019 & IA No. 1324/2019 in I.P.A. 1/2019

2. The Petitioner by way of present application under Order XXXIII Rule 1 read with Section 151 Code of Civil Procedure, 1908 (herein after referred to as 'CPC') seeks permission to file a suit as *forma pauperis* and consequently prays for exemption from paying court fee. The application is accompanied with a proposed commercial suit under Section 2(1) (C) (vi) and Code 36006 of the Commercial Courts Act, 2015 for recovery of Rs. 22,87,46,277.10/- along with *pendente lite* and future interest at the rate of 24% per annum w.e.f. 1st April 2018.

3. On 14th March 2019, without service of notice, Respondents No.1 & 2 entered appearance through Counsel. Relying upon Order XXXIII Rule 5 (f) of CPC, Respondents prayed for rejection of the application on the ground that the suit is barred by law of limitation. The Petitioner filed written submissions and the counsels have been heard on this issue.

Brief Facts

4. In order to decide the application it is necessary to note certain relevant facts.

5. Respondent Nos. 3 and 4 (Allahabad Bank) engaged and appointed Respondent Nos. 1 and 2 (National Buildings Construction Corporation Ltd.-NBCC) as a Consultant & Project Manager for the Rehabilitation, Re-strengthening, Remodelling, Retrofitting, Renovating and Interior Decoration of the existing building of Allahabad Bank situated at A-17, Parliament Street, New Delhi-01.

6. The Contract between Allahabad Bank and Respondent No.1 was executed on 20th December 2007. After signing of the said Contract, Respondent No. 1 and 2 floated a tender for the aforementioned works. The Petitioner— Ancient Infra-Tech (Pvt.) Ltd. [formally known as M/s Shambhavi Contractors Pvt. Ltd.] participated in the tender process and was the successful bidder. Accordingly, a contract dated 06th January 2009 was executed between the Petitioner and NBCC.

The period of completion of works was stipulated as 12 months and the original date of completion was recorded as 4th December 2009. The completion date was subsequently extended to 31st December 2011. The Petitioner took over the site and commenced the work on 5th December 2008. It is alleged that time was the essence of the Contract, but since NBCC breached in fulfilling their contractual liabilities as per the terms of the Contract, work progress could not be maintained according to the schedule. The difficulties faced by the Petitioner, owing to failure on the part of the Respondents in handing over and clearance of the complete site were brought to the notice of the Respondents but were not resolved.

7. Petitioner submitted running bills for the work done from time to time. Against the said bills, Respondents withheld certain amounts and released only part payments. The Petitioner then made a representation to the Chairman of NBCC and the Allahabad Bank, highlighting it's grievances. While the said representation was under consideration, the Respondents took over the site on 2nd March 2012 and then terminated the Contract on 4th May 2012.

8. The Petitioner alleges that the site was taken over forcibly, without any prior intimation or authority and the termination of the Contract is arbitrary, unreasonable, unlawful and illegal. On 22nd February 2013, Respondents No.1 &2 allotted the balance work of construction, re-strengthening and retrofitting work to M/s Trilok and Associates at the costs and risk of the Petitioner. Pursuant to retendering of the work, Petitioner and Respondents exchanged several correspondences. Petitioner sent letters dated 11th March

2013 and 12th March 2013 requesting for status of outstanding due and release of the balance payment for the work done. NBCC replied to the same vide letters on 4th June 2013 and 9th December 2013. The Petitioner then issued a legal notice dated 7th February, 2014 to the Respondents claiming amounts due under the Contract; loss and damages; compensation etc. NBCC denied all the demands through its reply dated 11th August 2014.

Submissions of the Parties

9. Mr. Tarun Vaid, learned counsel for the Petitioner argues that that Respondent's objection is frivolous and the proposed suit is within time as the cause of action is continuing. He relied on Clause 37.2 read with Clause 72.2(f) of the General Conditions of the Contract (herein after referred to as 'GCC') and argued that the Respondents were required to finalise the dues on the raising of the final bill. This, he says could have been possible only after the completion of the risk and cost work by the new contractor. The said work as per the knowledge of the Petitioner has been completed on 31st December 2015. Thereafter the final bill has been raised and the same is still pending finalization and thus the cause of action for the accompanying suit continues. Relying upon letters dated on 4th June 2013 & 9th December 2013, he further argued that the Respondents, on their own showing have denied the finalisation of the accounts of the Petitioner on the ground that the risk and cost work was still in progress. In view of this stand, Petitioner's payments were not settled and the cause of action continued. Despite the completion of the said work on 31st December 2015, the Respondents have still failed and neglected to settle the accounts and therefore the cause of action is subsisting and continuing and the suit is

within the time limit as stipulated under the Limitation Act, 1963 (herein after referred to as the 'Limitation Act').

10. Per-contra, Mr. Sanjiv Mahajan, learned counsel for the Respondents has contended that the suit is barred by law on the ground of limitation as the cause of action crystallised on the date of termination of the Agreement i.e. 4th May 2012. The Petitioner ought to have approached the Court within the period stipulated under the Limitation Act i.e. 3 years from the date of termination and thus the accompanying suit is grossly barred by time.

11. Mr. Mahajan has further urged that the Respondents in their communication dated 4th June 2013 have made their stand clear that no amount was due and payable to the Petitioner. The differential amount of Rs. 9,22,860.76/- that finds mention in the said communication was to be paid after completion of risk and work as stipulated in Clause 72.3 (f) read with Clause 73.1 of the GCC. This admission according to him cannot be construed to mean that NBCC admitted that any other payment, alleging due to the Petitioner was kept pending settlement. NBCC has specifically denied that any payment was due and payable to the Petitioner. The amount of Rs.9,22,860.76/- was retained and not released pending adjustment against the costs and risk work allotted to the third party. Petitioner's claim in the proposed suit is for damages; compensation etc and payment for the work done and all such claims are independent of the said amount and thus Petitioner ought to have approached the court within time. Later, NBCC in reply to the legal notice refuted the said amount as well. He urged that since the Petitioner's legal notice liquidated the amounts that were allegedly due

to the Petitioner, the cause of action surely stood delineated on the said date and the proposed suit is thus grossly barred by limitation.

Analysis and Findings

- Scope of court's jurisdiction to decide the maintainability of the suit in an application under Order XXXIII Rule 1, CPC:

12. It is first essential to probe into the scope of the jurisdiction of the Court to weigh upon the objection raised by the Respondents. The present application under Order XXXIII Rule 1, CPC requires the Court to enquire into the means of an indigent person. Order XXXIII Rule 5, CPC provides that the Court shall reject an application for permission to sue as an indigent person in situations enumerated therein. The said provision reads as under:-

“ORDER XXXIII- SUITS BY INDIGENT PERSONS

5. Rejection of application—The Court shall reject an application for permission to sue as an indigent person—

(a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or

(b) where the applicant is not an indigent persons, or

(c) where he has, within two months next before the presentation of the application disposed of any property fraudulently or in order to be able to apply for permission to sue as an indigent person:

Provided that no application shall be rejected if, even after the value of the property disposed of by the applicant is taken into

account, the applicant would be entitled to sue as an indigent person, or

(d) where his allegations do not show a cause of action, or

(e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter, or

(f) where the allegations made by the applicant in the application show that the suit would be barred by any law for the time being in force, or

(g) where any other person has entered into an agreement with him to finance the litigation.”

(underlining added)

13. Sub-Clause (f) of Rule 5 of Order XXXIII, CPC enjoins the Court to examine and scrutinize the allegations made by the applicant in the application so as to determine whether the proposed suit to be presented to the Court is barred by any law for the time being in force. The application, as mandated by Order XXXIII Rule 2, CPC is required to contain the particulars of the plaint in the suit. The present application contains full particulars of the suit and is also accompanied with a plaint, seeking permission to sue in *forma pauperis*. A reading of the aforesaid provisions manifests that the application filed under Order XXXIII Rule 1, CPC seeking permission to sue as an indigent person cannot be treated merely as an application seeking permission to sue as an indigent person. The Court while deciding an application under Order XXXIII Rule 1, CPC is required go into the question of the maintainability of the suit so as to ascertain

whether the allegations made in the petition are such which attract any Clause of Rule 5. The afore-mentioned view has been noted by a full judge bench of the Madhya Pradesh High Court, in the case of Tej Kumar v. Subhash Chandra & Ors reported in 1989 M.P.L.J 382 and held as under:

“4. In view of the aforesaid decision of the Division Bench of the Nagpur High Court with which we respectfully agree, it is manifest that the application filed under Order 33, Rule 1, C.P.C. seeking permission to sue as an indigent person cannot be treated only as an application seeking permission to sue as an indigent person but from the moment of the presentation of that application there is a plaint plus an application for permission to sue in forma pauperis. It, therefore, follows that while deciding an application submitted under Order 33, Rule 1, C.P.C. the Court has a right to consider the question of its own jurisdiction to try the case.

5. In Vijai Pratap Singh v. Dukh Horan Nath Singh, AIR 1962 SC 941, the Supreme Court has not taken a view contrary to that of the Nagpur High Court. The Supreme Court has held as under : --

'An application to sue in forma pauperis is but a method prescribed by the Code for institution of a suit by a pauper without payment of fees prescribed by the Court fees Act. If the claim made by the applicant that he is a pauper is not established the application may fail. But there is nothing personal in such an application. The suit commences from the moment an application for permission to sue in forma pauperis as required by Order 33 is presented, and Order 1, Rule 10 would be as much applicable in such a suit as in a suit in which court-fee had been duly paid.'

(Emphasis on underlined portion by us).

A plain reading of the aforesaid dictum of the Supreme Court admits only of one interpretation that the suit commences from the moment an application for permission to sue as an indigent

person is filed before the Court under Order 33, Rule 1, C.P.C. In the aforementioned judgment, the Supreme Court has also considered the scope and ambit of the Court to pass an order rejecting the application under Order 33, Rule 1, C.P.C. It has been held that while rejecting the application seeking permission to sue as an indigent person, in exercise of the powers of the Court under Order 33, Rule 5, C.P.C, the Court is concerned to ascertain whether the allegations made in the petition are such which attract any of the clauses of Rule 5. The Court at that time has not to see whether the claim of the petitioner is likely to succeed. It has merely to satisfy itself that the allegations made in the petition if accepted as true would entitle the petitioner to the relief he claims. If after accepting the allegations made in the plaint to sue, the court finds that the application is liable to be rejected in view of any of the provisions contained in Clauses (a) to (g) of Rule 5 of Order 33, C.P.C, then it can reject the application.....”

(underlining added)

14. This enquiry as per the provision would however be a limited one. The merits of the defences of the Respondent, which require elaborate investigation cannot be gone into at this stage. However, if the reading of the application and the accompanying plaint would show that the suit would be barred by any law, the Court would be within its jurisdiction to reject an application under Rule 5 of Order XXXIII, CPC. Thus, the question of limitation raised by the Respondent, has to be examined not on the basis of the pleas advanced by the Respondent but from the stand point of the Petitioner. The allegations made in the application and the accompanying plaint are to be analysed accepting them to be true and that is precisely what

the court proposes to do in the present case.

15. The question of limitation is often a mixed question of fact and law. In the present case, in view of the scope of jurisdiction discussed above, the question of limitation can be examined on the basis of the admitted facts only and if on consideration of such facts, the suit is found to be barred by limitation, it would be within the jurisdiction of the court to reject the application under Rule 5 of Order XXXIII, CPC.

16. The proposed suit is for recovery of principal outstanding amount along with the interest allegedly arising out of breach of the Contract executed between the parties. The date of execution of the Contract, the term of the Contract and its termination are all facts admitted in the application. The petition raises nine (9) claims which read as under:

- a) Claim no. 1: principle out-standing amount: Rs. 6,32,78,794.14.
- b) Claim no. 2: expenditures incurred in shifting retrieved material and old bank record hither and thither for making working space: Rs. 8,00,000.00.
- c) Claim no. 3: compensation incurred for breach of contract as the Respondents had not fulfil their contractual obligations under both contracts, as to, not completing the site clearance and interior work and not decided decisions for completion the work within stipulated period, even till currency of contract agreement dated 06.01.2009 etc.: Rs. 1,01,37,647.68.
- d) Claim no 4: cost of T & P, machinery, unused material, camp office, labour huts etc Rs. 44,72,550.00:
- e) Claim no. 5: expenditure incurred in unnecessary dragged in to multiple litigations: Rs.22,80,000.00.

f) Claim no. 6: cost of reference to this hon'ble court including court fee: Rs. 34,00,000.00.

g) Claim no. 7: damages and losses incurred for deliberately, malafidely, intentionally and illegally breach of contract, criminal breach of trust, misappropriation etc., committed by the Respondents as to release corresponding payment to third party without any authority, encashed BGs, forcibly taken over site, terminated contract, reduced BOQ rates and altered already/deleted passed quantity of work done, sell the unused material etc: Rs.7,00,00,000.00.

h) Claim no. 8: present interest @ 13.75% p.a. from the date when principal out-standing amount was actually due for payment up to date of reference: Rs.7,43,77,285.35.

i) Claim no. 9: interest @ 24% p. a. On the amounts claimed/awarded:

17. The cause of action and the plea of limitation are pleaded in para 81 of the present petition reads as under:-

“a. The cause of action arose to the Petitioner initially when the Respondents did not adhere to terms and conditions of contract agreement dated 20.12.2007 and contract agreement dated 06.01.2009, when the Respondents had failed to handover the site and hindrance free site and miserably failed to complete the site Clearance work and commenced the interior work together, and arbitrary and malafidely withheld the payment, reduced the BOQ rates, altered/tempered already pass quantity of work, and when the Respondents have encashed BG and not decided the pending decisions and issued so many bogus letters and notices to harass the contractor for taking undue benefits, and also when taken of site forcible on 02.03.2012 and terminated the contract on dated 04.05.2012 in arbitrary, unreasonably, unlawfully and illegal manner.

b. The cause of action arose when the Central vigilance have decided the complaint on dated 30.12.2015, as such filed by the Petitioner on 17.09.2012 and CVC has registered the same as Complaint no. 27690 on dated 30.11.2012 which has forwarded the same to the CVO NBCC for investigation and submission of report within 12 week, and after conclusion of investigation report which conducted by the CTE in twice, but after lapse of 3 years the CVO has submitted investigation report vide letter no. 63(251)Vig.2015/574 dated 29.09.2015 to the CVC, wherein requested to close the complaint, however the CVC has agreement with NBCC to close the complaint and the CVC has further advised/directed to the CVO NBCC/NBCC to resolve the subject matter as per law vide **OFFICE MEMORANDUM** No.012/W&H/117 dated 30.12.2015, as such received by the Petitioner under RTI Act, on dated 14.11.2017 vide letter no. CVC/RTI/APP/CIC/16/72-362013 dated 6.11.2017, but the CVO has neither resolve mater as per law, nor supply the CTE conclusion report to the Petitioner till date, hence the cause of action to file a civil suit is still continue.

c. The cause of action arose to the Petitioner on many dates, which is still continue, being the Respondents has withhold and lien to retained the balance/pending payment of work done and T & P, Machinery and unused material of the Petitioner until dues are finalized/adjusted after completion of the risk and cost work and pending the CTE observations on the work executed by the Petitioner etc. as such intimated by the Respondents vide letter no. GM/ZO(SPZ)/Allah. Bank works/NBCC/2013/237 dated 04.06.2013, reproduce the same read here: "how may further note that CTE has inspected the works executed by you, twice and the CTE observations on the works executed by you are still pending. You are contractually liable to take corrective measures with regard to the defects in the works executed by you at your cost. Hence, on the conclusion of CTE inspection reports, the required tests/removal of defects will also be liable to be done at your risk and cost", but the Respondents have not intimated to the Petitioner regarding CTE's observations and removal of

defects works till date, however the balance work has been completed on 31.12.2015 as verbally informed, hence the cause of action to file a civil suit is still continue until finalise the final bill of the Petitioner and balance work and finalization/adjustment of dues etc.

d. The cause of action to file a civil suit is still continuing, being final bill of balance work and also work executed by the Petitioner have not finalized by the Respondents, and are not releasing the due amount and T & P, machinery of the Petitioner till date, for which the Respondents have admitted and promise to release the due amount and T & P and machinery lying at site of the Petitioner after finalization/adjustment of dues after completion of the risk and cost work, vide letter no. GM/ZO (SPZ)/Allah. Bank works/NBCC/2013/696 dated 09.12.2013, Reproduce the same here read as: "We would like to draw your attention to our letter no. GM/ZO (SPZ)/Allah. Bank works/NBCC/2013/237 dated 04.06.2013 issued in reply to your letter dated 11.03.2013 & 12.03.2013. In the said letter we had specifically mentioned that since NBCC has awarded the balance work in your risk and cost and the said risk and cost work is still under progress, in terms of clause 72.3 (f) read with clause 73.1 of GCC, amount due to you, if any, cannot be paid until dues are finalized/adjusted after completion of the risk and cost work. The provisions of the contract are also applicable for your T & P and machinery lying at site, if any". Hence the cause of action to file a civil suit is still continuing until finalization/adjustment of dues after completion of alleged risk and cost work.

e. The balance work is executed and completed at risk & cost of the Petitioner as alleged, therefore the contract agreement dated 06.01.2009 between Respondents and Petitioner is still subsisting and continuing, until & unless completed the balance work and finalization/adjustment of dues after completion of balance work under risk and cost tender, hence cause of action to file a recovery suit is still continuing.

f. The contract agreement dated 06.01.2009 between Respondents and Petitioner still subsisting and continuing, until

& unless finalized the final bill of the Petitioner as well as final bill of subsequent contract of alleged risk and cost tender, hence cause of action to file a civil suit is still continuing until finalized the final bills.”

(underlining added)

18. The Contract dated 6th January 2009 was terminated on 4th May 2012. The Petitioner alleges that the cause of action is continuing, as the Respondents has withheld and retained the balance/pending payment of the work done by the Petitioner and the T&P, Machinery and unused material. In support of the plea that the cause of action is continuing, the Petitioner has relied upon the letter dated 04th June 2013 and 9th December 2013 which reads as under:-

Dated :04.06.2013

“No. GM/ZO(SPZ)/Allah.Bank Works/NBCC/2013/237
To,
Shri LR. Kashyap
M/s Shambhavi Contracts Pvt. Ltd.
1/324, Hira Niwas, Bye Pass Road,
SOLAN
Himachal Pradesh-173211.

Sub: Rehabilitation, Remodeling and Re-strengthening of Allahabad Bank Building at 17, Parliament Street, New Delhi-110 001 - Agreement dated 06.01.2009— Rgd.

Dear Sir,

Please refer your letter No. SCPL/NBCC/A. Bank/2008-09 - 15072 dated 11/03/2013 and 15074 Dated 12/03/2013, **requesting for status of account and release of balance payment in the captioned matter.**

As per our records, the account, position **against the work executed,** at the captioned project is as under:

1. Amount of en-cashed B.G,	Rs. 50,68,823.00
2. Amount of Security Deposit	Rs. 25,98,997.00
3. Payment due against 9 th bill	Nil
4. Credit for materials available at site	Rs. 3,97,225.00
5. Debit balance recoverable on account different recovery .	(-) <u>Rs. 3,39,259.00</u>
Total	Rs. 77,25,786.00 (A)

Since you had miserably failed to perform the contract, we constrained to terminate your contract and after termination the balance work was awarded on your risk and cost to M/s Trilok & Associates under intimation to you. Although the detail of risk and cost of your left out work has been intimated to you but for your Convenience the financial position of the same is again reiterated:

1. Contract value of the awarded balance-work on risk and cost to M/s Trilok & Associates	Rs. 5,19,87,719.07
2. Value of your balance work as per the BOQ and quoted percentage rates by you	<u>Rs. 4,1,84,793.83</u>
Total	Rs. 68,02,925.24(B)
Difference between A and B = Rs. 77,25,786.00 - Rs. 68,02,925.24	
= Rs. 9,22,860.76	

Amount as per 'A'	= Rs. 77,25,786.00
Amount as per 'B'	= Rs. 68,02,925.24
Difference in amount	= Rs. 9,22,860.76

However after award of the work on your risk and cost a sum of Rs. 9,22,860.76 is lying in credit balance with NBCC but the amount could not be released to you as the work of risk and cost is still under progress. The Clause 72.3 (f) read with Clause 73.1 of GCC of the contract clearly stipulate that the amount due to the party, if any, will not be payable to the party until dues are finalized/adjudicated after completion of the risk and cost work.

You may further note that CTE has inspected the works executed by you, twice and the CTE observations on the works executed by you are still pending. You are contractually liable to take corrective measures with regard to the defects in the works executed by you at

your cost, Hence, on the conclusion of CTE inspection reports, the required tests/removal of defects will also be liable to be done at your risk and cost.

We understand you will appreciate the position as narrated herein above and oblige by the provisions of agreement executed between the NBCC and M/s Shambhavi Contracts Pvt. Ltd.

Thanking you

AND

Dated: 09.12.2013

NO: GM/ZO(SPZ)/Allahabad Works/NBCC/2013/696
M/s Shambhavi Contractors (P) Ltd,
Hira Niwas, Ward No.1,
H.No.324, Near Saproon Bus Stand,
By Pass Road, Solan-173 211
Himachal Pradesh

Subject - .Construction of Retrofitting and Re-strengthening work of Allahabad Bank Building at A-17, Parliament Street, New Delhi.

Dear Sir,

Reference is invited to your letter no. SCPL/NBCC/A.Bank/2008-9-16002, dated 13.9.2013 whereby request has been made for release of pending payment and T&P, Machinery and material lying at site.

We would like to draw your attention to our letter no. GM/ZO(SPZ)/Allah.Bank Works/NBCC/2013/237 dated 04.06.2013 issued in reply to your letters dated 11.3.2013 & 12.3.2013. In the said- letter we had specifically mentioned that since NBCC has awarded the balance work on your risk & cost and the said risk and cost work is still under progress, in terms of Clause 72.3(f) read with Clause 73.1 of GCC, amount due to you, if any, cannot be paid until dues are finalized/adjusted after completion of the risk and cost work, The same provisions of the contract are also applicable for your T&P and Machinery lying at site, if any.

In view of position narrated herein above and the provisions of agreement executed between NBCC and you, you will appreciate that your request cannot be accepted at this stage.

Thanking you.

(underlining added)

19. Relying upon the aforesaid communications, Petitioner contends that the cause of action is continuing as the Respondents have till date not finalised the bill for the work executed by the Petitioner. This contention of is untenable and misconceived. The Contract between the parties concededly stood terminated on 4th May 2012. The cause of action for challenging such termination and for the price of the work done was required to be initiated within the period prescribed under the Limitation Act. The relevant Articles governing this cause of action are Article 18 and Article 55 and the same read as under:

Description of suits	Period of limitation	Time from which period begins to run
PART II-Suits relating to contracts		
18. For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years	When the work is done.
55. For compensation for the breach of any contract, express or implied not herein specially provided for.	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it

		ceases.
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20. The main plank of Petitioner's argument is the correspondence received from the Respondent. The said letters, reproduced above, in the considered opinion of the Court do not advance or extend the cause of action. Although the Respondents No. 1 & 2 in their letter dated 4th June 2013 admit that an amount of Rs. 9,22,860.22 is lying with them to the credit of the Petitioner for the work executed, however, at the same time by referring to Clause 72.3 (f) read with Clause 73.1 of GCC, it is denied that the said amount is payable. The subsequent letter reiterates this stand. These communications are being misinterpreted to say as if the Respondents were deferring the finalisation of the payments due to the Petitioner. On the contrary, in the view of this Court, in the said communication, Respondents have categorically stated that only the amount specified therein i.e. Rs. 9,22,860.76/- was due to the Petitioner for the work executed, subject to the finalisation/adjudication of the risk and cost work. The Respondents No. 1&2 also denied returning the equipment. It does not mean that the Respondent agreed to process the bills or claims of the Petitioner after completion of the risk and cost of the work.

21. Even if one would assume for the sake of argument that by virtue of the aforementioned letters, the Respondents deferred the finalisation / completion of risk and cost work, the subsequent communications being the exchange of legal notices, leave no room for any doubt on this issue. The Petitioner through legal notice dated 7th February 2014, controverted the stand taken by

the Respondent and asserted that notwithstanding the finalisation of risk and cost, they were entitled to recover the balance payment due under the Contract. The relevant portion of the said notice is reproduced herein under:-

“.....The addressees thereafter wrongly and illegally shifts their wrong on my client by issuing various letter only with sole motive to create false evidence in their favour and thereafter wrongly and illegally cancelled the agreement -in a wrong and illegal manner and as such addressees are legally bound to pay the following amount to my client.

1. Due amount of Rs. 7,49,78,992.35/-
 2. Loss & Damages of Rs. 7,00,00,000/-
 3. Compensation of Rs. 1 ,01,37,647.22/-
- Total Rs. 15,51,16,639.56/

The above said addressees are jointly as well as severally liable to pay the said amount of Rs. 15,51,16,639.56/- alongwith interest since taking possession till realization. The agreement in question was revoked due to sole negligent acts and conduct on the part of above said addressees for which above said addressees are jointly as well as severally liable to pay said amount to' my client for all intends and purposes. The addressees have wrongly and illegally withhold the amount of my client with themselves in wrong and illegal manner.”

22. The Respondent replied to the said notice and rebutted and countered the allegations and denied that any amount was due and payable to the Petitioner. The relevant portion of the said reply is reproduced hereunder:-

“6. That Para 5 of the notice is absolutely wrong and denied. It is denied that in, respect of the 3rd, 4th, 5th, 6th, 7th, 8th and 9th Bill

any amount wrongly or illegally withheld or ignored. The amounts payable as per the work done and the joint measurements was paid to your client. The deductions done were as per the terms and conditions of the contract between the parties. Your client has as a counter blast to the termination have raised these frivolous claims without any basis and contrary to the contractual stipulations. It Is denied that any term or condition of the agreement was misinterpreted.

15. That Para 15 of .the your notice is wrong and denied. It is denied that my client has done any illegal act. The financial position of your client and the fact it was declared as a defaulter has nothing to do with my client and the same is purely attributable to your clients acts and omission. My client is as such not responsible for the same. It is denied that your client has suffered any financial, business, mental and physical harassment and damages lo any act or conduct of my client. It is denied that your client is entitled to Rs 7 cores as compensation.

16. That Para 16 of your notice is wrong and denied.- It is denied that my client failed to hand over the site or had disconnected the electricity. It is further incorrect that the bank guarantee was illegally encashed. It is denied that the material or the store official record of your client is in possession of my client, the communications addressed to your client were bring to your client's notice the slow progress of work. Despite that your client failed to maintain the progress of work and as a result thereof, my client were constrained to terminate the contract. None of the amounts claimed by your client are payable by my client. Neither any amount is due nor any loss or damages has been incurred by your client. Moreover no compensation is payable to your client, as is being claimed in the present notice under reply. It Is denied an amount of Rs. 15,51,16,639.56p is payable to your client. It is further denied that the agreement was terminated due any act or conduct on part of my client. The basis and reasons for the termination of the contract was provided in details in the show cause notice and the termination order. It is denied that any amount has been illegally withheld by my client.

As stated hereinabove no amount is payable by my client to your client.”

(underlining added)

23. Thus, it clearly emerges that the cause of action manifested on the termination of the contracted and even if it was extended to a limited extent by virtue of the letters referred above, it finally concluded with the stand taken by the Petitioner in its legal notice and the Respondent’s reply thereto.

24. Petitioner has also relied upon Clause 37.2 and Clause 72.2 (f) of the GCC to urge that as per the said clauses the final bill was required to be submitted within three months of the completion of the work which is on 31st December 2015. The said clauses for the sake of ready reference are reproduced hereunder:-

“GCC clause no. 72.2 (f): "By giving notice in writing to withdraw from the contractor any items or items of work as the Engineer-In-Charge may determine in his absolute discretion and at the same executed at the risk and cost of the Contractor.

GCC clause no. 37.2: All running payments shall be regarded as payments by way of advance against the final payment only and not as payments for work actually done and completed and / or accepted by NBCC and shall not preclude the recovery for bad, unsound and imperfect or unskilled work to be removed and taken away and reconstructed or re-erected or be considered as an admission of the due performance of the Contract, or any part thereof, in this respect, or the accruing of any claim, nor shall it conclude, determine or affect in any way the powers of the NBCC under these conditions or any of them as to the final settlement and adjustments of the accounts or otherwise, or in any other way vary/ affect the contract. The final bill shall be

submitted by the contractor within three months of the completion of work, otherwise NBCC's certificate of the measurement and of the total amount payable for the work accordingly shall be final and binding contractor”

25. Even if the Court were to examine the question vis-a-vis the rights of the parties under Clause No. 37.2 and Clause 72.2 (f), the argument of the Petitioner is still not sustainable. Petitioner's contention that risk and cost of the completed on 31st December 2015 gives rises to a fresh cause of action in terms of Clause. 37.2 is *ex-facie* bereft of merit and is also misconceived. Clause 37.2 deals with the concept of raising the final bill within three months of the completion of work by the contractor. On the termination of the contract, there cannot be any completion of work by the contractor, as envisaged under Clause 37.2 of GCC. Petitioner's understanding of Clause. 37.2 is thus erroneous and contrary to the terms of the contract. Once the contract was terminated and the site was taken over by the Respondents and the work allocated to a new contractor, Clause. 37.2 has no relevance for the Petitioner. The final bill referred to in Clause 37.2 assumes the completion of work by the contractor and not by a new agency engaged for completion of work at the risk and cost of the contractor.

26. Petitioner's right to demand payment of the work executed on the date of termination arose on the said date and the said right was not postponed to a date when the work is completed, as is being agitated now. It is also worthwhile to note that Petitioner had also filed a writ petition raising the same claims that are now being sought in the present application. The said writ was dismissed on the ground of delay and laches, with the Court

observing that the Contract has been terminated more than three years back. Thereafter, an appeal was filed against the said order which was also dismissed vide order dated 5th February 2018. The relevant portion is as under:-

“LPA 45/2018

The appellant's grievance is that the learned Single Judge rejected the writ petition in limine.

The grievance articulated in the writ proceedings was that the respondent-National Buildings Construction Corporation Limited (for short 'NBCC') was appointed as a consultant by the Allahabad Bank. The respondent-NBCC defaulted in its duties and did not prepare the final bill and rather went ahead to invoke the “risk and cost” clause to award balance works to a third party. The learned Single Judge expressed the opinion that the dispute urged was purely the subject matter of other civil proceedings and granted liberty to the appellant to exhaust such remedy.

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In the field of judicial review and application of public law principles, it is reasonably well settled, for the last five decades, that up to the contract formation and finalisation stage the procedures and processes adopted by the States or its agencies are fairly the subject matter of the judicial scrutiny. Ordinarily, post contractual disputes relating to performance of the contracts or the payment of money, extent of work done etc. are not scrutinised under Article 226 of the Constitution of India.

There have been undoubtedly some instances where exceptions have been indicated - such as in the case of ABL International Limited (supra) where the Court went on to observe that there is no limitation in the writ proceedings and that if necessary and the circumstances are so deemed appropriate even examination of witnesses and their cross-examination can be resorted to. At the

same time, this Court notices that such situations are exceptional and cannot indicate a broad general principle of universal application.

The present case would require the Court to involve itself into detailed fact appreciation and also determining, atleast to a certain immediate extent, the rival rights of the parties. Having regard to all these factors, the Court is of the opinion that there is no error either in law or in the facts of the case with the impugned judgment of the learned Single Judge.

The appeal is therefore dismissed.”

- Judgements relied upon by the Petitioner:

27. The Petitioner has relied upon several judgments, *Rashtriya Ispat Nigam Ltd. v. Prathyusha Resources & Infra Pvt Limited*, (AIR 2016 SC 861) *Indian Oil Corporation Ltd. v. M/s SPS Engineering Ltd.*, (AIR 2011 SC 987) *National Highways authority of India v. Progressive Construction Ltd.*, (211(2014)DLT 62) *Indian Oil Corporation Ltd. v. SPS Engineering Ltd.*, (MANU/DE/1041/2018). A perusal of the said judgements makes it amply clear that the facts of the afore-noted decisions are distinguishable from the facts of the present case and thus are not applicable. In *Rashtriya Ispat Nigam Ltd (supra)*, it is noteworthy that in the afore mentioned case, it is an admitted position that the contract between the parties was not terminated and the issue before the Supreme Court was with regard to the rate of escalation based on the base year 1992 or 1994. In *Indian Oil Corporation* (supra), the Court was dealing with an appeal arising out of a petition filed under Section 11 of the Arbitration and

Conciliation Act, 1996 and held that a claim cannot be rejected on the ground of res judicata. In view of the facts of the said case, the same is not applicable herein. In National Highways authority of India (supra), this Court was deciding a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996. By way of the said petition the appellant challenged the award of the arbitral tribunal which upheld the claim of the respondent with regard to revision of rates of the BOQ items. A perusal of the said decision elucidates that this Court has elaborately dealt with the observation of the Arbitral Tribunal, however the court has not specifically decided the issue of limitation.

28. The question of limitation is undeniably linked to the cause of action. The cause of action in the present case arose on the date of termination of the Contract i.e. 4th May 2012. The termination of the Contract, therefore, entitled the Petitioner to approach the Court for redressal of its grievances. The Respondent No. 1&2 alleging breach on the part of the Petitioner have terminated the contract on 4th May 2012. The time period for any action based on the breach of contract thus began to run. In accordance with Article 55 of Schedule 1 of the Limitation Act, the suit ought to have been filed within three years from the date when the contract was broken. In the considered view of this court, the starting point of limitation for the suit occurred the moment the contract was broken. In the present case the work was retendered by the Respondent at risk and cost of the Petitioner. Petitioner contends that since the risk and cost work was continuing, the period of limitation also continues. To the Court, Petitioner's argument is untenable in law. The retendering of the work at cost and risk of the

Petitioner does not extend the period of limitation. The Supreme Court in **Essar Constructions v N.P. Ramakrishna Reddy** (2000) 6 SCC 94) has held that the statute of limitation assumes the existence of a cause of action and not define or create one. The Petitioner's claims are for compensation/damages; return of T&P; price for the work done are not linked with the completion of work by the Respondent through the engagement of a new contractor. From the Petitioner's stand point the moment the contract was terminated it was entitled to all the alleged claims which are now raised in the present petition. The engagement of a new contractor by the Respondent for the completion of the work cannot justify the Petitioner's inaction for approaching the Court within period prescribed of three years. Once the contract was broken the rights and obligations flowing out of the contractual provisions, except as provided therein, ceased to exist. The termination of the contract is alleged to be wrongful and arbitrary resulting in causing damage to the Petitioner. Thus as far as the Petitioner is concerned, the breach was complete and the time period for limitation commenced. There is no continuing cause of action as canvassed by the Petitioner. The limitation cannot continue indefinitely. The Petitioner's argument that since the bills have not been finalised till date the cause of action is subsisting till date is totally misconceived. The uncertainty for the period of limitation is contrary to the settled principles of the Limitation Act. In this regard, it is apposite to note the observation of the Supreme Court in the case of **Bharat Barrel and Drum Mfg. Company Private Ltd. and Ors. vs. The Employees' Estate Insurance Corporation** reported in AIR 1972 SC 1935. The relevant part reads as under:

“The necessity for enacting periods of limitation is to ensure that actions are commenced within a particular period firstly to assure the availability of evidence documentary as well as oral to enable the Respondents to contest the claim against him: secondly to give effect to the principle that law does not assist a person who is inactive and sleeps over his rights by allowing them when challenged or disputed to remain dormant without asserting them in a court of law. The principle which forms the basis of this rule is expressed in the maxim vigilantibus non dormientibus, jura subveniunt (the laws give help to those who are watchful and not to those who sleep). Therefore the object of the statutes of limitations is to compel a person to exercise his right of action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims.

(underlining added)

29. The law pertaining to the period of limitation on breach of a contract and subsequently retendering of work has been dealt with at length by a Division Bench of Kerala High Court in the case of **Delta Foundation and Construction, Kochi & Ors v. State Construction, Corporation Ltd, Ernakulam** AIR 2003 KERALA 201 wherein the Court has observed as under:

“.....At the moment breach occurs, time begins to run, and the starting point of limitation for suit for compensation for breach of contract is when the contract is broken. Bench has taken the view that only when the work is re-tendered plaintiff would be able to consider the damages caused. We are of the view that would be going against the law of limitation. The Supreme Court in *Essar Constructions v N.P. Ramakrishna Reddy* MANU/SC/0346/2000 held that statute of imitations assumes the existence of a cause of action and does not define or create one.....”

30. The aforementioned observations have been fortified by a coordinate bench of this Court in the case of **KLA Construction Technologies Pvt. Ltd v. Chadha Sugar and Industries Pvt. Ltd** MANU/DE/2699/2018.

31. In view of the above discussion, the Court has no hesitation to hold that the allegations made in the application show that the suit would be barred by limitation and thus the application seeking permission to sue as an indigent person is rejected and all pending applications are disposed off.

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32. In light of the above discussion, since the court has concluded that the proposed suit is barred by limitation, the present petition cannot sustain and is thus dismissed

SANJEEV NARULA, J

APRIL 09, 2019

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