

\$~

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

+ **FAO(OS) (COMM) 180/2019**

M/S ANCIENT INFRATECH (PVT.) LTD. Appellant
Through: Mr. D.S. Chauhan Ms. Beena Rani
Panday and Ms. Ruchi Singh, Advocates.

Versus

**M/S NATIONAL BUILDING CONSTRUCTION CORP. LTD. &
ORS.** Respondents
Through: Mr. Sanjeev Mahajan, Advocates.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE ASHA MENON

ORDER
29.07.2019

%

1. The appellant/petitioner is aggrieved by an order dated 9.4.2019 whereby, the learned Single Judge has dismissed IPA No.1 of 2019 filed by it for permission to institute a commercial suit under Section 2(1)(C)(vi) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 against the respondent/defendant, National Building Construction Corporation Ltd. (in short 'NBCC') for recovery of a sum of Rs. 22,87,46,277.10/- towards cost of T & P, machinery, unused material, camp office etc.

2. A glance at the relevant facts is considered necessary. In December, 2018, the appellant/plaintiff instituted a commercial suit on the Original Side of this Court for recovery of money against the respondents/defendants. Accompanying the said suit was an application filed under Order XXXIII

Rule 1 of the Code of Civil Procedure, 1908 (CPC) for seeking permission to file the suit as *forma pauperis* and for being granted exemption from paying the requisite court fee.

3. On receiving advance notice, the respondent/NBCC entered appearance on 14.3.2019. Invoking the provisions of Order XXXIII Rule 5 (f) of the CPC, the respondent/NBCC prayed for rejection of the application filed by the appellant under Order XXXIII Rule 1 CPC on the ground that the suit itself was barred by limitation. Learned counsel for the respondent/NBCC referred to an order dated 9.2.2016, passed in W.P. (C) 1047/2016, filed by the appellant/plaintiff for seeking quashing of a letter dated 4.5.2012 issued by the respondent/NBCC, terminating its contract on the ground of delay in completion of the work. Vide order dated 9.2.2016, the captioned writ petition filed by the appellant herein was dismissed as being barred by delay and laches on the ground that termination of its contract had taken place more than three years ago. It is noteworthy that the aforesaid order dated 9.2.2016 was upheld by the Division Bench vide order dated 2.5.2016, passed in LPA 265/2016 filed by the appellant.

4. The brief relevant facts of the case are that the respondents No.3 and 4/Allahabad Bank had appointed respondents No.1 and 2/NBCC as a Consultant and Project Manager for the rehabilitation, restrengthening, remodelling, retrofitting, renovating and interior decoration of their existing building at A-17, Parliament Street, New Delhi. Respondents No.1 and 2/NBCC in turn floated a tender for execution of the aforesaid works. The appellant, then known as M/s. Shambhavi Contractors Pvt. Ltd., participated in the tender process and was declared as the successful bidder. The appellant executed a contract dated 6.1.2009 with the respondents No.1 and

2/NBCC. The stipulated period for completion of the work was 12 months. The original date of completion was 4.12.2009, which was subsequently extended to 31.12.2011. The appellant was handed over the site and it commenced the work on 5.12.2008. On 4.5.2012, the respondents No.1 and 2/NBCC terminated the appellant's contract on the ground of failure on its part to carry out its obligations and failure to take steps to remedy breaches etc. The impugned termination notice refers to an earlier notice dated 14.2.2012, issued to the appellant, its reply dated 27.2.2012 and the communication dated 2.5.2012, addressed by the respondents No.1 and 2/NBCC to the appellant pointing out the failure on its part to execute the work within the fixed time schedule.

5. The stand of the appellant was that the respondents No.1 and 2/NBCC had committed breach of contract due to which work progress could not be maintained in terms of the schedule; that there was delay in handing over and clearance of the complete site on the part of the respondents No.1 and 2/NBCC and certain amounts liable to be paid to the appellant against running bills for the work done, were illegally withheld with only part payments released. It was thus stated that termination of the contract by the respondents No.1 and 2/NBCC was arbitrary and unlawful.

6. It is an undisputed position that on 22.2.2012, respondents No.1 and 2/NBCC allotted the balance work under the contract to a third party for being executed at the risk and cost of the appellant. Several letters were exchanged between the parties wherein, the appellant demanded the status of its outstanding dues and asked for release of the balance payment for work done which was refuted by the respondents No.1 and 2/NBCC. Finally, a legal notice dated 7.2.2014 was served by the appellant on the respondents

No.1 and 2/NBCC quantifying *inter alia* the amounts due and payable to it under the contract, towards loss and damages, compensation etc. that were refuted by the respondents No.1 and 2/NBCC vide reply dated 11.8.2014.

7. Before initiating civil action against the respondents No.1 and 2/NBCC, in the year 2016, the appellant had filed a petition under Article 226 of the Constitution of India for quashing the termination notice dated 4.5.2012 whereby, the contract awarded to it was terminated by the respondents No.1 and 2/NBCC. The said writ petition was, however, dismissed on two grounds. Firstly, that it entailed serious disputed questions of facts and secondly, that the writ petition was barred by delay and laches as termination of the contract had taken place over three years ago. Aggrieved by the dismissal order dated 9.2.2016, the appellant preferred an intra-Court appeal registered as LPA 265/2016, which was also dismissed in *limine* by the Division Bench.

8. Thereafter, the appellant did not seek any legal recourse till December, 2018 when it decided to file a suit for compensation and damages against the respondents No.1 and 2/NBCC, as an indigent entity. It is noteworthy that though the dates mentioned in the verification clause of the plaint as also the affidavits sworn in support of the accompanying applications including the application moved by the appellant under Order XXXIII Rule 1 CPC for permission to file the suit as *forma pauperis*, are 19/24.7.2017, the suit was filed by the appellant in the Registry only on 21.12.2018 and it came to be listed before the learned Single Judge on 29.1.2019. As the respondents No.1 and 2/NBCC prayed for rejection of the application filed by the appellant under Order XXXIII Rule 1 CPC (I.A. No.1324/2019), the said issue being a legal issue, was taken up for

consideration by the learned Single Judge in the first instance and the plea of the respondents No.1 and 2/NBCC that the suit was hopelessly barred by limitation was upheld on the following grounds:-

- (i) That the contract dated 6.1.2019, executed between the parties was terminated by the respondents No.1 and 2/NBCC on 4.5.2012 and therefore, the period of limitation for seeking legal recourse against the respondents began to run from 4.5.2012, in terms of Article 55 of Schedule 1 of the Limitation Act that computes the period of three years as from the date when the contract is broken.
- (ii) That the appellant's claim for compensation/damages, return of T & P, price for the work done etc. are in no way linked with the completion of work got done by the respondents by engaging a new contractor at the risk and cost of the appellant and that could not be treated a factor for extending the period of limitation.
- (iii) That the appellant was wrong in claiming that there was a continuing cause of action to institute the suit on the ground that the bills for work done, submitted by the appellant had not been finalized by the respondents No.1 and 2/NBCC.
- (iv) That the correspondences exchanged between the parties cannot extend the cause of action since there was no admission made by the respondents No.1 and 2/NBCC in their letters that any amounts were due and payable to the appellant. Instead, the stand taken by the respondents No.1 and 2/NBCC in their letters dated 4.6.2013 and 9.12.2013 was that the amount due to the appellant, if any, could not be paid till completion of the work awarded to a third party, at the risk and cost of the appellant.

(v) That once the appellant had served a legal notice dated 7.2.2014 on the respondents No.1 and 2/NBCC, quantifying the amount due and payable to it under various heads including the heads loss and damages, compensation etc., which was countered by the respondents No.1 and 2 who had denied any liability to pay the said amount to the appellant in terms of its reply dated 11.8.2014 to the legal notice dated 7.2.2014 , issued by the appellant, then, an actionable cause of action had arisen in favour of the appellant.

9. The learned Single Judge thus held that the period for instituting a civil suit by the appellant had started to run on the contract being terminated by the respondent No.1/NBCC on 4.5.2012 and re-tendering of the contract would not result in the limitation getting extended. Consequently, the application filed by the appellant under Order XXXIII Rule 1 CPC for permission to sue as an indigent person, was rejected on the ground that the suit itself was barred by limitation.

10. Learned counsel for the appellant has assailed the impugned order on the ground that the learned Single Judge failed to appreciate that if the respondents No.1 and 2/NBCC had withheld the balance payment due and payable to the appellant over and above the amounts towards loss and damages, compensation etc. till finalization/adjustment on completion of the retendered work, at the risk and cost of the appellant, then in those circumstances, the cause of action would continue to run in favour of the appellant till the balance work was completed by the third party; that the learned Single Judge has failed to appreciate that the respondents No.1 and 2/NBCC had neither settled the bills of the appellant on completion of the

work, nor released the balance payment towards T & P, machinery, unused material etc.; that the suit was within limitation in view of the provisions under Clauses 37.2 and 72.2(f) of the General Conditions of the Contract (in short ‘GCC’) that required the final bill to be submitted by the appellant within three months reckoned from the date of completion of the work that stood concluded on 31.12.2015; that the learned Single Judge erred in observing that the date of issuance of the legal notice i.e. 29.2.2014 was an integral part of cause of action and lastly, that the period of limitation had to be reckoned on the date when the work was completed, which in the instant case, could be treated as complete only on the completion of the re-tendered work by the third party appointed by NBCC.

11. We have perused the impugned judgment in the light of the averments made in I.A. 1324/2019 and the plaint. We have also examined the documents including the correspondence exchanged between the parties, as placed on record. The facts of the case are undisputed. Admittedly, the contract dated 6.1.2009, awarded to the appellant was terminated by the respondents No.1 and 2/NBCC on 4.5.2012 and the balance work was awarded to a third party for completion at the risk and cost of the appellant on 22.2.2013. To examine the aspect of cause of action, it is necessary to refer to Articles 18 and 55 of Schedule I of the Limitation Act. The period of limitation prescribed in Article 18 for instituting a suit for the price of work claimed, is three years from the date when the work is done. Article 55 prescribes that a suit for compensation for the breach of contract not specifically provided for, is three years from the date when the contract is broken or when the breach in respect of which the suit instituted, occurs or when it ceases. For purposes of ready reference, the aforesaid Articles are

reproduced below:-

<i>Description of suits</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
<i>PART II-Suits relating to contracts</i>		
<i>18. For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment</i>	<i>Three years</i>	<i>When the work is done</i>
<i>55. For compensation for the breach of any contract, express or implied not herein specially provided for</i>	<i>Three years</i>	<i>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.</i>

12. It is also relevant to note that Section 9 of the Limitation Act prescribes that once the time has begun to run, not subsequent disability or inability to institute a suit or make an application, stops it.

13. We may next examine the averments made by the appellant in para 81, which is the cause of action para and states as follows:-

“81.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 completed 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 effects 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.”

14. In the instant case, the main thrust of the arguments advanced by learned counsel for the appellant to claim that the suit had been instituted within the period of limitation is that, despite issuance of the termination order dated 4.5.2012, by the respondents No.1 and 2/NBCC, the cause of action to institute a civil suit had to be treated as a continuing one as the respondents had withheld and retained the balance amounts payable to the appellant for the work done under other heads including T & P, machinery, unused material etc. However, the aforesaid submission is manifestly erroneous.

15. The expression ‘right to sue’ has not been defined but it has fallen for interpretation on several occasions by the Supreme Court and the High Courts, including in the cases of State of Punjab & Ors. vs. Gurdev Singh, reported as **1991 (4) SCC 1**, Daya Singh & Anr. vs. Gurdev Singh (dead) by LRs & Ors., reported as **2010 (2) SCC 194**, Khatri Hotels Pvt. Ltd. & Anr. vs. Union of India & Anr., reported as **2011 (10) Scale 190** and Board of Trustees of Port of Kandla (supra).

16. There is no doubt that a cause of action is a bundle of facts and has to be looked at collectively to determine whether a suit has been instituted within the period of limitation. The law on the issue of the date when the cause of action for instituting a suit arises, is quite well settled. The test to determine the date on which a cause of action would have arisen in favour of a plaintiff to institute a suit, is to verify as to the date on which an actionable

cause of action had arisen for the first time in favour of the plaintiff.

17. In the instant case, once the contract was terminated by the respondents No.1 and 2/NBCC on 4.5.2012, there is no manner of doubt that the cause of action for setting aside the said termination order and for demanding the price of work executed by the appellant, started to run from the said date. Thus, irrespective of the subsequent dates when the appellant wrote to the respondents demanding the amounts allegedly payable to it towards price of work executed, compensation, damages etc., the cut off date for computing the period of limitation would remain the date when the respondents No.1 and 2/NBCC had terminated the contract i.e. 4.5.2012. The said view is reinforced on a reading of the relevant Article governing limitation, which in this case is Article 18. In fact, Article 55 would come into play only in circumstances where limitation has to be computed on a continuing breach. In this case, all the successive breaches came to halt on 4.5.2012, the date when the contract was terminated by the respondents No.1 and 2/NBCC. By no stretch of imagination can the appellant plead that engagement of a third agency by the respondents No.1 and 2/NBCC to complete the project, could be treated as a successive breach on the part of the respondent for extending the period of limitation to sue. It also does not lie in the mouth of the appellant to claim that there was a continuing wrong after 04.05.2012 and therefore, there was a reoccurring cause of action kept accruing in its favour till the date the suit was finally instituted by it against the respondent/NBCC.

18. Even otherwise, a perusal of the nine claims raised by the appellant against the respondents No.1 and 2/NBCC in the proposed suit for recovery of money reveal that they are for claiming compensation/damages, cost of

T&P, machinery, unused material, multifarious litigation expenses, court fee, losses on account of breach of contract, interest etc. None of the said claims are related even remotely to re-tendering of the contract by the respondents No.1 and 2/NBCC to a third party for the appellant to contend that engagement of the new contractor, who was required to complete the unfinished work at its risk and cost, would be a ground for it to claim a continuing cause of action to institute the suit.

19. The learned Single Judge has rightly held that as far as the appellant is concerned, once the contract had been terminated by the respondents No.1 and 2/NBCC resulting in damages caused to it, the breach was complete and the period of limitation would have to be computed from the said date. For arriving at the said conclusion, the decision of a Division Bench of the Kerala High Court in the case of Delta Foundation and Construction, Kochi & Ors v. State Construction, Corporation Ltd, Ernakulam reported as **AIR 2003 KERALA 201** has been cited wherein, it was observed as follows:-

*“5.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 limitations assumes the existence of a cause of action and does not define or create one.....”*

20. Similarly, the concept of a continuing wrong was explained by the Supreme Court in Bal Krishna Savalram Pujari & Ors. Vs. Sh. Dayaneshwar Maharaj Sansthan & Ors. reported as **AIR 1959 SCC 798** in the following

words:-

“31.It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders does of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by itself continues, then the act constitutes a continuing wrong.”

21. We do not find any merit in the argument advanced by learned counsel for the appellant that Clauses 37.2 and 72.2(f) of the GCC would come to the aid of the appellant on the aspect of limitation. The said clauses are reproduced herein below for ready reference:-

“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.”

22. Clause 72.2 (f) is a clause under which the respondents No.1 and 2/NBCC could get the work executed at the risk and cost of the appellant. Clause 37.2 contemplates that a final bill should be submitted by the contractor within three months of the completion of the work, failing which, NBCC's certificate of the measurement and of the total amount payable, would be treated as final and binding on the contractor.

23. The contract of the appellant was terminated by the respondents No.1 and 2/NBCC on 04.05.2012 and it allocated the balance work to a third party for being completed at the appellant's risk and cost. Therefore, the question of "completion of work" as postulated in Clause 37.2 does not arise and nor can the appellant plead that since the balance work was to be completed by the third party at its risk and cost, the cause of action to sue would continue to run in its favour till completion of the said work. The said assumption is based on a complete misreading of the relevant Clauses of the GCC and unsustainable. It cannot be pleaded that retendering of work at the risk and cost of the appellant would in any way extend the period of limitation. In any case, the claims of the appellant were not linked to the retendering of the work, but were independent thereof and could have formed the basis of an actionable claim if the appellant would have sued within the period of limitation, that would have to be computed from 4.5.2012 i.e., the date of termination of the contract.

24. The period of three years reckoned from 04.05.2012, would have expired on 3.5.2015. However, for reasons best known to it, the appellant did not seek legal recourse till as late as in January/February, 2016, when it first elected to file a writ petition in this Court, which was dismissed vide order dated 9.2.2016, that was upheld by the Division Bench vide order

dated 2.5.2016. After 2.5.2016, the appellant again went into deep slumber only to surface in July, 2018, when the plaint and the application under Order XXXIII Rule 2 CPC were drafted, signed and verified but came to be filed after five months, towards the end of December, 2018. The above conduct of the appellant speaks volumes about its lackadaisical approach when it was all along aware of the fact that the right to sue for damages and compensation was premised on the termination of its contract by the respondents No.1 and 2/NBCC as far back as on 4.5.2012.

25. In view of the aforesaid facts and circumstances, we do not find any merit in the present appeal. The impugned judgment does not warrant interference and is upheld. The appeal is dismissed in *limine* alongwith the pending applications.

HIMA KOHLI, J

ASHA MENON, J

JULY 29, 2019

NA/rkb