

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

NOTICE OF MOTION NO. 695 OF 2013

IN

COUNTERCLAIM NO. 4 OF 2013

IN

SUIT NO. 3429 OF 2008

M/s. National (India) Contractors
& Engineers

.. Applicant
(Defendant to the counter claim
and Original Plaintiff to Suit)

In the matter between :

Maharashtra State Police Housing
& Welfare Corporation Limited
Vs.

.. Plaintiff

M/s. National (India) Contractors
& Engineers

.. Defendant

WITH

NOTICE OF MOTION NO. 1657 OF 2015

IN

NOTICE OF MOTION NO. 695 OF 2013

IN

COUNTERCLAIM NO. 4 OF 2013

IN

SUIT NO. 3429 OF 2008

Maharashtra State Police Housing
& Welfare Corporation Limited

.. Applicant
(Plaintiff to the counter claim
and Original Defendant to Suit)

In the matter between :

Maharashtra State Police Housing
& Welfare Corporation Limited
Vs.

.. Plaintiff

M/s. National (India) Contractors
& Engineers

.. Defendant

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K. Talekar

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K.
Talekar

Mr. Mukesh J. Pabari for Plaintiff in Suit No. 3429/2008 and for Defendant in CC/1/2013.

Mr. Vishal Talsania a/w Ms. Laxmi Bussa for Defendant in Suit No. 3429/2008 and Plaintiff in Counter Claim No. 4/2013.

CORAM : N.J. JAMADAR, J.

DATE : 2ND MARCH 2020

ORAL ORDER :

NOTICE OF MOTION NO. 695 OF 2013

1. This notice of motion is taken out by the plaintiff-defendant to the counter-claim for rejection of the counter-claim under the provisions of Order VII Rule 11(d) of the Code of Civil Procedure Code, 1908 ('The Code') on the ground that the counterclaim is barred by law of limitation.

2. The background facts necessary for determination of this notice of motion can be stated in brief as under :-

(a) The plaintiff is a partnership firm. It deals in the business of 'Civil Engineers and Contractors', including Government Contractors. The defendant had invited tenders for the work of construction of 550 quarters and 18 shops for policemen of Commissionerate of Police, Takli, Nagpur. The bid submitted by the plaintiff was accepted. Eventually a

formal contract came to be executed by and between the parties on 28th March 2003. Under the terms of the contract, the said work was to be commenced on 28th March 2003 and completed within the stipulated period of 18 months of commencement. However, on account of various acts, omissions and defaults on the part of the defendant, the execution of the work got delayed beyond the completion date of 27th September 2004. The defendant, however, unlawfully and unjustifiably terminated the contract by communication dated 23rd November 2005. Hence, the plaintiff instituted the suit for recovery of a sum of Rs. 3,62,12,491/- along with interest @ 18% per annum for the breach of contract, damages and compensation as shown in the particulars of claim Exhibit 'AAAAA'.

(b) The defendant appeared in response to the writ of summons. Apart from resisting the suit by filing written statement, the defendant has filed a counter claim for a sum of Rs.9,13,91,523/- along with further interest @ 18% per annum alleging that

the default on the part of the plaintiff to execute the work within the stipulated period resulted in huge loss to the defendant. The defendant was constrained to re-tender the work at much enhanced rate. Thus, the plaintiff is liable to pay the damages for breach of contract and the additional sum which the defendant was made to part with to get the work executed from another contractor, namely M/s.Keti Constructions (India) Private Limited.

(c) In the backdrop of the aforesaid counterclaim, the defendant to the counterclaim has taken out this notice of motion.

3. The applicant asserts that the contract was terminated by the defendant on 23rd November 2005. The counterclaim came to be lodged on 11th June 2010 i.e. after five years of the termination of the contract, which, according to the applicant, furnished the cause of action for the defendant. The counterclaim is thus ex-facie barred under the provisions of Article 55 of the Limitation Act, 1963. The applicant has, therefore, prayed for rejection of the counterclaim under Order VII, Rule 11 of the Code.

4. An affidavit in reply is filed on behalf of the defendant. The defendant contends that the notice of motion is misconceived. It is disputed that the cause of action arose to the plaintiff to the counter claim on the date the contract came to be terminated. The defendant asserts that under the terms of the contract, the defendant was entitled to recover the excess costs incurred by the defendant to get the work executed in the event of default on the part of the contractor/applicant in execution of the work in accordance with the terms of the contract. Thus, the cause of action for the defendant to institute the counter claim arose after the work was re-tendered and the excess cost got crystallized.

5. I have heard the learned counsel for the applicant and the learned counsel for the defendant, at some length.

6. The learned counsel for the applicant submitted that the counter claim is hopelessly barred by limitation. From the own showing of the defendant, indisputably, the contract came to be terminated on 23rd November 2005. The defendant claims that there was breach of contract on the part of the plaintiff and, thus, the defendant repudiated the contract by communication dated 23rd November 2005. In this view of the matter, according to the learned counsel for the

applicant, the time began to run upon the breach of contract. Article 55 of the Limitation Act, 1963 prescribes a period of three years for a suit for compensation for breach of contract. The counterclaim lodged on 11th June 2010 is therefore clearly barred by limitation.

7. In opposition to this, the learned counsel for the defendant submitted that the termination of contract by the defendant on 23rd November 2005 cannot be construed to have furnished the cause of action for the defendant. The termination of the contract, according to the learned counsel for the defendant, would furnish a cause of action for the plaintiff. For the defendant, the ascertainment of damages after re-tendering of the work provided the cause of action. Until the work was re-tendered and got executed by another agency, the defendant would not have ascertained the damages and therefore there was no occasion for the defendant to file a counterclaim, submitted the learned counsel for the defendant.

8. Article 55 of the Limitation Act, 1963 reads as under :-

*“THE SCHEDULE: PERIODS OF LIMITATION
[Sections 2 (j) and 3]
FIRST DIVISION-SUITS*

<i>Description of suits</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
<i>55.For</i>	<i>Three years</i>	<i>When the contract is</i>

<i>compensation for the breach of any contract, express or implied not herein specially provided for.</i>		<i>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>
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9. Part 2 of the first schedule of the Limitation Act prescribe the period of limitation for the suits relating to contracts. Article 55, as is evident from the text thereof, is in the nature of a residuary article as it provides that for compensation for the breach of any contract, express or implied, not herein specially provided for, the period of limitation is three years, and the period begins to run when the contract is broken or where there are successive breaches, when the breach in respect of which the suit is instituted occurs and/or where the breach is continuing one, when it ceases.

10. It is necessary to note that the defendant does not claim that it is a case of continuing breach. The submission on behalf of the defendant is premised on the proposition that the ascertainment of the damages was a condition precedent for institution of the suit and until the moment the damages were ascertained, the time prescribed under Article 55 did not begin to run.

11. It would be contextually relevant to note the provisions contained in section 23 of the Limitation Act. It reads as under :

“23. Suits for compensation for acts not actionable without special damage : In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.”

12. Section 23 addresses a situation where the alleged wrongful act does not give rise to a cause of action unless some specific injury actually results therefrom. It provides that the period of limitation shall be computed from the time when the injury results. The submission which is sought to be advanced on behalf of the defendant endeavours to take the support of the prescription in section 23 of the Limitation Act.

13. The broad submission on behalf of the defendant that the ascertainment of the damages was *sine quo non* for accrual of the cause of action cannot be acceded to unless the case falls within the ambit of the provisions contained in section 23 of the Limitation Act. In the event of a breach of a contract, the moment the breach occurs, the time begins to run. If the submission on behalf of the defendant is acceded to, without any reservation, the prescription contained in

Article 55 of the Schedule would become otiose.

14. A profitable reference in this context can be made to a judgment of this Court in the case of *Cotton Corporation of India Limited, Bombay Vs. M/s. Hindustan Cotton Co., Bombay* ¹. The said case arose out of a transaction of sale and delivery of the goods. The defendant therein had refused to take the delivery of the goods. The plaintiff sold the goods and thereafter instituted the suit for damages. The period of limitation was sought to be computed from the date on which the goods were sold. This Court, after adverting to the provisions contained in Article 55, observed that on a plain reading of Article 55, the suit ought to have been filed within three years from December 1973, when defendant had informed the plaintiff, in that case, that it has rejected the goods or at least within three years from January, 1974 when defendant confirmed the rejection of goods again.

15. A full Bench judgment of the Delhi High Court in the case of *M/s. Bhajan Singh Hardit Singh and Co., Delhi Vs. Karson Agency (India) and Ors.* ² considered the question in a greater detail. The said decision also arose in the backdrop of the sale and delivery of the goods and refusal on the part of the defendant to accept the delivery

¹ AIR 1995 Bombay 125

² AIR 1967 Delhi 101

of the goods :

“(38) If the property in the goods did not pass to the buyer there can be no question of the seller having any right to resell by virtue of the provisions in [Section 46\(1\)](#) and [54\(2\)](#) of the Sale of Goods Act.

(39) Once it is held that there is no question of the appellant having a right to resell the goods under [Section 54\(2\)](#) of the Act, there can also be no question of any cause of action for the recovery of the shortfall according to the appellant on the alleged resale of the goods by him. It was thus a simple case of a breach of the contract by the respondents- defendants by refusing to take delivery. That being so, on the said breach of the contract, the appellant-plaintiff acquired the cause of action to sue for compensation for the breach of the contract, and such a suit is governed by [Article 115](#) of the [Limitation Act](#).

(40) There is clearly no basis for the argument of Shri Anoop Singh placing reliance upon [Section 24](#) of the Limitation Act. The said section contemplated the case of a suit for compensation for an act which does not give rise to a cause of action. But, in the view taken by that action or the conduct of the respondents-defendants in refusing to take delivery by the end of July, and thereby committing a breach of the contract, gave rise to a cause of action for the appellant-plaintiff to file a suit for compensation for the breach of the contract. [Section 24](#) of the Limitation Act is, not available to the appellant.”

16. The aforesaid principles apply to a case of a breach of a works contract as well. A party who alleges a breach of contract, is required to institute a suit for damages within three years from the date of breach. Different considerations come into play if under the terms of the contract, the party has a right to get the contract executed from

another agency and recover the enhanced cost of execution of the work from the party in breach. In the absence of such express stipulation, a party is not at liberty to get the work executed and approach the court with a case that the damages were ascertained at a later point of time and such ascertainment of the damages furnishes a cause of action to institute the suit.

17. On the aforesaid touchstone, reverting to the facts of the case, it is imperative to note the stipulations in the contract. Clauses 13, 22, 23 of the contract have a material bearing on the controversy. They read as under :

<i>Clause 13:</i>	<i>The work comprised in this tender shall be commenced immediately upon the issue of work order, its acceptance and as soon as possession of the site can be had. The whole work including all additions and variations as aforesaid (but excluding such, if any, as may have been postponed by an order from the Executive Engineer) shall be completed in every respect by the contractor(s) within stipulated time and if from any cause whatever (other than willful obstruction or default or the part of the Executive Engineer or his staff) and except as hereinafter provided the whole of such work shall not be finished to the satisfaction of the Executive Engineer, within the stipulated or appointed period, the Contractor(s) shall forfeit and pay to the Corporation by way of ascertained</i>
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	<i>and liquidated damages for each default, the sum of Rs.2,000/- (Rupees Two Thousand only) for every day that such default continues and the amount of such damages, if any, may be deducted by way of set off from any unpaid portion of the contract price or may be otherwise recovered from the contractor(s) and shall be brought into account by the Executive Engineer, when settling the Contractor's/Contractors' accounts for his final certificate as hereinafter provided.</i>
	<i>Extension of Time on account of alteration etc.:</i>
	<i>Provided nevertheless that if the contractor(s) shall be of the opinion that he is/they are entitled to any extension of time on account of the works being altered, varied or added to or on account of any delay by reason of any inclement weather or other causes beyond the control of the contractor(s) or in consequence of orders to that effect from the Executive Engineer himself (which orders the Executive Engineer is hereby empowered to make), then in any such case or cases, it shall be competent for the Executive Engineer by an order in writing to the extent the aforesaid period for final completion by such period or periods as he may deem reasonable and the contractor(s) shall thereupon complete the work or works within such extended period or periods as aforesaid: further that the Contractor(s) shall not be entitled to any extension of time unless he/they shall, within thirty days (30 days) after the happening of the event in respect of</i>

which he/they shall himself/themselves entitled to any such extension of time, give to the Executive Engineer written notice of such claim for the extension of time and of the ground or grounds therefore and of the period thereof unless in any case the Executive Engineer shall in his discretion, dispense with such notice and certify the extension of time provided further that in cases in which any extension of time has been granted, the aforesaid provisions relating the payment of damages for default in completion of the work within the time so extended shall apply. The above provisions regarding extension of time shall not apply to any extra work involved in the extra depth of foundation mentioned in Clause 5.

Compensation for delay :

Clause 22 : The time allowed for carrying out the work at entered in the tender shall be strictly observed by the Contractor(s) and shall be reckoned from the date on which the order to commence work is given to the Contractor(s). The work shall throughout the stipulated period of the contract be proceeded with all due diligence (time being deemed to be of the essence of the contract on the part of the contractor(s) and if the Contractor(s) makes/ make default therein, he/they shall pay as compensation the sum which may be determined under Clause 13.

Note : The quantity of work to be done within a particular time would be as follows:

(i) $\frac{1}{4}$ (In financial terms)

$\frac{3}{8}$ time.

	(ii) $\frac{1}{2}$ (In financial terms) $\frac{1}{2}$ time. (iii) $\frac{3}{4}$ (In financial terms) $\frac{3}{4}$ time. (iv) 550 Quarters with infrastructure and development of land in 30 months, including monsoon.
	<i>In the event of the Contractor(s) failing to comply with any of these programmes he/they shall be liable to pay as compensation an amount equal to 1(one) percent, or such smaller amount as the Superintending Engineer, Police Housing Corporation (whose decision in writing shall be final) may decide, of the said lumpsum tendered amount of the whole work for everyday that the due quantity of work remain incomplete, provided always that the total amount of compensation to be paid under the provisions of this clause shall not exceed 10(Ten) per cent of the lumpsum tendered amount of the whole work as shown in the tender.</i>
	Action when whole security deposit is forfeited :
Clause 23 :	<i>In any case in which under any clause of this contractor shall have rendered himself liable to pay compensation amount to the whole of his security deposit whether liable to pay compensation amounting to the whole off his security deposit whether paid in lumpsum or deducted by installments or in the case of abandonment of the work owing to serious illness or death of the contractor or any other cause the General Manager, on behalf of the Corporation, shall have power to adopt any of the following courses, as he may deem best suited to the</i>

interest of Corporation :-

- a) To rescind the contract (for which rescission notice in writing to the contractor under the head of General Manager shall be conclusive evidence) and in that case the security deposit of the Contractor shall stand forfeited and be absolutely at the disposal of the Corporation.*
- b) To carry out the work or any part of the work departmentally debiting the contractor with the cost of completion of the balance work, expenditure incurred on tools and plant, and charges on additional supervisory staff including the fees payable to PMC employed for getting the un-executed part of the work completed and crediting him with the value of the work done departmentally in all respects in the same manner and at the same rates as if it has been carried out by the contractor under the terms of his contract. The certificate of the Executive Engineer as to the costs and other allied expenses so incurred and as to the value of the work so done departmentally shall be final and conclusive against the Contractor.*
- c) To order that the work of the contractor be measured up and to take such part thereof as shall be un-executed out of his hands, and to give it to another contractor to complete, in which case all expenses incurred*

	<i>on advertisement for fixing a new contracting agency, additional supervisory staff including the cost of work charged establishment and the cost of the work executed by the new agency will be debited to the contractor against the value of the work done or executed through the original contractor shall be credited to the contractor in all respects and in the same manner and at the same rates as if it had been carried out by the contractor under the terms of his contract. The certificate of the Executive Engineer as to all the cost of the work and other expenses incurred as aforesaid for or in getting the unexecuted work done by the new contractor and as to the value of the work so done shall be final and conclusive against the contractor. In case the contract shall be rescinded under clause (a) above, the contractor shall not be entitled to recover or be paid any sum for any work therefore actually performed by him under this contract unless and until the Executive Engineer shall have certified in writing the performance of the such work and the amount payable to him in respect thereof and they shall only entitled to be paid the amount so certified. In the event of either of the causes referred to in clause (b) or (c) being adopted and the cost of the work executed departmentally or through a</i>
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	<i>new contractor and other allied expenses exceeding the value of such work credited to the contractor, by the Corporation under the contract or otherwise however the contractor shall have no claim against the Corporation if the certified value of the work done departmentally or through a new contractor exceeds the certified cost of such work and allied expenses, provided always that whichever of the three courses mentioned in clauses (a), (b), (c) adopted by the Executive Engineer, the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchases or procured any materials, or entered into any engagements or made any advance on account of or with a view to the execution of the work in the performance of the contract.</i>
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18. In the event of the repudiation of the contract, the defendant was entitled to take the measures as provided in (a), (b) and (c) of clause 23 of the Contract. The said clause expressly authorizes the defendant to get the balance work executed through a new contractor. The clause further authorises the defendant to recover the enhanced cost of the project on account of the repudiation of the contract and its execution by another agency. It would be contextually relevant to

note the claim which the defendant has made. (Notice, dated 17th October 2008-Exh.QQQQ) :

A) AMOUNT TO BE RECOVERED :

- 1) Accepted cost of work (M/s. National (I) Contractor & Engr.) Rs.17,43,47,639.00
- 2) Cost of completed work (M/s. National (I) Contractor & Engr.) Rs.10,92,47,974.00
- 3) Balance cost of work (M/s. National (I) Contractor & Engr.) (1-2) Rs. 6,50,99,665.00
- 4) Accepted cost of balance work (M/s. KETI Construction (I) Ltd. Indore) Rs.15,29,90,000.00
- 5) Amount to be recovered due to re-tendering (4-3) Rs.8,78,90,335.00 (A)

B) ADDITIONAL AMOUNT TO BE RECOVERED :

- 1) Extra Amount to be paid to Architect (Already paid + difference in total fee) Rs.21,97,259.00
- 2) Extra Amount to be paid to PMC (Already paid + difference in total fee) Rs.17,57,800.00
- 3) Advertisement expenses Rs. 41,920.00
- 4) Printing of tender document & Drawing Rs. 70,641.00
- 5) Escalation at the rate of 10% of Sr.No.A(4) (Over the accepted tender cost) Rs.87,89,033.00
- 6) Liquidated damages for period 25/10/2005 to 22/11/2005 (=30 x 5000 per day) Rs.1,50,000.00
- 7) N.D.T. Test of E.S.R. Rs. 84,270.00

Total Rs.1,30,90,923.00 (B)

19. The question, which in the backdrop of the aforesaid facts, arises for consideration is whether the counterclaim is within the statutory period of limitation from the date of re-tendering, execution

and ascertainment of enhanced costs? The averments in the counterclaim do not provide much assistance on this aspect. A bald assertion is made in the counter claim that the counter claim is not barred by limitation. Neither the date on which the cause of action arose nor the justification as to how the counter claim is within the period of limitation find mention in the counter claim.

20. However, from the perusal of the material on record, especially the documents annexed to the plaint, it becomes evident that the applicant was put to notice that the defendant was in the process of getting the balance work executed through another agency. In the letter dated 19th January 2007, it was informed to the applicant that the defendant was poised to award the contract for the execution of work left unexecuted by the applicant and thereupon the defendant would be able to determine and quantify the restitutorial compensation recoverable from the applicant.

21. In another communication dated 21st May 2007, the defendant has informed the applicant as under :

*“3 This Corporation vide letter
No.PHC/TB/550 Nagpur/125/2007 dated 19.1.2007
informed you that our Corporation is poised to award
the contract fro the execution of the left unexecuted
by you. We shall be able to determine and quantity
the restitutorial compensation recoverable from you*

only after the unexecuted work is executed to permit estimation of the incremental cost likely to be borne by our Corporation.”

22. The defendant had thereafter addressed the notice to the applicant on 17th October 2008 and claimed the compensation of Rs.9,13,91,523/- i.e. the suit claim. In the said notice the defendant adverted to the stipulations contained in clauses 15, 21 and 23 of the contract and thereafter provided therein the cost of the balance work got executed through M/s. Ketu Construction (India) Private Limited, Indore and additional amount to be recovered due to re-tendering.

23. In the aforesaid view of the matter, it becomes evident that the unexecuted part of the work was not executed in any event upto January 2007 and the defendant had informed even in May 2007 that it was in the process of awarding the contract to get the incomplete work executed from another agency.

24. In this view of the matter, the question as to whether the counterclaim is instituted within three years of the ascertainment of the enhanced costs and additional amount, which the defendant was allegedly made to pay, and for which the defendant claims right to recover under clause 23 of the contract, is in the realm of facts which warrant adjudication.

25. Undoubtedly, if a clear case of bar of limitation is made out, the Court may, in exercise of its power under Rule 11(d) of Order VII, reject the plaint. In the instant case, the question of limitation is in the arena of mixed question of law and facts. Hence, I am not persuaded to accede to the submission on behalf of the applicant that the plaint deserves to be rejected for being barred by limitation.

26. Thus, the following order :

O R D E R

- (i) The notice of motion stands dismissed.
- (ii) The defendant to the counterclaim may file the written statement to the counterclaim within a period of four weeks.
- (iii) List the matter as per C.M.I.S. date.

[N.J. JAMADAR, J.]