

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 24.11.2020

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.Nos.413 and 431 of 2020

O.P.No.413 of 2020

1. M/s.Roman Tarmat Ltd.,
Rep. its General Manager
Mr.N.V.Natarajan
No.3, Rajparisvel Apartments
Sastri Nagar, VI Cross Street
Adyar, Chennai – 600 020

... Petitioner

Vs.

1. The Chief Engineer Highway
Metro/Employer
No.1, New Street
Super Bazar Building
Alandur, Chennai – 600 016

2. The Division Engineer
Highways TNUDP III
(C.M.D.P – Division IV)
Chennai – 600 016

3. The Executive Director
Tamil Nadu Road Infrastructure Development Corporation
4th Floor, LLA Building
735, Anna Salai, Chennai- 600 002

...Respondents

Original Petition filed under Section 34(2)(b)(iv) and (v)(b)(ii) of the Arbitration and Conciliation Act, 1996, as amended to allow the O.P by setting aside the Award dated 28.12.2019 passed by the Arbitral Tribunal, in so far it relates to awarding of (i) Rs.2,52,77,199/- towards balance value of work, as spelt out in paragraph 27(c) at page 60 of the Award dated 28.12.2019; and (ii) seinorage fee of Rs.70,31,340/- to be paid by the petitioner to the respondent as spelt out in paragraph 27(d) at page 60 of the Award dated 28.12.2019 and by granting all the reliefs sought for by the petitioner in its claim statement filed before the Arbitral Tribunal.

For Petitioner : Mr.M.S.Krishnan
Senior Counsel
for Mr.B.Harikrishnan

For Respondents : Mr.R.Udhayakumar
Special Government Pleader

O.P.No.431 of 2020

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2. The Executive Director
Tamil Nadu Road Infrastructure Development Corporation
4th Floor, LLA Building
735, Anna Salai, Chennai- 600 002 ... Respondents

Original Petition filed under Section 34(2) and 34(2A) of the Arbitration and Conciliation Act, 1996 to set aside the impugned award dated 28.12.2019 passed by the learned sole Arbitrator in respect of the claims of the Respondent and allow the counter claims of the petitioners in its entirety.

For Petitioners : Mr.R.Udhayakumar
Special Govt. Pleader (incharge)

For Respondents : Mr.M.S.Krishnan
for Mr.B.Harikrishnan

COMMON ORDER

This common order will govern both the captioned 'Original Petitions' ('OPs' in plural and 'OP' in singular for the sake of brevity). In this order 'O.P.No.413 of 2020' shall be referred to as 'senior OP' and 'O.P.No.431 of 2020' shall be referred to as 'junior OP', for the sake of convenience and clarity.

2. Both the captioned OPs have been filed assailing an 'arbitral award dated 28.12.2019' ('impugned award' for the sake of brevity), which has been made by an 'Arbitral Tribunal' ('AT' for the sake of brevity) constituted by a sole Arbitrator. This means that both captioned OPs are applications under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity and convenience.

3. Lis before the AT was between the Highways Department of the Government on one side and a contractor/company, which goes by the name 'Roman Tarmat Ltd.', on the other side. In this order for the sake of convenience, 'Highways Department of the Government' shall be collectively referred to as 'State' and 'Roman Tarmat Ltd.', shall be referred to as 'Contractor'. Before the AT, contractor was the claimant and State was respondents. To be noted, Tamil Nadu Road Infrastructure Development Corporation was a garnishee before the AT. Senior OP has been filed by the Contractor and junior OP has been filed by the State, both assailing the impugned award and this means that the captioned OPs are in the nature of cross OPs.

4.Mr.M.S.Krishnan, learned senior counsel instructed by counsel on record Mr.B.Harikrishnan, on behalf of contractor and Mr.R.Udhayakumar, learned Special Government Pleader (in-charge) on behalf of the State were before me in this web-hearing on a video-conferencing platform. With the consent of learned counsel on both sides, captioned OPs were taken up for final disposal and heard out.

5. Owing to the short statutory perimeter and limited legal land scape of Section 34 i.e., the limited legal land scape bounded by the short statutory perimeter of Section 34 of A and C Act within which the exercise/legal drill of testing the impugned award has to perambulate, it would suffice to give essential facts imperative for appreciating this order. In other words, it is not necessary to dilate qua facts. In this view of the matter, suffice to say that lis between the parties arises out of two contracts, both dated 29.01.2010 and captioned TNUDP-III Works-Widening and Strengthening of Minjur-Kattur-Thirupalaivanam Road Km 0/0- 10/4 and TNUDP-III Works-Widening and Strengthening of Minjur-Kattur-Thirupalaivanam Road Km 0/0- 17/4; that said contracts were envisaged a period of 16 months for completion of road laying work forming subject matter of said contracts; that said contracts were

terminated well before this 16 months period i.e., on 21.04.2011 to be precise; that the reasons for termination and termination itself became the crux and gravamen of the lis between the parties before AT; that contractor filed a writ petition on 16.05.2011 challenging the termination; that this writ petition came to be disposed of by this Court on 17.11.2011 *inter alia* owing to arbitration clause in said contracts; that the contractor approached the adjudicator in accordance with the arbitration clause on 28.11.2011; that adjudicator made an order on 18.04.2012; that thereafter the contractor filed an OP under Section 11 of the A and C Act on 20.04.2015; that the sole Arbitrator who constituted the AT was appointed in the said OP; that prior to filing of Section 11 OP, contractor triggered the arbitration clause vide trigger notice dated 09.05.2012; that the sole Arbitrator, who was appointed by this Court entered upon reference, adjudicated upon the disputes between the parties and made the impugned award; that before the AT, there were claims by the contractor and counter claims by the State; that vide the impugned award some claims of contractor were acceded to; that counter claims of the State were also acceded to; that both contractor and State, not being satisfied with the impugned award, have filed the captioned

OPs; that senior OP has been presented on 28.08.2020 and junior OP has been presented on 11.07.2020 (to be noted, senior OP has been presented post Junior OP but the reference as senior OP and junior OP is based on numbers assigned to the captioned OPs by the Registry); that the captioned OP were heard out with consent of both sides as mentioned supra.

6. It is necessary to extract from the case file and reproduce the claim made by the contractor before AT, the counter claim made by the State before AT, issues framed by AT and the operative portion of the impugned award. They are as follows:

'Claim made by the contractor':

i) *Declare that the Respondents' letter/s, both dated 21.04.2011 purporting to terminate (i) Contract No.1 TNUDP-III Works-Widening and Strengthening of Minjur-Kattur-Thirupalaivanam Road Km 0/0-10/4; and (ii) Contract No.2 TNUDP-III Works-Widening and Strengthening of Minjur-Kattur-Thirupalaivanam Road Km 0/0- 17/4, as illegal and invalid;*

ii) *Declare that the adjustment and appropriation of Rs.1,43,00,000/- as confirmed the Respondents vide their letter dated 06.02.2012, which is alleged to be due from the Claimant under Contract Nos.1 & 2, from and out of monies payable under Contract No.2, is contrary to Contract, not justifiable and illegal;*

iii) Direct the Respondents to pay up the Claimant Rs.8,45,63,139/- together with interest thereon at the rate of 10.5% on Rs.4,99,40,209, from the date of the claim statement till the date of realization;

iv) Direct the Respondents to pay the costs of the Arbitral proceedings to the Claimant.'

'Counter claim made by the State:

Sl.No.	Heads of Claim	Amount (Rs.)
1.	Increase in value of work	9,95,50,687/-
2	Illegal usage of permit	-
a.	Seigniorage Fee	70,31,340/-
b.	Special Damages for illegal exploitation	5,00,00,000/-
	TOTAL	15,65,82,027/- + interest

'On the rival pleadings, 7 issues framed by AT are as follows:

1) Whether the Claimant is entitled to the relief sought for in para 20(i) of the claim statement?

2) Whether the Claimant is entitled to amount claimed in the claim statement in para 20(iii)?

3) Whether the claim made by the Claimant is barred by limitation?

4) Whether the Respondent is entitled to counter claim made in the reply statement?

5) Whether the Claimant / Respondent is entitled to any

interest and if so, what is the rate of interest?

6) Whether the Claimant / Respondent is entitled to cost in this proceeding and if so, what is the cost?

7) Whether the Claimant / Respondent is entitled to any other relief in this proceeding?'

'The operative portion of the impugned award (paragraph 27 of impugned award) is as follows:

'The Tribunal therefore pass the following award

(a) The Claimant is entitled to receive from the Respondent a sum of Rs.2,61,86,314/-.

(b) The Claimant is also entitled to interest at 10% from 9.5.2012 to 11.8.2018.

(c) The Respondent is entitled for a sum of Rs.2,52,77,199/- from the Claimant, towards balance value of work.

(d) The Claimant has to pay a sum of Rs.70,31,340/- towards Seigniorage fee to the Respondent.

(e) The Respondent after deducting the said sum of Rs.2,52,77,199/- towards balance value of work and a sum of Rs.70,31,340/- towards Seigniorage fee, totaling to a sum of Rs.3,23,08,539/-, from the aforesaid amounts due and payable to the Claimant (set out in Clause a & b), shall pay the balance amount within 2 months from the date of receipt of this award. Failing which the amount shall carry an interest at 10% from the expire of 2 months specified above till payment of entire amount due.

(f) In view of the facts and circumstances of the matter in issue, the parties have to bear their respective costs.'

7. To be noted, the impugned award mentions that there was documentary evidence before it in the form of Exs.C1 to C38 on behalf of the claimant/contractor and Exs.R1 to R108 on behalf of State. This Court is informed by both sides without any disputation or disagreement that oral evidence was also let in. In any event, there is a reference to oral evidence and extracts of deposition in the impugned award. Before proceeding further, it is necessary to mention about prayers in both senior and junior OPs. In the senior OP filed by the contractor, the prayer reads as follows:

' It is therefore prayed that this Hon'ble Court may be pleased to allow the O.P by setting aside the Award dated 28.12.2019 passed by the Arbitral Tribunal, in so far it relates to awarding of (i) Rs.2,52,77,199/- towards balance value of work, as spelt out in paragraph 27(c) at page 60 of the Award dated 28.12.2019; and (ii) seinorage fee of Rs.70,31,340/- to be paid by the petitioner to the respondent as spelt out in paragraph 27(d) at page 60 of the Award dated 28.12.2019 and by granting all the reliefs sought for by the petitioner in its claim statement filed before the Arbitral Tribunal and render justice. '

8. Adverting to prayer, learned senior counsel for contractor, on

instructions, from counsel on record Mr.B.Harikrishnan, submits that the third limb of the prayer which assails granting of all the reliefs sought for by the petitioner in its claim statement (i.e., Contractor) will stand deleted. This means that the challenge to the impugned award by the contractor is limited to sub-paragraphs (c) and (d) in operative portion (paragraph 27) of impugned award, which has been extracted and reproduced supra.

9. This takes us to prayer in the junior OP i.e., State OP. Prayer in the junior OP reads as follows:

'In the light of the above, it is most humbly and respectfully prayed that this Hon'ble Court may be pleased to set aside the impugned award dated 28.12.2019 passed by the Learned Sole Arbitrator in respect of the claims of the Respondent and allow the counter claims of the petitioners in its entirety and thus render justice.'

10. Learned State counsel submitted that this is not happily worded as this prayer would mean that the counter claim of the State, which has been allowed by the AT, would also stand challenged. Therefore, learned State counsel made it clear that challenge to the impugned award in the State OP i.e., junior OP is restricted to sub-clauses (a) and (b) of

Paragraph 27 of the impugned award i.e., operative portion of the impugned award, which as already mentioned supra, has been extracted and reproduced above. Besides this a portion of sub-paragraph (c) also stands assailed to the extent it went against the State as only a part of counter claim has been allowed. In this regard, it is to be noted that this Court has already extracted the claim of the contractor and the counter claim of the State elsewhere supra in this order. The claim as well as the counter claim are under different heads as would be evident from the extracts supra.

11. When claims and counter claims have been made under several heads and when several heads of claim are separate and distinct, if the court finds that the award with regard to some items is bad, the Court can segregate the award and uphold the award claim wise. This principle was laid down by Hon'ble Supreme Court in **J.G.Engineers Pvt.Ltd vs Union Of India & Anr** reported in (2011) 5 SCC 758. Relevant portion is contained in Paragraph 25 of **J G Engineers case law**, which reads as follows:

'25.It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will

segregate the award on items which did not suffer from any infirmity and uphold the award to that extent....'

12. It is on the basis of the above re-worked prayers that the captioned OPs are being heard out. The Registry shall take note of this aspect of the matter qua drafting procedure.

13. Learned senior counsel for contractor made submissions solely on limitation aspect. In other words, it is the emphatic say of learned senior counsel that the counter claim of State is barred by limitation, it ought not to have been entertained and therefore, sub-paragraphs (c) and (d) of the operative paragraph of impugned award should go. If sub-paragraphs (c) and (d) of the operative paragraph of the impugned award go, sub-paragraph (e) will automatically stand re-worked. It was also made clear that with regard to sub-paragraphs (a) and (b) which are partly in favour of the contractor, the contractor is satisfied with the same and the contractor is not assailing those portions in sub-paragraphs (a) and (b), which have not gone in favour of the contractor.

14. It is therefore clear that the submission on behalf of contractor turns solely on limitation and therefore turns solely on assailing the counter claim of the State being entertained. Furthering his submissions

in this direction, learned senior counsel drew the attention of this Court to sub-paragraph (b) of Paragraph 17 of the impugned award which reads as follows:

'17(b) This Tribunal carefully considered the submission made in this regard.

The admitted facts are that

(i)	The Respondent terminated the contract on	21.04.2011
(ii)	The Claimant filed Writ Petition before the Hon'ble High Court on	16.05.2011
(iii)	The writ petition was disposed on	17.11.2011
(iv)	The Claimant approached the Adjudicator on	28.11.2011
(v)	The Adjudicator passed the Award on	18.04.2012
(vi)	The Claimant sent letter to the Respondent naming the Arbitrator	09.05.2012
(vii)	The Claimant filed OP under Section 11 of the Act before High Court, Madras on	20.04.2015
(viii)	The said OP was registered on	28.04.2016

15. A perusal of Paragraph 17(b) of the impugned award reveals that it is an adumbration of chronicle of events. Adding to the aforementioned chronicle, it was submitted that said contracts are dated 29.01.2010, they were terminated on 21.04.2011 much before the envisaged period and more importantly, the counter claim of the State was filed on 09.01.2019 before AT. In this regard, it is to be noticed that the chronicle and dates are not disputed. In other words, there is no

disputation or disagreement regarding the chronology or dates. To buttress his submission that the counter claim of State is barred by limitation, learned senior counsel pressed into service ***Voltas Limited Vs. Rolta India Limited*** case law reported in **(2014) 4 SCC 516**. Learned senior counsel submitted that when a counter claim is made (without resorting to arbitration trigger notice under Section 21 of A and C Act), for determining whether it has been made within the prescribed period of limitation, the date of institution of counter claim is the test. It was also submitted that the exceptions are, when the counter claimant has sought to trigger the arbitration by serving notice or when the counter claimant has made an independent claim against the claimant. To be noted, this is an exception to the general rule as laid down by Hon'ble Supreme Court in the oft-quoted ***Praveen Enterprises*** case [***State of Goa Vs. Praveen Enterprises*** reported in **(2012) 12 SCC 581**].

16. Learned State counsel i.e., learned Special Government Pleader responded to this point of limitation by saying that the contractor ought not to have filed a writ petition and the contractor, according to the arbitration clause should have acted within 14 days from the date on which the adjudicator made the order i.e., within 14 days from

18.04.2012.

17. Be that as it may, in response to the argument that the State claim is barred by limitation, learned State counsel submitted that issues which caused the termination of said contracts are inter-alia price escalation and misuse of a quarry from where the contractor was permitted to quarry material required for laying the road. It was submitted that the quantum of such counter claims could be ascertained (loss suffered by the State) and therefore the quantification could be done only in 2019 when the Collector sent his report. In other words, it is the specific say of learned State counsel that limitation would start running from 2019 when the quantification was made by the Collector. This Court notices that it is not the case of State that claim was made in time and quantification was made latter.

18. Assailing the award made in favour of the contractor, learned State counsel submitted that it turns on two points, namely appointment of supervisory consultant and the issue of hindrance. On supervisory consultant appointment, learned State counsel pointed out that the impugned award has proceeded on the basis that the same has happened only on 01.03.2010. In this regard, attention of this Court was drawn to a

letter dated 15.02.2010 bearing reference RTL/TNUDP/MKT-I/04/2010, which is Ex.R5. Adverting to Ex.R5, it was submitted by learned State counsel that a perusal of letter written by the contractor to the State would clearly reveal that this supervisory consultant was there even as of 15.02.2010 and therefore, the impugned award proceeding on the basis that 01.03.2010 is the reckoning date is incorrect and the same flies in the face of Ex.R5. With regard to hindrance, attention of this Court was drawn *inter-alia* to a communication dated 17.04.2010 bearing reference RTL/TNUDP/MKT-I/15/2010 (Ex.C15), wherein the contractor had written to the State. Specific attention was drawn to penultimate paragraph of Ex.C15 where the contractor has merely mentioned that there are certain hindrances. This according to learned State counsel is vague as this 17.04.2010 communication does not mention about hindrance with clarity or specificity. Thereafter, another letter dated 15.12.2010 from the contractor was also adverted to with regard to hindrance. What is of relevance is, with regard to hindrance, attention of this Court was drawn to Clause 7 captioned 'Site visit' and clause 1.2 of said contracts captioned 'site information', which read as follows:

'7. Site-visit

7.1 The Bidder, at the Bidder's own responsibility and risk is encouraged to visit and examine the Site of Works and the surroundings and obtain all information that may be necessary for preparing the Bid and entering into a contract for construction of the Works. The costs of visiting the Site shall be at the Bidder's own expense.'

'1.2 Site Information

1.2.1 The information given hereunder and provided elsewhere in these documents is given in good faith by the 'Employer, but the Contractor shall satisfy himself regarding all aspects of site conditions and no claim will be entertained on the plea that the information supplied by the Employer is erroneous or insufficient.'

19. Adverting to the aforesaid clauses, learned State counsel submitted that findings returned vide the impugned award by the AT are contrary to the terms of the contract and therefore, the impugned award is liable to be dislodged qua hindrance aspect of the matter also.

20. This Court now proceeds to deal with the rival submissions.

21. This Court deems it appropriate to first take up the submissions made on behalf of State. As would be evident from the submissions captured supra, the entire matter turns on supervisory consultant and hindrances. This Court is of the considered view that a reference to exhibits, namely Ex.R5 with regard to supervisory consultant and Ex.C15 with regard to hindrances are in the realm of appreciation of evidence

and it also tantamounts to reviewing the award on merits. This is clearly impermissible post ***Ssangyong*** principle. To be noted, owing to the date of presentation of senior and junior OPs which have been mentioned supra, both captioned OPs are governed by the post 23.10.2015 regime of the A and C Act or to put it differently, A and C Act as amended by Act 3 of 2016, which kicked in with retrospective effect on and from 23.10.2015 would apply to captioned OPs. To be noted, ***Ssangyong*** principle is law laid down by Hon'ble Supreme Court in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in (2019) 15 SCC 131. In ***Ssangyong***, more particularly in Paragraphs 34 to 36, Hon'ble Supreme Court advertent to earlier judgments in ***ONGC Ltd. v. Western Geco International Ltd.***, reported in (2003) 5 SCC 705 rendered on 04.09.2014 and ***Associate Builders*** case [***Associate Builders Vs. Delhi Development Authority*** reported in (2015) 3 SCC 49] rendered on 25.11.2014 (prior to 23.10.2015) held that Paragraphs 28 and 29 of ***Associate Builders*** are no more available owing to Explanation 2 to Section 34(2)(b)(ii). However, what is of importance is, Hon'ble Supreme Court has held in no uncertain terms that a review on merits of

the dispute is impermissible post 23.10.2015. Before proceeding further, this Court is clear in its mind that the arguments made by learned State counsel with regard to supervisory consultant and hindrances have force, but that would hold water only in a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for the sake of brevity). In this regard this Court deems it appropriate to place on record its appreciation for the thorough preparation and marshalling of facts with clarity by learned counsel. As already alluded to supra, the statutory perimeter of Section 34 is short and the legal landscape of Section 34 is very limited. Therefore, the arguments though sound/forceful as appeal grounds, cannot be countenanced in a Section 34 legal drill owing to the same being neither an appeal nor a revision. In this regard, this Court deems it appropriate to remind itself of *Fiza Developers* principle being law laid down by Hon'ble Supreme Court in *Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited* reported in (2009) 17 SCC 796 wherein Hon'ble Supreme Court held that Section 34 is a one issue summary procedure. Thereafter in *Emkay Global Financial Services Ltd. v. Girdhar Sondhi* reported in (2018) 9 SCC 49, *Fiza Developers* principle was reiterated as a step in the right direction.

What is of significance is, Hon'ble Supreme Court holding that a Section 34 legal drill or legal exercise is a one issue summary procedure does not mean that the lis itself should turn on one issue. It has been instructively and elucidatively held by the Hon'ble Supreme Court that one issue means the arbitral award being assailed itself is the issue in a Section 34 application and answer to this one issue on which the matter turns has to be found by adopting a summary procedure. This part of the narrative has become necessary as submissions made by learned State counsel though cannot be countenanced in a Section 34 application, they are good enough in a regular appeal under Section 96 CPC legal exercise.

22. This takes this order to the submission of learned State counsel that findings in the impugned award on those two aspects of the matter i.e., supervisory consultant and hindrances are contrary to the terms of said contract, namely Clause 1.2 captioned 'Site Information' and Clause 7 captioned 'Site Visit', which have been extracted and reproduced supra.

23. This Court carefully examined the two covenants. A careful perusal of the two covenants makes it clear that they provide for and encourages the contractor to visit and examine the work site and its surroundings to obtain all information. With regard to work site

information, it has been made clear that the documents are given in good faith by the State and it is for the contractor to satisfy himself regarding all aspects of the site (a claim cannot be entertained on the believed information). A careful perusal of the impugned award reveals that it cannot be gainsaid that the view taken by AT is an implausible view. After all, there was a mass of evidence, both oral and documentary before the AT, which have been set out supra and in the case on hand, in this regard. **Hodgkinson** principle comes into play. **Hodgkinson** principle is a legal principle laid down by an English Court in 1857 in **Hodgkinson Vs. Fernie** reported in **140 ER 712**. **Hodgkinson** principle put in simple terms is AT is the best judge of the quality and quantity of evidence before it. To be noted **Hodgkinson** principle has been recognized by Hon'ble Supreme Court in **Associate Builder** case supra. On the basis of quantity and quality of evidence before it and on appreciation of the evidence before it, AT has come to the conclusion that there were hindrances. The finding of the AT with regard to the supervisory consultant is also factual. Therefore, these findings qua facts cannot be held to be contrary to the two clauses of said contract, namely clauses 1.2 and 7. It does not run head on into either of these covenants.

Both these covenants provide for the manner in which the parties would go about the site and its availability. There is no rigour in these covenants much less rigour to hold that the impugned award is contrary to the very covenants in said contracts. Therefore, this aspect of the matter does not carry the State any further in its campaign against the impugned award i.e., with regard to the two aspects alluded to supra.

24. This takes us to the limitation aspect on which the counter claim of State has been assailed by the Contractor. The law is too very well settled that limitation is founded on public policy. No elucidation in this regard is necessary. Be that as it may, all the provisions of 'The Limitation Act, 1963 (Act 36 of 1963)', hereinafter 'Limitation Act' for the sake of convenience, have been made applicable to arbitral proceedings vide Section 43 of A and C Act, which reads as follows:

'43. Limitations.—

(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.

(3) Where an arbitration agreement to submit future

disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

25 In the light of Section 43 and in the light of the chronology, which has been extracted and reproduced' supra elsewhere in this order, in the cases on hand it is necessary to extract Section 21 of A and C Act, which reads as follows:

'21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.'

26. In the cases on hand, on 09.05.2012 contractor triggered the arbitration agreement between the parties, which is in the form of a clause in said contract,. There is also no dispute that what would apply to the case on hand is Article 55 of Part II of the Limitation Act.

Article 55 reads as follows:

<i>Description of suits</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
55. For compensation for the breach of any contract, express or implied not herein specially provided for.	Three years	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance.
	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has noticed that performance is refused
	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.

27. To be noted, in the extract and reproduction supra first column is description of suits, second column is period of limitation and third column is time from which period begins to run. In this case, time begins to run from the date of termination, namely 21.04.2011. If this is the

case, three years period elapses on 20.04.2014. The question is, whether the counter claim was made within this three years period. As far as the State is concerned, arbitration clause was not triggered and the counter claim was made only before the AT on 09.01.2019. Therefore, the ***Voltas Vs. Rolta*** principle comes into play. If ***Voltas Vs. Rolta*** principle is applied, State, not having triggered the arbitration clause, cannot now be heard to contend that the counter claim made on 09.01.2019 is within time merely because the quantification was made available by the District Collector only in 2019. If the quantification was made available much later, that is clearly internal affairs of the functioning of the State machinery and that cannot extend the prescribed period of limitation, which is the test of conflict with public policy plea in this case. Limitation being founded on public policy should be adhered to and implemented strictly. Limitation Act makes it clear that limitation is to be tested even if it is not set up as a defence. This is vide Section 3 of the Limitation Act, which reads as follows:

'3. Bar of limitation.—(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) For the purposes of this Act,—

(a) a suit is instituted,—

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted—

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded;

(ii) in the case of a counter claim, on the date on which the counter claim is made in court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court.'

(underlining made by this Court for ease of reference)

28. Therefore, the counter claim made by State on 09.01.2019 is clearly time barred as rightly contended by learned senior counsel for the contractor. Therefore, that part of the impugned award certainly deserves to be dislodged as being in conflict with public policy of India. As already alluded to and delineated supra, limitation is founded on public

policy. With regard to the claim of the claimant, there has been trigger on 09.05.2012 and trigger is within the meaning of Section 21 of A and C Act. This Court is informed that receipt of this notice is instantaneous and therefore, this takes the wind out of the sails qua contractor not acting within 14 days from the date of the order made by the Adjudicator argument. In other words, contractor's claims have been made on 09.05.2012, which is well within three years if computed from 21.04.2011.

29. In the light of the narrative thus far and in the light of the reworked prayers in the senior and junior OPs, which have already been set out supra elsewhere in this order (which the Registry shall take note of while drafting), the following order is passed:

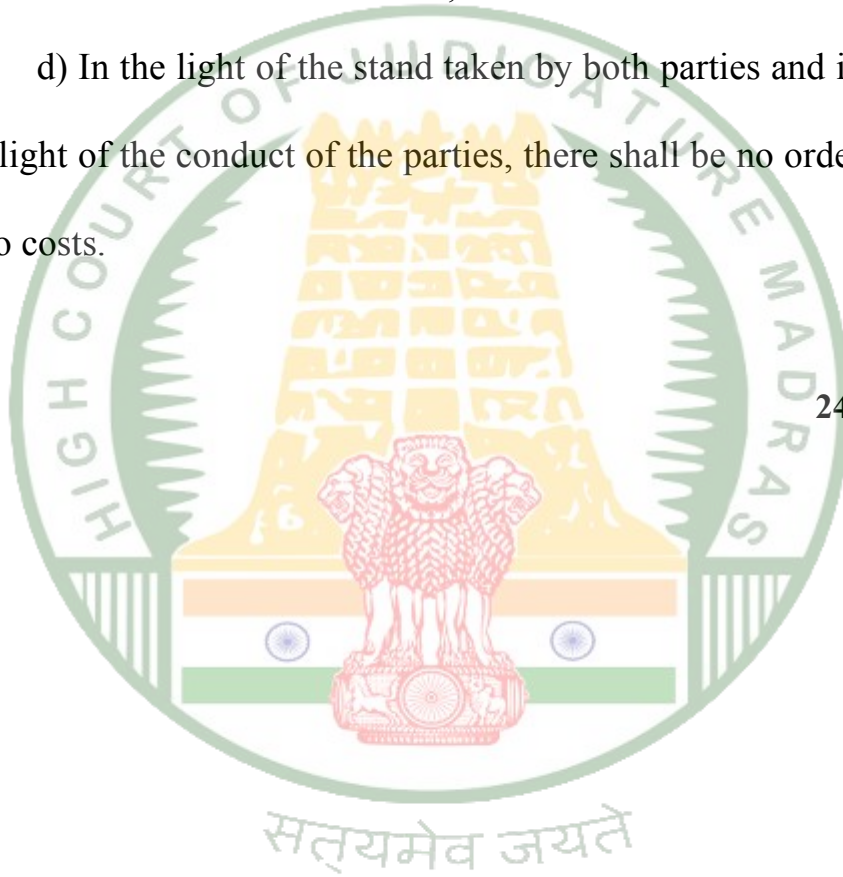
- a) O.P.No.413 of 2020 will stand allowed vide the prayer limited to challenging sub-paragraphs (c) and (d) of paragraph 27 of the impugned award as alluded to supra;
- b) O.P.No.431 of 2020, which is now a challenge to sub-paragraphs (a), (b) and a portion of (e) of paragraph 27 of impugned award which went against State, will stand dismissed.

c) As a consequence of (a) and (b) sub-paragraph (e) of Paragraph 27 of impugned award will stand deleted except interest at the rate of 10% per annum from two months time frame set out therein;

d) In the light of the stand taken by both parties and in the light of the conduct of the parties, there shall be no order as to costs.

24.11.2020

gpa



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O.P.Nos.413 and 431 of 2020

M.SUNDAR.J.,

gpa



O.P.Nos.413 and 431 of 2020

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