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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:12.07.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

O.S.A.Nos.147 and 153 of 2021

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

... Appellants (Both OSAs)

Vs

1.M/s.Roman Tarmat Ltd.
rep. By its General manager,
Mr.N.V.Natarajan

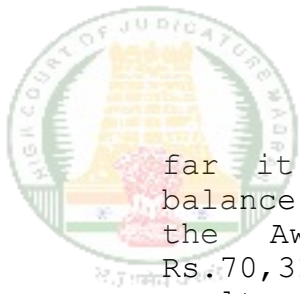
2.The Executive Director
T.N.Road Infrastructure Development Corporation
4th Floor, LLA Building,
735, Anna Salai,
Chennai 600 002

... Respondents (Both OSAs)

Appeals filed against the Order of this Court dated 24.11.2020 in O.P.Nos.431 and 413 of 2020.

In O.P.No.431 of 2020 : Original Petition filed under Section 34(2)(b)(iv) and (v)(b)(ii) of the Arbitration and Conciliation act, 1996 as amended 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.

In O.P.No.413 of 2020: 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 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 28.12.2009 and by granting all the reliefs sought for by the petitioner in its claim statement filed before the Arbitral Tribunal.

For Appellants : Mr.R.Shunmugasundaram,
Advocate-General,
Assisted by Mr.V.T.Aravind Gosh,
A.G.P. (CS)

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

COMMON JUDGMENT
(made by the Hon'ble Chief Justice)

The appeals arise out of a common judgment and order of November 24, 2020 passed on petitions challenging an arbitral award of December 28, 2019. The appellants' challenge to the arbitral award on the ground of the claim being barred by limitation has been repelled. On the first respondent contractor's challenge to the counter-claim filed in the arbitral reference by the appellants herein, the counter-claim has been rejected.

2. The short question raised in seeking to dislodge the contractor's claim is that the termination of the two contracts was not questioned within the time referred to in a clause in the contract; and, as a consequence whereof, the contractor is deemed to have accepted the termination of the two contracts. The appellants submit that though such ground was squarely taken in course of the proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 and even urged in course of the hearing before the arbitration court, it is apparent from the order impugned that the arbitration court misconstrued the submission and did not deal with such aspect of the matter in the judgment and order impugned dated November 24, 2020.

3. The issues involved in the two appeals are identical. The appellants awarded similar contracts in favour of the respondent contractor for constructing two stretches of a road for the first ten kilometer and from the tenth kilometer to the 17th kilometer. Both contracts required the work to be completed within a certain period of time and the work to be taken up on a continuous basis.



4. For reasons that are not necessary to be looked into at present, the contracts were terminated by the employer on April 21, 2011. It is necessary, at this juncture, to notice clause 24 of the contract in either case that provides as follows:

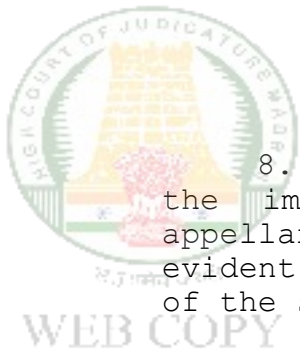
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"If the Contractor believes that a decision given by the Engineer was either outside the authority given to the Engineer by the contract or that the decision was wrongly taken, the decision shall be referred to Adjudicator within 14 days of the notification of the Engineer's decision".

5. The relevant provision implies that the engineer had due authority to take decisions as to the nature of the work and any other conditions attendant thereto. However, the engineer's decision was subject to scrutiny by an adjudicator, who was named in the relevant contracts, and the adjudicator could receive any grievance that the contractor would deem necessary to carry from any decision of the engineer. It cannot be missed that the clause expressly provides that the objection to the engineer's decision should be taken to the adjudicator, "within 14 days of the notification of the engineer's decision".

6. There is also no dispute that the decision to terminate the contract made on April 21, 2011 by the engineer concerned was not challenged before the adjudicator within 14 days of the notification thereof or of notice in such regard being received by the contractor. Instead, the contractor instituted W.P.No.12392 of 2011 and W.P.No.12393 of 2011 which were disposed of without any cheer for the contractor except that the contractor was permitted to approach the adjudicator, if the law so provided.

7. The contractor approached the adjudicator on November 28, 2011, more than seven months after the termination in either case was notified. The appellants claim that since the relevant clause in either contract required a decision of the engineer to be carried to the adjudicator within 14 days of the notification thereof, it implied that upon the expiry of 14 days and no objection being carried to the adjudicator, the contractor had accepted the decision. Despite the clause not providing negative words like 'not later than' or 'not thereafter', the appellants insist that the parties by contract fixed a particular time for an objection to the engineer's decision to be taken to the adjudicator and, in the contractor's failure to adhere to the time as was consensually fixed, the contractor lost the right to pursue any objection pertaining to the relevant decision of the engineer that was not carried to the adjudicator within the time stipulated in the contract.



8. The contention has to be raised to be rejected. However, the impugned judgment does not refer to it, though the appellants submit that the point was clearly taken as would be evident from ground 'D' of the petition lodged under Section 34 of the said Act:

"D. The learned arbitrator ought to have dismissed the claims of the respondent (the contractor) herein as barred by the law of limitation as the claims were made beyond the time-limit prescribed by the statute i.e. Limitation Act, 1963 and the agreement between the parties (14 days) under Clause 24 of the conditions of contract."

9. However absurd the ground urged by the appellants herein may have been, when an objection as to limitation - not only on the basis of a contractual term but also under the governing statute - was taken, the arbitration court was obliged to deal with such aspect of the matter. On a reading of the judgment and order impugned dated November 24, 2020, it is evident that another aspect of limitation engaged the attention of the arbitration court but the appellants' contention as to impermissibility of the contractor's claims on the ground of limitation may have been misconstrued and the fact that the ground was clearly taken in the petition may have been altogether overlooked.

10. The objection on the ground of clause 24 was taken in course of the arbitral proceedings and all murmurs of the contractor to the contrary have to be ignored. The award dated December 28, 2019 clearly records the objection on the ground of limitation "due to the contractual provisions" in paragraph 11 thereof. The discussion on such aspect covers several pages of the award before the ground is rejected, though in somewhat unsatisfactory terms. At least, there is some substance in the appellants' grievance that both before the arbitrator and in the challenge proceedings before the arbitration court, the substance of the objection raised was not appropriately received or dealt with. As far as the arbitrator was concerned, the point was dealt with and the ground dispelled without the appropriate reasons being indicated. The aspect does not appear to have been considered at all by the arbitration court, though it appears that the ground was squarely urged.

11. While dealing with the objection, the arbitrator has referred to Section 14 of the Limitation Act, 1963 and the period of time that is excluded when a party bona fide approaches an erroneous forum and diligently pursues the matter before such wrong forum. In such a case, where the invocation of the jurisdiction of the initial forum must be bona fide and the



prosecution of the matter must be diligent, the time spent before the wrong forum is excluded while counting the period of limitation before the subsequent forum. Ordinarily, the contractor approaching the writ court in this case may not have been regarded as having approached an erroneous forum since the writ court was an alternative forum, but not a wrong forum. Accordingly, the reference to Section 14 of the Act of 1963 by the arbitral Tribunal was completely unnecessary and utterly inapposite.

12. The arbitrator has next referred to the contractor having invoked Section 11 of the Act of 1996 to obtain the appointment of the arbitrator. It is true that an objection on the ground of limitation ought to be taken in Section 11 proceedings, whether on account of the substance of the claim being barred by limitation or the right to go to arbitration being barred by limitation. As is well known, there are two elements to limitation in arbitration matters: the limitation as to the subject-matter of the claim and the limitation to proceed in arbitration in such regard. In either case, if the remedy is barred, there is no question of an arbitral reference being directed.

13. Even though while reversing the previous Constitution Bench view in such regard, in *S.B.P. and Co. vs. Patel Engineering Ltd.* [(2005) 8 SCC 618], the Supreme Court held that objections as to limitation qua the subject-matter of the claim may be adjudicated by the Chief Justice or his designate in proceedings under Section 11 of the Act, it is not entirely impermissible for an objection on the ground of limitation to be urged before the arbitral tribunal notwithstanding such ground not having been taken in the previous proceedings under Section 11 of the Act. To such extent, the arbitrator in this case erroneously held that merely because the arbitral reference commenced upon an order passed in proceedings under Section 11 of the Act, the point of limitation was not open to the respondent in the reference before it. The arbitrator completely glossed over the appellants' reliance on clause 24 and the permissibility of such clause to be regarded as a clause of limitation despite no words of restriction or impediment being evident therefrom.

14. As noted above, the issue, though directly and substantially raised in the challenge to the award, was lost on the arbitration court. Usually, when a ground of importance is canvassed but is not addressed by an adjudicatory authority, the superior adjudicatory authority in seisin of a revision or an appeal may not go into the aspect by itself and may set aside the order impugned before it and remand the matter for a fresh consideration by the lower adjudicatory authority. However, a



practical view of the matter also needs to be taken. If the point is of such substance that it cannot be said with a degree of certainty as to whether the point would be accepted or rejected, it would be better to allow the adjudicating authority of first instance to give an opinion thereon since an original adjudication at the revisional or appellate level on such aspect would deprive the party which loses the point a court of appeal or a forum of revision. However, when the revising or appellate authority finds that there is hardly any merit in the point and it may be summarily dealt with on the basis of established principles, the time-consuming exercise of remanding the matter for a fresh adjudication may be avoided.

15. In the present case, it is the fervent appeal of the respondent that there is no merit in the ground of limitation urged by the appellants and when the objection taken inherently lacks merit, the appellate or revisional forum should not send the matter for a fresh consideration and prolong the time spent in court or the suffering of the parties. It is on such basis that the objection as to limitation as raised by the appellants herein is taken up for consideration even though such aspect of the matter did not receive the consideration of the arbitration court in seisin of the challenge to the award and the issue was inadequately and inappropriately dealt with by the arbitrator.

16. For a start, a clause of the kind that is sought to be pressed into service here by the appellants cannot be read to be a clause in the nature of limitation since it does not preclude the contractor approaching the adjudicator beyond a period of 14 days from the engineer's decision. Logically, it may be said that the clause implies a sense of limitation; but law is not always dependent on logic and the experience of law instructs that when a particular act - that would be permissible in the usual course - is sought to be prohibited, there must be an express embargo spelt out and not one gleaned out by implication. Secondly, it does not follow from the clause that merely because the contractor does not object to the engineer's decision by carrying a grievance to the adjudicator within 14 days of the engineer's decision, the contractor has no other remedy available. Thirdly, even if the adjudicator, whose role is that of a mediator or the like, is not approached, it cannot be said that the clause would prohibit a civil suit to enforce the contractor's claim or the institution of an arbitral reference if the contract was governed by an arbitration clause. Finally, though it is not necessary to comprehensively answer the issue on such score, what was done by the employer in this case was to terminate the contract and bring the relationship between the parties to an end. It is possible that the impact of the clause was limited to matters pertaining to engineering decisions and directions as to how the work would proceed or



continue and it did not extend to a seminal decision as the termination of the contract by the employer.

17. At any rate and without prejudice to the above, any impediment to the natural or legal right of a party to approach a court or an appropriate tribunal with the relief that it perceives it is entitled to, would fall foul of Section 28 of the Contract Act, 1872 just as prescribing a shorter period of limitation to institute the relevant action will also render the clause void under the same provision.

18. For the reasons aforesaid, the ground of limitation urged by the appellants herein is found to be utterly unmeritorious. It is true that the aspect should have been adequately dealt with by the arbitrator and engaged the attention of the arbitration court; but merely because the ground was raised and may not have been appropriately or adequately addressed would not imply that the substance of the ground cannot be assessed even at this stage and appropriate reasons be indicated to the appellants.

19. The other side of the limitation issue raised by the appellants pertains to the permissibility of the counter-claim being carried by the appellants herein before the arbitral tribunal. Such part of the matter has been appropriately and more than adequately dealt with in the judgment and order impugned. Merely because an arbitral reference may have been lodged before the arbitrator on a particular day would not imply that the period of limitation to file the counter-claim would begin to be counted from such date. The period of limitation in a counter-claim starts to run from when the cause of action arises. The distinction between a counter-claim and a set-off is that a set-off is in the nature of confession and avoidance and a set-off can be pleaded and asserted notwithstanding any period of limitation; though a counter-claim on similar grounds cannot be carried beyond the period of limitation, for the substance of such counter-claim has to stand independent of the rival principal claim.

20. On facts, the arbitration court in this case found that the appellants herein had done nothing before lodging the counter-claim before the arbitrator to stop the clock of limitation running, so to say. In matters pertaining to arbitration, a claim may be filed before the arbitrator ten years after the contract is terminated as long as there is an earlier request for the constitution of an arbitral tribunal since the commencement of the arbitral reference, within the meaning of Section 21 of the Act of 1996, is reckoned from the date on which a request for a reference is made by one party and such request is received by the other. The clock of limitation



stops immediately upon the receipt of the request by the other party. The subject-matter of the claim cannot be said to be barred by limitation if the commencement of the arbitral reference within the meaning of Section 21 of the Act has happened ten years prior to the statement of claim being lodged before the arbitrator.

21. At the same time, just because the clock of limitation has stopped for one party to the contract, it does not imply it has stopped for the other party, too. It would not do for a party to a contract to receive a request for an arbitral reference, not take any action in respect thereof and not even pursue its own claim; and then, to wait for the statement of claim of the other party to be lodged before starting to count the period of limitation. The period of limitation would still be running from the time the cause of action accrued to make the counter-claim irrespective of whatever steps may have been taken by the other party to the contract. The reasoning in the judgment and order impugned in such regard, as to the counter-claim of the appellants herein being hopelessly barred by limitation at the time it was lodged, cannot be flawed and calls for no interference whatsoever.

22. For the reasons indicated above, the appeals are dismissed and the arbitral award of December 28, 2019 as upheld and modified by the judgment and order impugned dated November 24, 2020 is left untouched, though on some additional grounds not found either in the award or the impugned judgment.

23. O.S.A.Nos.147 of 2021 and 153 of 2021 stand dismissed. There will, however, be no order as to costs. Consequently, C.M.P.Nos.6623 and 6711 of 2021 are closed.

Sd/-

Deputy Registrar (CS)

//True Copy//

Sub Assistant Registrar

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To

The Sub Assistant Registrar (Original Side),
Madras High Court.

+1CC to M/s.Additional Government Pleader, Sr.No.32804, 32799

+2CCs to M/s.B.Harikrishnan, Advocate, Sr.No.32870 & 32869

O.S.A.Nos.147 and 153 of 2021

SSN (CO)

K.RK. (30.07.2021)