

IN THE HIGH COURT OF ORISSA AT CUTTACK

**ARBA No.26 of 2022
(Through Hybrid mode)**

***M/S. Birla Institute of Management ...
(BIMTECH), Gothapatna,
Bhubaneswar, Khurda***

Appellant

Mr. P.K. Parhi, Advocate
(Asst. Solicitor General of India)
with Mr. D. R. Bhokta, Advocate
(Central Government Counsel)

-versus-

Fiberfill Interiors & Constructions ...

Respondent

Mr. T. Rana, Advocate
with Mr. S. K. Dwivedy, Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER

28.07.2022

Order No.

- 05.** 1. The appeal was moved on 4th July, 2022. On said date, Mr. Bhokta, learned advocate, Central Government Counsel appearing for appellant had submitted, his client wanted work done, inter alia, on interior design and by work order dated 27th March, 2012, engaged respondent. Subsequent thereto, agreement dated 8th June, 2012 was entered into, which by clause-6 therein made time essence of the contract. Design work was to be completed by 15th November, 2012.

Respondent did not do the work and ultimately by letter dated 12th July, 2014 the work was terminated. Respondent vacated the site on 30th July, 2014.

2. Mr. Rana, learned advocate appears on behalf of respondent and on query from Court made on 4th July, 2022 had submitted, commencement of the reference was by notice dated 25th March, 2017 issued by appellant. On further query from Court Mr. Parhi, learned advocate, Asst. Solicitor General of India appearing on behalf of appellant refers to paragraph-12 in the award, wherein there is summary of his client's claims made in the reference. It appears appellant had claimed Rs.3,76,35,234/- as summarized in page-140 of the statement of claim. Compensation was also claimed. On yet further query from Court Mr. Parhi submits, main claim was based on expenditure made by his client to get the work done by third parties.

3. Court has ascertained that respondent vacated the site on 30th July, 2014 and it filed counter statement including counter claims, on 18th September, 2018. It appears from impugned award that upon adjustment of entitlement to claims, the Tribunal awarded Rs.5,21,60,618/- to respondent. The appeal has been preferred

challenging award of the counter claim, as a severable part in the award. Respondent has not preferred cross-objection.

4. Mr. Rana relies on judgments of the Supreme Court in **State Of Goa vs. M/S Praveen Enterprises**, reported in (2012) 12 SCC 581, paragraph 17 (LAWPACK print). He also relies on **Voltas Ltd. vs. Rolta India Ltd.**, reported in (2014) 4 SCC 516, paragraph 21 (LAWPACK print). He submits, his client, in making the counter claim, stands covered by the exception carved out in **State of Goa** (supra).

5. Mr. Rana draws attention to letter dated 7th April, 2017 written by his client to appellant. He submits, this was notice given by his client of arbitrable disputes regarding his client's counter claims. Text of the letter is reproduced below.

*"We are in receipt of your notice dated 25.03.2017
No.BIM/DIR/2017/00202 for appointment of Arbitrator.*

At the very outset, we deny all the allegations and statements in the Notice regarding poor and defective work, use of substandard material and incomplete work by us at your site. To the contrary, as a matter of fact, we have done the work with utmost satisfaction and an amount of more than Rs.6 crores towards Principal Outstanding is

due since long time. Despite continuous efforts you have failed and neglected to pay the legitimate outstanding amount.

With regard to filing of Complaint and Case before the Police Authorities and Court of law by us the same is matter of record and sub judice, thus not relevant to discuss herein.

However, we do concede that there is an Agreement between us which contains an Arbitration Clause and since a dispute has already been arisen by non-payment of our legitimate outstanding dues by you, we also agree to refer the same for Arbitration. By reserving our rights to rebut the allegations made in the Notice under Reply, we hereby appoint Mr. Rana Mukherjee, Senior Advocate, Supreme Court as an Arbitrator.

Please be informed accordingly.”

6. Without prejudice to his above contention he submits, he relies on finding in award dated 2nd September, 2019 and concurrence therewith in impugned judgment dated 16th April, 2022, of fact that final bill had not been settled and as such, it could not be said that the counter claim was barred by limitation. He also draws attention to print of mail dated 17th September, 2016 sent by appellant to his client, from which first paragraph is extracted and reproduced below.

“This has reference to the closing of accounts with M/S. Fiberfill for the interior work carried out at BIMTECH, Bhubaneswar. In this regard, after discussion with yourself, Mr. N. P. Singh, our Project Consultant and our Management, it has been decided that both the parties, i.e. BIMTECH and Fiberfill agree to appoint Mr. N. P. Singh as the Sole Arbitrator for determining the amount to be payable to Fiberfill by BIMTECH.”

He lays emphasis that there cannot be any dispute regarding his client having claim against appellant, as acknowledged in said mail.

7. Mr. Parhi submits, alleged notice dated 7th April, 2017 is not the notice contemplated in **State of Goa** (supra) for respondent to claim to be covered by the exception carved out in the judgment. The letter was in answer to his client's notice dated 25th March, 2017, the former being commencement thereby of arbitration under section 21, Arbitration and Conciliation Act, 1996. He relies on contents of respondent's said letter dated 7th April, 2017 to urge that on the face, it is a reply and cannot be construed as a notice for arbitration. The counter claims were barred by limitation and in awarding them there is patent illegality on face of the award. The learned Court below erred in not appreciating this. He seeks interference in appeal.

8. Respondent in supporting award on the counter claim has raised two contentions in the alternative. The first is in supporting reasoning given in the award and impugned judgment on finding of fact regarding limitation. The found fact relied upon is that final bill had not been settled and therefore, it cannot be said that prescribed period had commenced running against respondent in preferring counter claim. The alternative contention is based on **State of Goa** (supra) on basis of said letter dated 7th April, 2017 for respondent to claim as covered by the exception carved out in the judgment.

9. There is nothing on record to show that prior to lodging counter claims, respondent had indicated its claims with particulars to appellant, on settlement of final bill remaining outstanding or otherwise. Facts are also that appellant had terminated the contract, irrespective of whether the termination was duly made and respondent vacated the site on 30th July, 2014. The claims were awarded on having been put forward as counter claims. In the circumstances, relevant provisions in Limitation Act, 1963 regarding accrual of right to sue or acknowledgement extending period of limitation, cannot come to aid of respondent. The mail dated 17th September, 2016 does not qualify as an acknowledgment as would appear from first paragraph therein

extracted above since, all that appellant said thereby was, both parties had agreed to appoint sole arbitrator for determining the amount to be payable to Fiberfill by BIMTECH. This cannot be pronounced upon as an acknowledgment because the law is settled that the acknowledgement must be clear and unambiguous. As aforesaid, particulars of counter claims had also not been put forward to appellant by respondent prior to filing of its counter claims.

10. Moving on to finding regarding fact of settlement on final bill remaining outstanding upon a disputed position on termination of the contract, this also cannot have a bearing on the question of limitation. This is because respondent had approached the Tribunal with its counter claims, contained in its counter statement filed on 18th September, 2018. Moment a claim is put forward by a counter claim the relevant provision in Limitation Act, 1963 stands attracted. Respondent has itself relied upon **State of Goa** (supra), wherein the Supreme Court said, as far as counter claims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of Limitation Act, 1963 provides that in regard to a counter claim in suits, the date on which the counter claim is made in Court shall be deemed to be the date of institution of the

counter claim. As Limitation Act, 1963 is applicable to arbitration, in the case of counter claim by a respondent in an arbitral proceeding, the date on which the counter claim is made before the arbitrator will be the date of institution in so far as such a counter claim is concerned. This brings us to respondent's contention of being covered by the exception made to this position, by the Supreme Court itself in said judgment. The passage, carving out the exception, in paragraph 17 is extracted and reproduced below.

“xx xx xx Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counter claim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under section 11 of the Act, the limitation for such counter claim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counter claim.”

11. In adjudicating whether or not respondent's case comes within above exception, it is necessary to also first appreciate the facts in **State of Goa** (supra). Claimant in that case had sought arbitration. Thereupon claimant made request under section 11, for appointment of

arbitrator. In the objection filed by respondent, to the request, no counter claim was asserted. There was appointment of arbitrator and claimant raised contention, when the matter ultimately went to the Supreme Court that the counter claims had not been referred. In those facts, the Supreme Court formulated two questions in paragraph 8. Said paragraph is reproduced below.

“8. Therefore the question that arises for our consideration is as under:

Whether the respondent in an arbitration proceedings is precluded from making a counter-claim, unless

*a) it had served a notice upon the claimant requesting that the disputes relating to that counter-claim be referred to arbitration **and the claimant had concurred in referring the counter claim to the same arbitrator;***
and/or

b) it had set out the said counter claim in its reply statement to the application under section 11 of the Act and the Chief Justice or his designate refers such counter claim also to arbitration.”

(Emphasis supplied)

12. The exception carved out in paragraph 17 is in answer to the second question. Since it is an exception, for purpose of applying it there must be strict construction. It, being answer to the second question, is straightaway inapplicable in case of respondent because in

this case there was no request under section 11, for appointment of arbitrator. Respondent had agreed that there should be arbitration. In absence of there having been a request made in this case for appointment of arbitrator, the question of deemed commencement of arbitration by respondent does not arise. Furthermore, on perusal of respondent's letter dated 7th April, 2017, it appears therefrom that it is a letter of denial. The denial was asserted by saying that to the contrary, respondent had done work with utmost satisfaction and an amount of rupees more than 6 crores towards principal outstanding is due since long time. This assertion was not made prior to receiving the notice under section 21 from appellant. To rely upon this as a commencement of counter claim notice to bring respondent's case within the exception to the **State of Goa** (supra) would be reading something into the exception, that is not there.

13. Mr. Parhi has relied upon paragraph 24 in **Voltas Ltd.** (supra). Said paragraph is reproduced below.

“On a careful reading of the verdict in Praveen Enterprises (supra), we find that the two-Judge Bench, after referring to, as we have stated hereinbefore, Sections 21 and 43 of the Act and Section 3 of the Limitation Act has opined, regard being had to the language employed in Section 21, that an exception has to be carved out. It saves the

*limitation for filing a counter claim if a respondent against whom a claim has been made **satisfies the twin test, namely, he had made a claim against the claimant and sought arbitration by serving a notice to the claimant.** In our considered opinion the said exception squarely applies to the case at hand inasmuch as the appellant had raised the counter claim and sought arbitration by expressing its intention on number of occasions. That apart, it is also perceptible that the appellant had assured for appointment of an arbitrator. Thus, the counter claim was instituted on 17.4.2006 and hence, the irresistible conclusion is that it is within limitation.”*

(Emphasis Supplied)

14. The subsequent Bench of equal strength in the Supreme Court by **Voltas Ltd.** (supra) interpreted its earlier judgment to say, the exception saves limitation for filing a counter claim if a respondent, against whom a claim has been, made satisfied the twin tests namely, he had made a claim against the claimant and sought arbitration by serving a notice to the claimant. These two steps are not satisfied by said relied upon letter dated 7th April, 2017. Neither can it be said that thereby a claim was made against appellant since, as aforesaid, the assertion of an amount of more than rupees 6 crores towards principal outstanding being due was made in denial to appellant's claim. More so, prior to or thereafter till before filing the counter statement with

counter claims, respondent had not made any claim against appellant. The second test requiring respondent, who had made a counter claim to have sought arbitration by serving a notice to the claimant is also not satisfied since by said letter dated 7th April, 2017, respondent conceded to existence of arbitration agreement and agreed with appellant to refer the disputes.

15. On query from Court it has been ascertained that respondent vacated the site on 30th July, 2014. The counter statement with counter claims was filed on 18th September, 2018. By aforesaid reasoning, inevitable conclusion before this Court is that the counter claims were barred by limitation on the date of institution. The bar of limitation stood attracted by provision in section 43 in the 1996 Act, making provisions in the 1963 Act applicable to the former. As such, the award is in violation of clause (a) under section 28 in the 1996 Act, as not being in accordance with the substantive law of limitation and the Act itself making it applicable to arbitration, for the time being in force in India. Court is satisfied that award on the counter claim suffers from grounds in section 34, for it to have been set aside. The Court below had not done so.

16. Award on counter claim upheld by impugned judgment is set aside. It is varied to that extent. Hence, appellant has those of its claims awarded, without adjustment.

17. The appeal is disposed of.

(Arindam Sinha)
Judge

Prasant

