

**HON'BLE SRI JUSTICE P.NAVEEN RAO
AND
HON'BLE SRI JUSTICE J. SREENIVAS RAO
COMMERCIAL COURT APPEAL NO.46 OF 2020**

Date:10.01.2023

Between:

M/s.IJM-Gayatri Joint Venture,
Rep.by its General Manager,
Mr.M.Praveer Kumar, B-1,
T S R Towers, Raj Bhavan Road,
Somajiguda, Hyderabad.

.... Appellant

And

Andhra Pradesh Road Development Corporation
Rep. by Chief Engineer, R & B and Managing Director,
5th Floor, HoD Buildings, MG Road, Opp: Indira Gandhi Municipal
Stadium, Vijayawada District and
another.

.... Respondents

This Court made the following :

**HON'BLE SRI JUSTICE P.NAVEEN RAO
AND
HON'BLE SRI JUSTICE J.SREENIVAS RAO
COMMERCIAL COURT APPEAL NO.46 OF 2020**

JUDGMENT: *(Per Hon'ble Sri Justice P.Naveen Rao)*

This appeal is filed against Order and Decree dated 08.05.2020 passed by the learned Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court Hyderabad in C.O.P.No.36 of 2018. C.O.P. was filed under Section 34 of the Arbitration and Conciliation Act, 1996 (Hereinafter referred to as the Act) to challenge the Award dated 07.03.2016 passed by the learned Sole Arbitrator in arbitration proceedings between the appellant/claimant herein and the respondent/employer.

2. Heard Sri C.V.Mohan Reddy learned senior counsel appearing for appellant and Sri T.Ramulu learned counsel for respondent No.1.

3. Appellant is a joint venture between IJM Corporation BERHAD, a company registered in Malaysia and M/s. Gayatri Projects Limited, a company incorporated under the Companies Act, 1956, with its registered office in Hyderabad. During the years 1998-2005, the Government of combined Andhra Pradesh has taken up a scheme named Andhra Pradesh State Highways Project (APSHP) for development of State Highways having high traffic density. In all there were 14 packages. One of the packages, i.e. the execution of the works

of widening and strengthening of Tallada—Deverapalli Road designated as APSH-7 was awarded to the Appellant. The Letter of Acceptance dated 12-03-1999 was issued at a contract price of ₹ 103,53,72,674/-. An Agreement (Hereinafter referred to as Agreement or Contract) was concluded between the Roads and Building Department (R&B), Government of Andhra Pradesh represented by the Engineer-In-Chief (R&B) and the Appellant executed on 12-03-1999. The Contract is in two parts, General Conditions of Contract (Part-I), i.e. G.C.C. and Conditions of Particular Application (Part-II), i.e., COPA.

4. On 13.07.2005 as per terms in clause 60.10 of COPA, the Appellant submitted its Statement At Completion (SAC). The engineer certified the Interim Payment Certificate (IPC) for the works without consideration of the total claim amount where only a portion was certified and paid.

5. On 5.02.2010 appellant sent letter calling upon respondent to settle the final bill within 30 days from the date of said notice. A Notice of Dispute was then issued by the appellant against respondent under COPA clause 67 on 20-3-2010 which was replied by the respondent on 26-03-2010 stating that claims are barred by limitation and not the final bill or any other bill barred by limitation. As per the terms of clause 67.3 COPA vide letter dated 2-05-2011 the appellant invoked Arbitration Clause. Finally, appellant approached the High Court of A.P. u/s 11(6) of the Act praying for the appointment of Arbitrator, which was opposed by the respondent on the grounds of limitation. In

order dated 12.10.2012 High Court appointed Shri V.V.S. Rao, Retired Judge of the High Court, as sole Arbitrator after rejecting the respondents contentions regarding limitation. The learned Arbitrator after considering the contentions of the respective parties and evidence on record passed Award on 07.03.2016 and partly allowed the claim Nos.1, 2(a), 3 and 6 with interest @ 6% p.a., and rejected the claim Nos.2(b), 4, 5 and 7. Questioning the said Award, the respondents herein filed COP No.36 of 2018 on the file of Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad. By the order impugned the Commercial Court allowed the COP partly setting aside award to the extent of Claim Nos.1, 2(a), 3, 7(a)(i) and 7(b) and confirmed the award in respect of claim no.6.

Submissions of learned senior counsel Sri C.V.Mohan Reddy appearing for appellant:

6.1. The question of limitation is a mixed question of fact and law. A question of fact necessitates the appreciation of evidence; a question of law necessitates an interpretation and/or implementation of the law. In setting aside the Award, the trial Court has reassessed the evidence, substituted its wisdom over the wisdom of the learned Arbitrator, particularly when arbitral record being not before it and the same is impermissible.

6.2. He contended that the Court below failed to appreciate the fact that the law of limitation as applicable to civil suits and arbitration proceedings is different. For arbitration proceedings the law of

limitation starts from the date of dispute whereas in civil proceedings, it starts from the date of last cause of action and Court below did not take into consideration Clauses 60.10¹ and 60.11² read with Clause 53.4³ of Agreement.

6.3. That the Court below has lost sight of the fact that the starting point of limitation can and will only arise once a dispute has arisen and dispute can only be said to have arisen when there is an assertion of a claim and a consequent denial of such claim. Though there was compliance of Clause 60.10, the respondent/Engineer under the garb of substantiation, delayed the certification of claims from 13.7.2005 till

¹ **Cl.60.10: Statement at Completion:** Not later than 84 days after the issue of the Taking-Over Certificate in respect of the whole of the works, the contractor shall submit to the Engineer at completion in the number of copies specified in the Appendix to Bid with supporting documents showing in detail, in the form approved by the Engineer,

(a) *The final value of all work done in accordance with the Contract up to the date stated in such Taking-Over Certificate;*

(b) *Any further sums which the Contractor considers to be due, and*

(c) *An estimate of amounts which the Contractor considers will become due to him under the Contract.*

Estimated amounts shall be shown separately in such Statement at Completion. The Engineer shall certify payment in accordance with Sub-Clause 60.2.”

² **Clause 60.11: Final Statement:**

Not later than 56 days after the issue of the defects Liability Certificate pursuant to Sub-Clause 62.1, the Contractor shall submit to the Engineer for consideration a draft final statement in the number of copies stipulated in the Appendix to Bid with supporting documents showing in detail, in the form approved by the Engineer,

(a) *the value of all work done in accordance with the Contract; and*

(b) *Any further sums which the Contractor considers to be due to him under the Contract or otherwise.*

If the Engineer disagrees with or cannot verify any part of the draft final statement, the Contractor shall submit such further information as the Engineer may reasonably require and shall make such changes in the draft as may be agreed between them. The Contractor shall then prepare and submit to the Engineer the final statement as agreed (for the purposes of these Conditions referred to as the “Final Statement”).

*If, following discussions between the Engineer and the Contractor and any changes to the draft final statement which may be agreed between them, it becomes evident that **a dispute exists, the Engineer shall deliver to the Employer an Interim Payment Certificate for those parts of the draft final statement which are not in dispute.** The dispute shall then be settled in accordance with Clause 67. The Final Statement shall be agreed upon settlement of the dispute.”*

³ **Cl.53.1: Procedure for claims notice of claims:**

Notwithstanding any other provision of the contract, if the contractor intends to claim any additional payment pursuant to any clause of these conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen.

March 2010. Having waited for considerable time, the appellant issued a notice on 20.3.2010 stating that if the claims were not certified, it would constitute a 'dispute' under the Agreement. In response, on 26.3.2010 the respondent for the first time disputed the claim. The dispute therefore only arose on 26.3.2010 and limitation could start only on 26.3.2010 and not on 15.10.2004 or 14.9.2004.

6.4. He further contended that admittedly, the works were completed on 31.7.2004 within the extended period and the TOC was issued on 24.4.2005. On 13.7.2005 the appellant submitted its SAC in compliance with Clause 60.10 of the Agreement. The parties exchanged correspondence on the claims in question between 13.7.2005 till March 2010, it was only on 26.3.2010 the respondent for the first time denied the claim on the technical ground of limitation, but not on the merits. Therefore, the breaking point for the purpose of calculating limitation is 26.3.2010 and not 2004 as erroneously opined by the court below.

6.5. Even otherwise, the Court below failed to consider Clauses 60.10 and 60.11 of the agreement and findings of Court below are contrary to Section 43 (3) of the Limitation Act.

6.6. The impugned judgment is in express violation of the substituted clause 67.3 (iv) of the Agreement.

6.7. That the Court below failed to appreciate the fact that the judgment in **State of Gujarat Vs Kothari Associates**⁴ is in the context of a civil suit and not an arbitration proceedings and Court below read the above judgment completely out of context.

6.8. It is further contended that the 1996 Act gives the supervisory role to Courts, to review the Arbitral award only to ensure fairness and intervention of Courts is envisaged in few circumstances only like in case of fraud, bias by the arbitrators, violation of natural justice etc. That the Court below cannot correct errors of the Arbitrators and the interpretation of contract and law is exclusive domain of the Arbitral Tribunal.

6.9. That the construction of the terms of contract is primarily for an Arbitrator to decide unless the Arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

6.10. That Clause 53.4 of the GCC empowers the Appellant to raise claims at any point of time as stipulated in the contract. Clause 60.10 of CoPA empowers the appellant to claim any further sums which the contractor considers to be due to him under the contract or otherwise along with its statement at completion (SAC) upon completion of the agreement work. Whereas first respondent issued final taking over certificate on 24.4.2005, the appellant by invoking clause 60.10 of

⁴ (2016) 14 SCC 761

CoPA submitted SAC on 13.7.2005 along with claim amount in question. The first respondent never rejected either part of the SAC or otherwise. The Agreement also empowers the appellant to submit draft final statement upon issuance of the Defect Liability Certificate under Clause 60.11 of CoPA. The said clause empowers the appellant to claim any further sums which he considered to be due to him under the contract or otherwise. The first respondent issued the final Defect Liability Certificate on 16.8.2007. Hence, the appellant is empowered to claim the amounts in question along with its Draft Final Statement, which was submitted on 9.10.2007 in compliance of Clause 60.11 of CoPA within the stipulated period. That Agreement empowers the contractor/appellant to claim the amounts in question. But unfortunately, the Court below wrongly and contrary to aforementioned terms and conditions of the Agreement held that *'The starting point of the Limitation on the above claim shall be computed from 15.10.2004 (within 3 years fro the scheduled date of completion) or at least within three years from 14.9.2004 i.e., 13.9.2007. The SAC, presented on 13.7.2005 cannot be considered as the first step required for initiation of invocation of arbitration'*.

7. The first respondent delayed the finalization of the said Draft Final Statement on one pretext or the other by repeatedly asking for clarifications from the Engineer and the Contractor. Consequently on 5.2.2010 the appellant issued 30 days notice to finalize the bill failing which he would construe the same as a dispute and would invoke the

dispute resolution clause and invoked the dispute resolution clause 67 on 20.3.2010 that is within three years from the submission of Draft Final Statement. Thus, appellant invoked the Arbitration clause within three years from the date of submission of Draft Final Statement. Thus, it is apparent that Court below ignored the mandatory provisions of Clauses 44, 53.4, 60.10, 60.11 and 67 of the Agreement read with Section 43 (3) of the Act, 1996.

8. Learned senior counsel fairly contended that the impugned order passed by the Court below is in violation of settled principle of law laid down by the Supreme Court. In support of his contentions, he relied upon the following decisions:

i) **State of Gujarat vs. Kothari and Associates**⁵;

ii) **Major (Retd.) Inder Singh Rekhi vs. Delhi Development Authority**⁶;

iii) **Geo Miller and Company Private Limited vs. Chariman, Rajasthan Vidyut Utpadan Nigam Limited**⁷;

iv) **McDermoti International Inc. vs. Burn Standard Co.Ltd., and others**⁸;

v) **Associate Builders vs. Delhi Development Authority**⁹

9. Learned counsel for respondents Sri T Ramulu, supports the decision of Commercial Court. According to him on thorough analysis

⁵ (2016) 14 SCC 761

⁶ (1998) 2 SCC 338

⁷ (2020) 14 SCC 643

⁸ (2006) 11 SCC 181

⁹ (2015) 3 SCC 49

of facts and law the learned Judge has rendered decision and no case is made out for interference.

9.1. He would submit that claims of appellant are time barred and therefore Arbitral proceedings are not maintainable. This fact was not properly appreciated by the learned Arbitrator. He would therefore submit that the view taken by the Commercial Court is valid.

9.2. He would submit that the dispute has arisen during the execution of project work which was completed on 14.9.2004.

9.3. He would submit that merely because in the correspondence dated 26.3.2010 respondent disputed the appellants' claim cannot give rise to a cause of action and does not save limitation. He would submit that an inaction by competent authority also gives rise to a cause of action and limitation started ticking from 13.7.2005.

10. In reply, learned senior counsel submitted that the Commercial Court grossly erred in not considering clauses 53.4, 60.10 and 60.11. In view of these claims judgment of Hon'ble Supreme Court in **Kothari Associates** is not applicable.

10.1. He would submit that till 28.3.2010 there was no communication from the respondents. Silence cannot be assumed as rejection. He would submit that on 9.10.2007 appellant submitted Draft Final Settlement (DFS). The cause of action arose on the said date. From the said date, Arbitration dispute was raised in time and

there was no delay. From 9.10.2007 to 5.1.2010 respondent was corresponding with Engineer. On 5.2.2010 appellant issued notice for settlement of claim and second notice was issued on 20.3.2010. On 26.3.2010 for the first time respondent disputed the claim made by appellant.

11. Prior to a deeper examination of issues and contentions submitted by the parties it is necessary to first reiterate the parameters the Court has to be mindful of while adjudicating a Section 34¹⁰ application.

¹⁰ **34. Application for setting aside arbitral award.**—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application [44](#)[establishes on the basis of the record of the arbitral tribunal that]—

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[45](#)[*Explanation 1.*—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[46](#)[(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.]

12. The scope of "**public policy**" in Section 34 has been narrowed once the 2015 amendment became effective and the award can be set aside only if the arbitral award (i) was induced or affected by fraud or corruption; or (ii) is in contravention with the fundamental policy of India; or (iii) is in conflict with the most basic notions of morality or justice. Section 2A was inserted by Amendment Act No.3 of 2016. In terms of this amended provision, an award cannot be set-aside merely on the ground of erroneous application of law or by re-appreciation of evidence.

13. In **Ssangyong Engg. & Construction Co. Ltd Vs. National Highways Authority of India**¹¹, the Supreme Court held that after the 2015 amendment to the Act, the interpretation of the term '**public policy**' has been narrowed down. It was further held that when it is tied to the 'basic notions of justice' as an argument it can be attracted only in very exceptional circumstances, i.e., when the conscience of the Court is shocked and does not warrant the Court's interference on grounds that in its opinion justice has not been met as that would amount to examining merits of the issue which is contradictory to the ethos of the Act.

¹¹ (2019) 15 SCC 131

13.1. In **Venture Global Engineering LLC and Ors. v. Tech Mahindra Ltd. and Ors**¹², it was held that an award can be set aside only on the grounds specified in Section 34 of the Arbitration Act and on no other ground. The court cannot act as an Appellate Court to examine the legality of award, nor can it examine the merits of claim by entering in factual arena like an Appellate Court. Thus, the courts are no longer permitted to reappraise evidence or set aside awards merely because the arbitral tribunal has made errors when dealing with it.

14. Recently, the Supreme Court in **Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.**¹³ observed that there is a disturbing tendency of Courts setting aside arbitral awards based on reassessing factual aspects and then vitiating the award on the grounds of patent illegality. The Court observed that this ultimately leads to corrosion to both the object of the Act and the endeavors made to preserve this object, which is minimal judicial interference with arbitral awards. It was held that patent illegality should be illegality that goes to the root of the matter and therefore erroneous application of law cannot be categorized as patent illegality. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes the view which is not even a possible one or interprets a clause in the contract in such a manner which no fair minded or reasonable person would or if the arbitrator commits an error of jurisdiction by exceeding outside

¹² (2018) 1 SCC 656

¹³ (2022) 1 SCC 131

the contract and dealing with matters not allowed to them. Further the Apex Court has made it clear that an award would be in conflict with public policy of India only when it is induced or effected by fraud or corruption or is in violation of Section 75 or Section 81 of the Act, or if it is in contravention of fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice.

15. In view of the narrowed down interpretation of the amended Section 34, whether or not it will be applicable to this case is to be seen. Arbitrator had been appointed by the High Court in 2012 and award was passed in 2016. The Supreme Court has consistently taken the view that the 2015 amendment will have prospective application. The trial Court observed that arbitration proceedings commenced before the 2015 Amendment to the Act. It stated, *"Since the arbitration was commenced before the Amendment of 2015 to the Arbitration and Conciliation Act, section 34 as it was existing before the amendment is applicable for adjudicating upon the challenge to the award, in view of the judgments of the Hon'ble Supreme Court. In fact amendments of 2015 may not have any impact as far as the facts of the case"*. While acknowledging that the grounds for interference by the Court had been substantially narrowed down, it held, *"In this case on hand since law prior to amendment is applicable, the court can consider the above judgment. The court has to find out whether the reasons given by*

the learned arbitrator are perverse or whether the award is patently illegal.”

15. This assertion by the lower court warrants a closer examination in view of judgments by the Hon’ble Supreme Court.

17. In **Ssangyong Engg. & Construction Co. Ltd**, the Apex Court held:

*“19. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of “public policy of India” in ONGC v. Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] [“Saw Pipes”] and ONGC v. Western Geco International Ltd. [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] [“Western Geco”] has been done away with, and a new ground of “patent illegality”, with inbuilt exceptions, has been introduced. **Given this, we declare that Section 34, as amended, will apply only to Section 34 applications that have been made to the Court on or after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.**”*
(emphasis supplied)

18. In a recent judgment of in **Ratnam Sudesh Iyer vs. Jackie Kakubhai Shroff**¹⁴, the Hon’ble Supreme Court relied the above judgment and reiterated this principle. It is beyond shadow of doubt that in the case of section 34 applications made to the Court on or after 23-10-2015 (the date of 2015 Amendment Act), the amended section 34 will apply, irrespective of whether arbitration proceedings commenced prior to that date.

19. The Arbitral Award was passed on 7-03-2016 and a copy of it was received on 8-03-2016 by the respondents thereafter initiated

¹⁴ (2022) 4 SCC 206

Section 34(2) proceedings in the lower Court in COP No.36 of 2018. Since it is well after 23.10.2015, amended section 34 would apply as is well established by the Apex Court. Despite judgment in **Ssangyong** being placed on record, lower Court erroneously concluded that challenge to the Award was to be adjudicated as per Section 34 as it stood prior to amendment.

20. The grounds of patent illegality based on which Respondent initiated challenge to the award has to be considered in the light of the Apex Court's consistent view of restrictive judicial interference as well as the insertion of Section 2-A that states that '*patent illegality*' will not include *erroneous application of law* by the Tribunal or re-appreciation of any evidence or merits of the matter.

21. The lower court considered the challenge to the award on the basis of two issues. Whether the decision of the learned arbitrator that the delay is attributable to the Employer can be inferred and whether the Contractor is entitled to claims No.1 2(a) , 3, 6, 7(a)(i) and 7 (b) as awarded and secondly whether any claims made by the Contractor are barred by the law of limitation.

22. With regards to the first issue, while considering it at length the lower court held that it found no patent illegality on the face of the Award and on the facts of the case the decision of the arbitrator as to entitlement of the claims cannot be interfered with, however, it went on to note that they would be re-examined based on the bar of limitation.

23. Therefore based on the lower courts findings and considering the grounds on which appeal is preferred, the Court sees it fit to confine itself to the question of limitation.

24. Respondent claimed in its challenge to the Award that the Award passed is contrary to COPA clause 60.10(b) and Article 55 and Article 137 of the Limitation Act. As per the Award, dispute arose on 26-3-2010 which is when the Respondent first rejected the claims of the Appellant and instead stated that they are time barred. The trial court chose to set aside this finding and observed that starting point of limitation shall be computed from 15.10.2004 (within three years from the scheduled date of completion) or at least three years from 14.09.2004. The SAC, presented on 13.07.2005 cannot be considered as the first step required for initiation or invocation of arbitration. Though the lower court observed that on merits it could not interfere or substitute its own view on the first issue, it concluded that indeed the proceedings were time barred. It held, *“since the award is in contravention of the law of limitation, which is based on public policy, on this ground it is to be concluded that the Award in respect of claims 1, 2(a) and 3 is against public policy of India and fundamental policy of Indian Law (as it was understood prior to the amendment of the Act). The findings on the point of limitation in respect of claim 1, 2(a) and 3 are against the terms of the contract*

and section 43 of the Act.” It further recorded that consequently the appellant is entitled to interest awarded under claims 7(a)(i) and 7(b).

25. In order to arrive upon its conclusion regarding and in effect set aside the arbitral award the lower court had to decide the starting point of limitation. This required a deeper examination of when is that a ‘dispute’, both as per the terms of the contract clauses and as per the Limitation Act, arose. In order to establish the exact time of dispute the Court exhaustively looked into all correspondence between the parties, re-examined case laws already discussed in depth by the sole arbitrator, independently noted a judgment to the effect, interpreted Contract clauses, categorized breach of contract as successive breaches based on extensions of time granted and observed disagreements regarding claims. Prima facie there is no doubt that this constituted reassessment of the merits of the case. The lower court’s finding that the award is in contravention to the law based on the interpretation of Pre-Amended Act is erroneous as detailed previously in the judgment. The parameters elucidated above all have to be kept strictly in mind in the adjudication of Section 34 applications as Section 34 proceedings in this matter began after the effective date of the amended Act.

26. It is a well established principle that limitation is a mixed question of fact and law to be determined by adducing necessary evidence at the trial or in the proceedings before Arbitrator. Considering that in this matter all claims will ultimately be tied to

whether arbitration was time barred or not, it is a substantial question of law that requires complete assessment of evidence and contract clauses.

27. The lower Court relied on **ONGC Limited v. Western Geco International Limited**¹⁵ (out of many others) to identify scope of 'public policy' in section 34. However this judgment discussed section 34 prior to the insertion of Section 2A which clearly provides that an Award cannot be set aside merely on the ground of erroneous application of law or by re-appreciation of evidence. The test for patent illegality as a ground for setting aside the award was laid down by the Apex Court in **Delhi Metro** case as well as scope of public policy violation. Clearly the lower court's findings with regards to the question of limitation and consequently claims made, are exceeding its jurisdiction under Section 34 of the Act. Any other interpretation at this stage would directly contradict the statutory provision. The Act as per its amendments clearly indicates legislative intent to reduce burden on Courts and to overcome systemic delays, high costs and ineffective resolution of disputes and Courts must adopt an approach consistent to the scheme of the Act.

28. Clause 5 of Contract Agreement deals with conditions of contract. In this section, Part II deals with conditions of particular application (COPA). Sub-clause 60.10 is about Statement

¹⁵ (2014) 9 SCC 263

At Completion (SAC) and Sub-clause 60.11 is about Final Statement (FS).

29. Sub-clause 60.10 enables the contractor 84 days time from the date of issue of Taking-Over Certificate for the whole of the works to submit Statement of Completion (SOC) showing (a) the final value of the work done upto the date stated in Taking Over Certificate; (b) any further sums which the contractor considers would become due.

30. According to Sub Clause 60.11 within 56 days after the Defects Liability Certificate was issued, the Contractor should submit the draft final statement showing all the work done in accordance with the contract and any further sums which the contractor considers to be due under the contract or otherwise.

31. From the chronology of events, it is seen that 4 Taking Over Certificates were issued concerning four milestones. First was on 23.12.2004 and the last was on 24.4.2005. On 13.7.2005 the Contractor submitted Statement At Completion (SAC) which was within 84 days stipulated in Sub Clause 60.10. The Defects Liability Certificate (DLC) was issued on 16.08.2007. This certificate also records that the date of delivery of road section in Mile Stone –II/2 was considered as 13.9.2005. As required by Sub Clause 60.11 Contractor submitted Draft Final Statement (DFS) on 9.10.2007, which was within 56 days of DLC. There was correspondence between respondent and the Engineer. As issue was not finalized, the contractor issued notices

on 5.2.2010 and on 20.3.2010. On 26.3.2010 the respondent communicated to the Contractor that the claims are not admissible in the first instance and are barred by time and the time of three years expired on 12.7.2008.

32. In the light of the chronology of events, the question for consideration is whether limitation started from 13.7.2005 when Contractor submitted SAC or 16.8.2007 when DLC was issued or 9.10.2007 when DFS was submitted by the contractor. To ascertain the actual date to compute period of limitation, it is necessary to revisit Sub Clauses 60.10 and 60.11. Under Sub Clause 60.10 the contractor has 84 days to submit SAC from the date of issuing Taking Over Certificate. Last Taking Over Certificate was issued on 24.4.2005 and SAC was submitted on 13.7.2005. Sub Clause 60.11 requires the contractor to submit DFS within 54 days of DLC. DLC was issued on 16.8.2007 and DFS was submitted on 9.10.2007.

33. Sub-clause 60.11 requires the Contractor and Engineer to discuss the possibility of effecting any changes by the Contractor in the DFS. If there is consensus and changes are effected, it becomes Final Statement. On the contrary, if only on some items issue was resolved, the Engineer would deliver to Employer Interim Payment Certificate to that extent and on balance items there would be a dispute. The dispute then should be settled in accordance with Clause 67.

34. Clause 67 deals with Statement of Disputes. As per Sub Clause 67.1, first the dispute should be referred to the dispute Review Board. If any issue/issues is/are not resolved by the board, then as per Sub-clause 67.3 the dispute/disputes should be referred to Arbitration.

35. According to the respondent, the cause of action arose on 13.7.2005 when SAC was submitted, whereas, according to contractor, it was on 9.10.2007 when the contractor submitted his DFS.

36. To appreciate respective contentions, it is necessary to see Sub Clause 67.1. To the extent relevant, it reads as under:

“If any dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after the repudiation or other termination of the Contract, including any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred to the Disputes Review Board (the Board)”

37. It envisages that there can be a dispute when there was disagreement by either party with any action/inaction/opinion/instruction/determination/certificate or valuation by the Engineer. Thus, resort to reference to the Board or to the Arbitrator would arise only when a dispute was raised/arise. Except, internal correspondence on various issues between the respondent and the Engineer, no dispute was raised by the respondent with the contractor till 26.3.2010 and the dispute raised now is on limitation to the claim but not on merits.

38. In response to the request of the contractor to reconsider, the respondent replied on 9.4.2010. The table enclosed to the letter reads as under:

S. No	Contractor contention vide letter dated 30.3.2010	Employer contention	Basis of dispute
1	The limitation period of 3 years applies only on Certification and payment of the bill pending with the Statement at Completion	The limitation period will start when the purported claims are raised for the first time. In the instant case the purported claims are raised in the Statement at Completion on 13.7.2005. The cause of action may arise earlier to 13.7.2005 or on 13.7.2005 and not later to 13.7.2005. The Commencement of limitation does not start on Certification and payment.	Indian Limitation Act
2	No decision is notified on the claims so far and bills are still pending certification by the Engineer	Notification of decision on the certification of claims cannot be taken as the start of Limitation.	Indian Limitation Act
3	In fact the limitation period of (3) years time period for settlement of the claim before 12.7.2008 applies to the Employer for not settling the Claims pending with the Statement at Completion, which were submitted to the Engineer.	Limitation is defined and legislated for a party who is claiming. The Employer is not claiming any amount in the present case.	Indian Limitation Act
4	Further, the contention of the Employer that the claims are not admissible in the first instance and that too without any detailed comment.... are not acceptable.	The claims are inadmissible under the provision of clause 53.1. which is a non obstante clause which over rides all the provisions of Contract if found contrary to clause 53.1. The Contractor has not furnished the details of notification under clause 53.1. as well as the invokement of substantive provision of Contract or applicable law under which any claims may arise.	Judgment of Supreme Court as reported AIR 1984 SC 1022 (1984 Lab I.C. 633)

Sd/-

For Chief Engineer (R & B) CRN&MD, APRDC

39. On 15.4.2010 Contractor addressed letter to the Engineer-in-Chief, R & B (Retd) taking recourse to Clause 67.1 requesting Dispute Review Board to resolve the disputes listed out in the letter. The Dispute Review Board has not finalized its proceedings for a long time. Finally, the contractor invoked Arbitration clause vide his letter dated 2.5.2011.

40. Having regard to the tone and tenor of the letters dated 26.3.2010 and 9.4.2010, it is deemed that cause of action arose for the first time on 26.3.2010. Having regard to chronology of events, the date to reckon for computation of period of limitation is 26.3.2010 when a dispute was raised by the respondent taking the plea of delay. Until that date, there was no communication with the contractor, whereas, there was exchange of correspondence between the respondent and the Engineer after the contractor submitted DFS on 9.10.2007. It is not a case of the employer keeping quiet to assume silence is answer as sought to be urged. Such stand is contrary to express terms of contract. Moreover, the employer did not keep quiet, but was corresponding with the Engineer.

41. For all the aforesaid reasons, Commercial Court Appeal No.46 of 2020 is allowed and the impugned order and decree passed by the learned Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad in COP No.36 of 2018 is hereby set aside and Award dated 07.03.2016 passed by the sole Arbitrator is upheld. However, no order as to costs. Pending miscellaneous applications if any shall stand closed.

P.NAVEEN RAO, J

J.SREENIVAS RAO, J

Date: 10.01.2023
TvK/KKM

**HON'BLE SRI JUSTICE P.NAVEEN RAO
AND
HON'BLE SRI JUSTICE J. SREENIVAS RAO**

COMMERCIAL COURT APPEAL NO.46 OF 2020

Date: 10.01.2023

Tvk/KKM