

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 20.03.2023

+ FAO(OS) (COMM) 196/2019 & CM APPL. 37019/2019

NABINAGAR POWER GENERATING
COMPANY LTD.

..... Appellant

versus

AMR INDIA LTD.

..... Respondent

Advocates who appeared in this case:

For the Appellant : Ms. Manvinder Acharya, Sr. Adv with Mr.
R. Sudhinder, Mr. Dattatray Vyas and Mr.
Akshay Singh Sengar, Advocates.

For the Respondent : Mr. Brijesh Kumar Goel, Mr. Rajeev
Kumar, Mr. Sajal Goel and Ms. Rashmi
Bhardwaj, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

1. The appellant (hereafter 'NPGC') has filed this intra-court appeal under Section 37(1) of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') impugning an order dated 05.07.2019 passed by the learned Single Judge of this Court (hereafter 'the **impugned order**'), whereby the learned Single Judge dismissed NPGC's application under Section 34 of the A&C Act to set aside the arbitral award dated 10.12.2018 (hereafter 'the **impugned award**').

2. The arbitral proceedings were commenced pursuant to the notice dated 29.03.2014, issued by the respondent (hereafter 'AIL') seeking reference of the disputes to arbitration. The Arbitral Tribunal substantially allowed most of the claims made by the respondent and rejected the counter-claims raised by NPGC. NPGC had assailed the impugned award by filing an application under Section 34 of the A&C Act [being OMP (COMM.) 248/2019]. The said application was rejected by the learned Single Judge in terms of the impugned order. The learned Single Judge did not find that the arbitral award was vitiated by patent illegality or was in conflict with the public policy of India. The learned Single Judge also held that the impugned award rested on the findings of facts rendered after appreciation of evidence, and such findings were not amenable to challenge under Section 34 of the A&C Act.

3. The present appeal was listed for the first time before a Co-ordinate Bench of this Court on 20.08.2019 and thereafter on 26.09.2019. After briefly hearing the counsel for NPGC at the said hearing, the Court held that the question regarding the interpretation of clauses of the contract were within the exclusive domain of the Arbitral Tribunal and it was not open for the Court, either under Section 34 or under Section 37 of the A&C Act, to act as the first or second appellate court and re-examine the import and effect of the contractual clauses. The Court held that if the Arbitral Tribunal's interpretation of contractual clauses was a plausible interpretation, the same could not be interfered with. The Court referred to the decision of the Supreme Court

in *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI): (2019) 15 SCC 131* and on the strength of the said decision, upheld the view of the learned Single Judge to the effect that the interpretation of the Arbitral Tribunal of Clause 33.3.0 of the Special Conditions of the Contract was a plausible interpretation and therefore, could not be interfered with in proceedings under Section 34 of the A&C Act.

4. Thus, by an order dated 26.09.2019, NPGC's challenge of the impugned award, inasmuch as it had declined to interfere with the decision of the Arbitral Tribunal to award certain claims raised by AIL, was rejected; the notice in this appeal was confined to NPGC's plea that the Arbitral Tribunal had erroneously rejected its counter-claims as barred by limitation.

5. This Court is informed that NPGC has preferred a Special Leave Petition impugning the order dated 26.09.2019 passed by the Coordinate Bench of this Court, rejecting NPGC's challenge to the impugned award and the impugned order insofar as AIL's claims are concerned.

6. It is agreed that, the only question that requires to be considered by this Court is whether the impugned award, to the extent that it rejects NPGC's counter-claims as barred by limitation, is patently illegal or is it in conflict with the fundamental policy of the Indian law.

Factual Context

7. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

7.1 The disputes between the parties arose in connection with the agreement for “*Site Levelling and Infrastructure Package for Nabinagar Super Thermal Power Project (3 X 660 MW)*” dated 04.07.2011. AIL had submitted its bid for the said contract pursuant to the notice inviting tender issued by NPGC. AIL’s bid was accepted and the same was communicated by NPGC to AIL by a Letter of Award (hereafter ‘**LOA**’) dated 11.05.2011. Subsequently, the parties entered into a formal contract on 04.07.2011, which was effective from the date of the LOA. In terms of the contract, the works were required to be completed within the period of 30 calendar months from the date of the LOA, that is, on or before 10.11.2013. The execution of the contract was delayed. AIL claimed that the delay was attributable to NPGC, however, NPGC disputed the same. NPGC claimed that the progress of the work was very poor and it had sent several communications calling upon AIL to expedite the works; however, AIL had failed to do so. NPGC claimed that in the circumstances, it was constrained to invoke Clauses 41 and 41.1 of the Special Conditions of the Contract to cancel/offload the construction relating to the boundary wall by a letter dated 15.01.2013 as an initial measure. It also put AIL to notice to expedite the improvement of the works within a period of seven days.

7.2 NPGC claims that despite several notices issued thereafter, the pace of the work did not improve. Therefore, NPGC was constrained to issue a notice dated 21.09.2013 threatening cancellation of the contract in question and calling upon AIL to resume the work within a period of seven days. Thereafter, by a notice dated 21.10.2013, NPGC terminated the contract in question and further informed AIL that it would get the work executed through a suitable agency at the risk and cost of AIL. NPGC states that thereafter, a meeting was held between the representatives of the parties on 18.11.2013 for completion of compliances that were required to be done within seven days including joint measurement but AIL failed to give any commitment to complete the same.

7.3 AIL issued a notice dated 29.03.2014 invoking the arbitration agreement and seeking reference of the disputes relating to the contract in question to arbitration. NPGC acknowledged the notice of arbitration by a letter dated 03.05.2014. However, according to NPGC, the parties could not proceed to arbitration immediately until joint measurements and final reconciliation was completed. On 03.06.2014, AIL once again requested NPGC to appoint an arbitrator for adjudication of the subject disputes, however, NPGC did not comply with the said request and it responded by a letter dated 04.07.2014 stating the process of referring the disputes to arbitration would take some more time. Thereafter, AIL issued letters dated 01.08.2016 and 25.08.2016, once again requesting NPGC to appoint a Sole Arbitrator. NPGC claims that, thereafter, the representatives of the parties held a meeting on 18.09.2016 to amicably

resolve the disputes but the same could not be resolved. On 13.02.2017, AIL issued another notice yet again seeking reference of the disputes to arbitration. NPGC did not comply with the said notice and this led AIL to file a petition under Section 11 of the A&C Act before this Court for constitution of the Arbitral Tribunal [APP. No. 215/2017 captioned ***AMR India Limited (Formerly known as AMR Construction Ltd.) v. Nabinagar Power Generating Co. Pvt. Ltd.***].

7.4 By the order dated 24.05.2017 passed by this Court, the Sole Arbitrator was appointed and the Arbitral Tribunal was constituted.

7.5 AIL filed its Statement of Claims before the Arbitral Tribunal on 10.08.2017. NPGC filed its Statement of Defence and the counter-claims on 18.09.2017.

Submissions

8. Ms. Maninder Acharya, learned senior counsel appearing for NPGC, submitted that the impugned award holding that its counter-claims were barred by limitation, is wholly erroneous and the impugned award is liable to be set aside. She referred to the letter dated 04.07.2014 sent in response to AIL's letters seeking reference of the disputes to arbitration. She submitted that NPGC had informed AIL that it was working on all aspects of arbitration proceedings and AIL would be informed after settlement of necessary issues. She emphasised that AIL was informed that an action had been taken to execute the balance work at the risk and cost of AIL and the implications of the same would be informed in due course. She submitted that AIL was put to due notice

of NPGC's claims. She further submitted that various other communications issued by NPGC were without prejudice and reserved the right of NPGC to take further action. She submitted that NPGC had made consistent efforts to resolve the disputes amicably and the last set of joint meetings for resolution of the disputes were held on 18.09.2016 and 21.09.2016. She submitted that NPGC's counter-claim filed on 18.09.2017 was thus clearly within the period of limitation.

9. She refers to the decision of the Supreme Court in ***Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority: (1988) 2 SCC 338*** and ***Geo Miller and Company Private Limited v. Chairman, Rajasthan Vidyut Utpadan Nigam Limited: (2020) 14 SCC 643*** in support of her contention that the period of limitation was required to be computed from the date on which the disputes had crystalized and not from any prior date. She submitted that the disputes would crystalize only on the failure of the parties to amicably resolve the same. She also referred to the decision of the Supreme Court in ***National Highway Authority of India v. Transstroy (India) Limited: 2022 SCC Online SC 832*** in support of her contention that the disputes could not be construed as confined to the claims made by AIL but also encompassed the counter-claims, which arise from NPGC's stand. She contended that since the counter-claims formed a part of the same disputes, the same could not be dismissed as barred by limitation.

Reasons and Conclusions

10. At the outset, it is relevant to briefly note the counter-claims raised by NPGC. The counter-claims filed by NPGC were not placed

on record but a copy of the same was handed over by Ms. Acharya. A perusal of the counter-claims indicates that NPGC had raised eight counter-claims.

11. The first counter-claim was for a sum of ₹38,06,85,717.58/- (Rupees Thirty Eight Crore Six Lakh Eighty Five Thousand Seven Hundred and Seventeen and Fifty Eight paisa only) on account of works executed at the risk and cost of AIL. AIL claimed that it had awarded the balance work of site levelling and infrastructure package to M/s Simplex Infrastructure Ltd. by a Letter of Award dated 05.06.2014 at a contract value of ₹ 62,54,665.90/- against the original contract value of ₹26,20,59,856.70/-. Consequently, it was entitled to ₹36,33,90,809.20/- as being the difference in two values. Similarly, it had awarded the work for construction of a part of the boundary wall to M/s Satyendra Kumar Constructions Pvt. Ltd. in terms of a Letter of Award dated 04.03.2013 at a contract value of ₹1,38,76,475.80/- against the original contract value of ₹89,38,548.50/-. Therefore, it was entitled to ₹49,37,927.30/- on account of difference in the value of the contract as awarded to AIL and as awarded to M/s Satyendra Kumar Constructions Pvt. Ltd. It claimed that the second part of the work of site levelling infrastructure package was awarded to M/s Arcon Project Pvt. Ltd. by a Letter of Award dated 25.01.2014 at a contract value of ₹3,06,15,955.95/- against the original contract value of ₹1,65,64,720.60/-; thus, entitling NPGC to the differential value of ₹1,40,51,235.35/-. In addition, the work of channelling, fencing of steelyard was awarded to M/s Naveen Prasad Singh in terms of a Letter of Award dated 14.06.2014 at a

contract value of ₹34,32,685/- against the original contract value of ₹25,06,525.27/- thus, entitling the NPGC to the differential value of ₹9,26,159.73/-.

12. The aggregate differential amount between the value of the contracts re-awarded to the various agencies at the risk and cost of AIL as mentioned above and the contract value worked out to ₹38,33,06,131.58/-. NPGC claims that it had already recovered a sum of ₹26,20,414/- and therefore, was entitled to the balance amount of ₹38,06,85,717.58/-

13. The second counter-claim was for a sum of ₹4,36,06,897.10/- on account of escalation over and above the risk and cost amount (being the first counter-claim). NPGC claims that it was entitled to an escalation at the rate of 12% of the differential value of the contract as awarded to AIL and as awarded to various other agencies for completion of the work.

14. The third counter-claim related to penal recovery of shortage of reinforcement steel amounting to ₹67,14,548/-. NPGC claims that it issued steel for execution of the works. Whilst some of the quantity of the steel was used but the remaining was kept idle. It alleges that AIL had a callous approach in respect of free issued material resulting in total shortage of 88.716 per MT of steel after accounting for permissible wastage of 3% of the total issued quantity. Thus, it was entitled to recover an amount of ₹67,14,548/- on account of said shortage. The same was computed at the rate of ₹39,200 per MT for shortage/wastage

up to 5% and twice the said rate for the shortage beyond 5%. NPGC's fourth counter-claim was for a sum of ₹4,19,622/-, which was computed on a similar basis for shortage of structural steel.

15. NPGC also claimed a sum of ₹3,77,76,664.70/- as compensation for delay in execution of the work (fifth counter-claim). In addition, NPGC claimed interest during construction computed at ₹3,20,35,078.08/- (sixth counter-claim); charges amounting to ₹3,80,68,571.75/- on account of overhead charges (seventh counter-claim); and litigation cost (eighth counter-claim). Additionally, NPGC also claimed interest at the rate of 14.5% per annum for the pre-reference period from 22.10.2013 till the commencement of the arbitral proceedings on the aforesaid counter-claims; *pendente lite* interest at the rate of 14.5% computed on the value of its claims and 14% future interest from the date of the final award.

16. It is clear from the above that the cause of action for raising the counter-claims had arisen in the year 2013-14. It is NPGC's case that it had repeatedly pursued AIL for increasing the progress of the works and had sent several communications in this regard. However, it alleged that AIL had, despite making commitments, failed to improve its performance and this resulted in NPGC taking the final steps for terminating the contract. This was done by a letter dated 21.09.2013, however, prior to the said notice, NPGC had already removed a part of the contract relating to the construction of a part of the boundary wall, from AIL's scope of work. It is AIL's case that NPGC had terminated the contract illegally and had issued a notice dated 29.03.2014 invoking

the arbitration agreement. Thus, in terms of Section 21 of the A&C Act, the arbitral proceedings commenced on 29.03.2014. A bare perusal of the counter-claims indicates that NPGC had, after termination of the contract, proceeded to award the contract for execution of the balance works to four separate entities – M/s Simplex Infrastructure Ltd. by LOA dated 05.06.2014; M/s Satyendra Kumar Constructions Pvt. Ltd. by LOA dated 04.03.2013; M/s Arcon Project Pvt. Ltd. by LOA dated 25.01.2014 and; M/s Naveen Prasad Singh by LOA dated 14.06.2014. Thus, undeniably, NPGC was aware of its outlay for execution of the balance works on the dates of issuing the LOAs in favour of the said contractors. And, NPGC had claimed the additional amount for execution of the works at the cost and risk of AIL as its first counter-claim. Clearly, the cause of action for this claim had arisen on NPGC terminating the contract with AIL and in any view when it had awarded the balance works to other contractors. This was more than three years prior to NPGC filing its statement of counter-claims on 18.09.2017. The cause of action for NPGC's claim on account of shortage of steel and structural steel had also arisen prior to termination of the contract in question and in any event immediately thereafter. This was at least three years prior to the filing of statement of counter-claims. The claims relating to delay on the part of AIL in executing the works also related to the period prior to termination of the contract.

17. Ms. Acharya's contention that since NPGC, by its letter dated 04.07.2014, had informed AIL that extra cost implication would be informed to it in the course of time, the same extended the period of

limitation for making the claims, is bereft of any merit. Merely informing AIL that NPGC would inform the extra cost subsequently, neither extends the limitation nor defers the cause of action.

18. Merely because NPGC had issued various communications, expressly stating that the same were without prejudice to its rights or further action, did not extend the period of limitation.

19. It is settled law that the Limitation Act, 1963 does not extinguish the obligations but merely the remedies for enforcing the same. Thus, notwithstanding that NPGC had reserved its right to take action, failure to do so within the stipulated time barred its remedy before the Arbitral Tribunal.

20. In *State of Goa v. Praveen Enterprises: (2012) 12 SCC 581*, the Supreme Court had held as under: -

“20. As far as counterclaims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of the Limitation Act, 1963 provides that in regard to a counterclaim in suits, the date on which the counterclaim is made in court shall be deemed to be the date of institution of the counterclaim. As the Limitation Act, 1963 is made applicable to arbitrations, in the case of a counterclaim by a respondent in an arbitral proceeding, the date on which the counterclaim is made before the arbitrator will be the date of “institution” insofar as counterclaim is concerned. There is, therefore, no need to provide a date of “commencement” as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counterclaims. There is however one exception. 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 counterclaim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under Section 11 of the Act, the limitation for such counterclaim 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 counterclaim.”

21. In view of the above, the date of institution of the counter-claims would be reckoned as the date on which the counter-claims are filed. In the present case, the counter-claims were filed on 18.09.2017. It is apparent that the same was after three years had elapsed from the date on which the cause of action for claims had arisen.

22. The decision in the case of *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority* (*supra*) is of little assistance to the appellant in the facts of the present case. In the said case, the Supreme Court had emphasized that the dispute would arise when there is a claim and a denial or repudiation of the claim. In the present case, the principal counter-claim is premised on the assertion that AIL was responsible for delaying in execution of the contract and therefore, was liable to pay the compensation for the same. The dispute in this regard had squarely arisen with AIL contesting the allegation that the delay was attributable to it and seeking reference of the disputes to arbitration.

23. As noted above, it is also NPGC’s claim that it had issued multiple communications and held several meetings with its representative because of poor progress of the work. According to NPGC, despite several opportunities, AIL had failed to take steps for increasing the pace of work. Resultantly, NPGC was constrained to

terminate the contract and award the balance works to other parties. In view of the above, NPGC's contention that the arbitrable disputes had not arisen is clearly unmerited and militates against its own assertions regarding the course of events that had compelled it to take a drastic step of terminating the contract with AIL. It is well settled that negotiation and exchange of communication after the disputes have arisen do not extend the period of limitation. In ***Geo Miller & Co Pvt Ltd v Rajasthan Vidyut Utpadan Nigam Ltd*** (*supra*), the Supreme Court had observed that “*mere correspondence of the appellant by way of writing letters/reminders to the respondent subsequent to this date [date of cause of action] would not extend the time of limitation.*”

24. The contention that the disputes had not crystallized as the parties were in negotiation is unmerited for the reason that the same were not subject matter of negotiation. It is conceded that there is no communication produced on record by NPGC mentioning its counter-claims. Further, it is also not disputed that the said counter-claims were not the subject matter of any negotiation.

25. We find it difficult to accept NPGC's contention that the period of limitation for preferring counter-claims would commence after the negotiations – which were held after the arbitral proceedings had commenced – had failed. The discussions held between the parties on 18.09.2016 or 21.09.2016 were after the arbitral proceedings had commenced by virtue of the notice dated 29.03.2014 issued under Section 21 of A&C Act. Thus, it is obvious that these negotiations were for exploring the possibility of resolving the disputes that had already

arisen. The negotiations were not of a nature, the failure of which would result in an arbitrable dispute; the negotiations were to resolve the then extant arbitrable disputes.

26. The decision in the case of *National Highway Authority of India v. Transstroy (India) Limited* (*supra*) is also of little assistance to the appellant. In that case, NHAI had issued a notice dated 22.07.2016 terminating the contract in question. The contractor had issued a notice dated 02.01.2017 seeking reference of the disputes for amicable settlement in terms of contractual clause to the said effect (clause 26 of the contract in question). The said negotiations had failed and the arbitral tribunal was constituted. The contractor filed a statement of claims on 15.05.2017. NHAI filed a statement of defence on 11.07.2017. Two days later, NHAI filed an application seeking further time to file its counter-claims and thereafter, placed the same on record. The counter-claims raised by NHAI were not entertained on the ground that the said counter-claims had not matured by following the procedure as prescribed under the contract inasmuch as the same were not the subject matter of the pre-arbitration negotiations. In the said context, the Supreme Court explained that there was a difference between claims and disputes. It was not necessary for NHAI to follow the procedure for amicable resolution for its counter-claims as required under clause 26 of the contract since the parties had already attempted to resolve the disputes amicably, albeit, in the context of claims raised by the contractor. The Supreme Court emphasized that ‘dispute’ would not only include claims but also include the stand of the counterparty and

was wider than claims. The Supreme Court accepted NHAI's contention that its counter-claims were a part of the disputes and therefore, it was not required to separately refer them for amicable resolution before referring them to arbitration.

27. In the present case, there is no cavil that the counter-claims also relate to the disputes that had arisen between the parties on termination of the contract. NPGC has been precluded from agitating the same not on the ground that such counter-claims are otherwise not maintainable but because the same were not preferred within the period of three years from the date of cause of action. The decision in the case of *National Highway Authority of India v. Transstroy (India) Limited* (*supra*) is not an authority for the proposition that the period of limitation for filing of the counter-claim is required to be construed in reference to the date of filing of the claims by the claimant.

28. In view of the above, we find no infirmity with the decision of the Arbitral Tribunal in rejecting NPGC's counter-claims as barred by limitation. The learned Single Judge has rightly rejected the petitioner's challenge on the said ground. This appeal is unmerited and is, accordingly, dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

MARCH 20, 2023
Ch