

The appellant could not make sufficient progress with the work. Time had to be extended which was done by the respondents.

The appellant applied to the respondents for extension of time on 20th November, 2003 which was granted on 5th April, 2004 up to 31st May, 2004. In spite of the extended period expiring without completion of the work, the concerned engineer of the respondents asked the appellant to continue the work. Then he went on to demand a higher price for the work to be completed saying that the cost of raw materials had increased. Unless a higher price was paid, it was not possible for him to complete the remainder work.

Now Clause 2 of the agreement between the parties stipulated that if work proportionate to time was not performed the contractor would have to pay damages to the respondents at the rate specified in the agreement. On such terms the work could be proceeded with.

By his letter dated 18th November, 2004 the Executive Engineer, Burdwan High Way Division No.III, PW Roads noted that in spite of extension of time the work “has not yet been proportionately executed”. The letter was a kind of a show cause, asking the appellant to give reason why penal action under clause 2 of the agreement should not be imposed on him. The duration of the agreement was extended till 30th November, 2004.

On 20th November, 2004 the appellant replied to this show cause notice alleging various defaults on the part of the respondents which prevented him from progressing with the work timely. This was followed by a letter dated 24th November, 2004 where the appellant, inter alia, stated that the executive engineer had no power to issue the notice. Such power was vested with the Superintendent Engineer. He also stated that proportionate work had been accomplished by him.

By a decision contained in his letter dated 25th November, 2004 the Superintendent Engineer imposed daily penalty on the appellant under

Clause 2 to be effective from 1st December, 2004. Time to perform the work was extended till 20th December, 2004.

On 16th December, 2004 the appellant submitted a bill claiming Rs.1,26,22,303/- for extra work allegedly done.

Finally, on 22nd December, 2004 the Executive Engineer decided that the appellant had become liable to forfeiture of his entire security deposit. In accordance with its terms at or about the same time, the agreement was also deemed to have been terminated by the respondents.

Then the matter rested for nearly seven years.

On 8th January, 2011 the appellant made the said claim together with claims for certain extra works amounting to Rs.2,31,000/- , Rs.43,37,550/-, Rs.45,000/- and for refund of security deposit of Rs.17,19,432/- thereby commencing arbitral proceedings under Section 21 of the Act. It was stated in the above demand that the bills already raised by the appellant up to the second R.A bill of Rs.79,58,907/- did not include the present demand.

THE AWARD

The claims which were claimed before and awarded by the learned arbitrator related to some extra amounts of work claimed to have been done by the appellant contractor together with refund of his security deposit of Rs.7,95,898/- with the respondents.

The only substantial objection regarding limitation, with regard to the claim of the appellant was also raised before the learned arbitrator by the respondents, dealt with and rejected by him.

The learned arbitrator held that the claim was within the period of limitation.

Now it is to be seen whether on the principles governing scrutiny of an arbitral award by the court, it was liable to be set aside?

This point of limitation has been discussed in the award under the heading “preliminary point” by the learned arbitrator.

The question before him was: when the contract was terminated on 22nd December, 2004, whether the extra claims and refund of security deposit claimed by commencement of arbitration proceedings on 11th May, 2011 were barred by the laws of limitation?

According to the respondents the claims were barred by the laws of limitation.

According to the appellant since the joint final measurement had not been taken or the final bill finalized and approved, time had not begun to run. The right to sue continued throughout. The respondents counter argued that the time to claim any amount had begun to run from the date of completion of the work and was three years from that date. Thus, the claim of the appellant was hopelessly belated and barred.

The reasons given by the learned arbitrator for rejecting the defence based on limitation were as follows:

- a) A show cause notice under Clause 2 of the agreement could only be issued if the contract was subsisting.
- b) The duration of the contract had come to an end. Therefore, no show cause notice could have been issued. Liquidated damages could not have been imposed. Extension of time to perform the contract was unnecessary. The learned arbitrator ruled that since, the action under Clause 2 was invalid the subsequent termination of the contract under Clause 3 was also invalid. The period of limitation did not commence.
- c) The appellant had made representations to the Superintending engineer to withdraw the Clause 2 notice on 15th December, 2004 and 4th April, 2005.

Such representation was not disposed of. As long as the representations remained pending the period of limitation did not commence.

- d) The respondents did not carry out their part of the joint measurement. The R/A bill submitted by the appellant was not approved by them. Hence the period of limitation did not start.

VIEWS:-

The reasons advanced by the learned arbitrator in the award are preposterous and so hopelessly wrong that one does not need a second look to say that the above issue has been most wrongly decided.

What the appellant was claiming was payment for particular bills and for return of the forfeited security deposit. What really mattered was whether the claim was made within the time prescribed by the laws of limitation. Under Article 18 of the schedule to the Limitation Act, 1963 in a works contract, the claim had to be made within three years of completion of the work, when no fixed time for payment has been stipulated. Otherwise under Article 137 the claim had to be made within three years from the time the right to sue accrued.

Suppose the agreement was wrongfully terminated. In that case the agreement would be alive after 22nd December, 2004. According to its terms and conditions, as the work progressed Running Account Bills (R/A bills) were required to be raised by the appellant contractor. These R/A bills represented claims for parts of the work undertaken. Each R/A bill was required to be approved and passed by the respondents after taking “measurement” of the work done, measurement representing the nature extent and value of the work done. As the work progressed, part payments were required to be released as provided in the agreement by the respondents on the basis of the proportion of work done, measured and approved. Whether the agreement was terminated or remained alive had no connection with the raising of and claiming payment of R/A bills, by the contractor. The bills including any claim for extra work had to be raised

within the period of limitation, in other words, within a period of three years from the date of the work done.

The reasoning process of the learned arbitrator, that if termination was unlawful, the period of limitation for raising the bill continued to run was thus totally absurd, unreasonable and patently erroneous to the point of being perverse.

So was his reasoning that wrongful imposition of liquidated damages extended the period of limitation.

If this argument is to be accepted, then a debtor could indefinitely postpone the accrual of a creditor's right to sue for his claim by refusing to attend to the measurement work and not making or approving the final measurement. If, this stipulation is there in any agreement, since it tends to defeat a creditor's claim, it is invalid.

If the work in question was classified under Article 137, the right to sue and the right to claim payment for the work done accrued at the same time on completion of the work and had to be made within three years of completion of the work.

I would like to set out a few paragraphs from **B and T AG vs. Ministry of Defence** reported in (2023) SCC OnLine SC 657.

“66. Mookerjee, J. in *Dwijendra Narain Roy v. Joges Chandra De*, reported in AIR 1924 Cal 600 has explained the true test to determine when a cause of action could be said to have accrued observing as under:

“10....The substance of the matter is that time runs when the cause of action accrues and a cause of action accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed; Coburn v. Colledge [(1897) 1 Q.B. 702]; Gelmani v. Morriggia [(1913) 2 K.B. 549]. The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief: Whalley v. Whalley [(1816) 1 M.R. 436]. The statute does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a

cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result.”

67. “Cause of action” means the whole bundle of material facts, which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit. In delivering the judgment of the Board in *Mussummat Chand Kour v. Partab Singh*, reported in ILR (1889) 16 Cal 98, Lord Watson observed:

“Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff it refers entirely to the grounds set forth in the plaint as the cause of action, or in other words to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour.”

68. Cause of action becomes important for the purposes of calculating the limitation period for bringing an action. It is imperative that a party realises when a cause of action arises. If a party simply delays sending a notice seeking reference under the Act 1996 because they are unclear of when the cause of action arose, the claim can become time-barred even before the party realises the same.

72. Whether any particular facts constitute a cause of action has to be determined with reference to the facts of each case and with reference to, the substance, rather than the form of the action. If an infringement of a right happens at a particular time, the whole cause of action will be said to have arisen then and there. In such a case, it is not open to a party to sit tight and not to file an application for settlement of dispute of his right, which had been infringed, within the time provided by the Limitation Act, and, allow his right to be extinguished by lapse of time, and thereafter, to wait for another cause of action and then file an application under Section 11 of the Act 1996 for establishment of his right which was not then alive, and, which had been long extinguished because, in such a case, such an application would mean an application for revival of a right, which had long been extinguished under the Act 1963 and is, therefore, dead for all purposes. Such proceedings would not be maintainable and would obviously be met by the plea of limitation under Article 137 of the Act 1963.”

Similarly, the right to claim return of security deposit accrued when the agreement was terminated and the deposit forfeited. The said claim was also hopelessly barred.

There was no evidence to prove that any work had been done after submission of the second RA bill. Yet the learned arbitrator ruled that the work was not measured according to the RA bill and the bill was not approved. The said part of the award is based on no evidence.

Equally unreasonable is the reason given by the learned arbitrator to justify the claims by holding that as long as the representation of the appellant to

the respondents with regard to imposition of Clause 2 was not disposed of, the period of limitation did not begin to run.

The above would very plainly show that the reasons given by the learned arbitrator are so unreasonable that no reasonable person would think of advancing reasons of that kind.

The view taken by the learned arbitrator shocks the logical reasoning process of a right thinking person, is blatantly absurd, patently erroneous, illegal and perverse. It is against the substantive law of India with regard to limitation and is thus against the public policy of India and ideas of justice.

IMPUGNED JUDGMENT

Very rightly the learned judge noted in his judgment that under Section 34 of the Act the court was not acting as a court of appeal but could only interfere with an award on extremely limited grounds as laid down by the Supreme Court in the case of **Ssangyong Engineering and Construction Company Ltd vs. National Highway Authority of India** reported in **AIR 2019 SC 5041**.

Primarily the learned judge rejected the claims of the respondent contractor on the ground of limitation. Grant of the same in the award was a patent error on the face of it. He also very rightly observed that the learned arbitrator was guilty of acting on no evidence as there was no supporting document of joint measurement or to show that any work had at all been executed after the payment of the second R.A bill. Therefore, there was no question of finalization of the third R.A bill. The learned judge also observed, most correctly that consideration of a representation by the appellant to the respondents for payment of the third R.A bill did not extend the period of limitation. He also ruled that time to make the claim began from the date of termination of the agreement on 22nd December, 2004. Thus, the claim lodged by the letter dated 11th May, 2011 was absolutely barred by limitation. He concluded by saying that entertaining

and allowing such claim rendered the award perverse shocking the conscience of the court.

On these grounds the award was rightly set aside by the learned judge.

We see no reason to interfere with the impugned judgment and order dated 23rd December, 2021. In fact, it is a most well reasoned judgment and order setting aside the illegal award dated 30th June, 2017.

The appeal is hereby dismissed.

Urgent certified photo copy of this judgment and order if applied for be furnished to the appearing parties on priority basis upon compliance of necessary formalities.

I Agree:-

(Biswaroop Chowdhury, J.)

(I. P. Mukerji, J.)