

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

FAO-CARB-11-2023 (O&M)

Reserved on: 10.01.2024

Pronounced on:13.02.2024

M/s Silicon Constructions Pvt. Ltd

...Appellant

Vs.

Shoppers Stop Limited and others

...Respondents

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA

HON'BLE MS. JUSTICE LAPITA BANERJI

Present:- Mr. Amit Jhanji, Sr. Advocate with
Mr. Sachit Singla, Advocate,
for the appellant.

LAPITA BANERJI, J.

The challenge in the present appeal is a common judgment and order dated December 03, 2022 passed by Additional District Judge, Chandigarh whereby two applications under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”), were dismissed.

2. Two arbitration petitions being Arbitration Petition No.508 of 2016 and Arbitration Petition No.513 of 2016 were preferred by the parties against the arbitral award dated July 3, 2016. The first petition was by the claimants/Shoppers Stop Limited and the second one was by the present appellant/M/s Silicon Constructions Private Limited, the counter claimant with which are concerned. Vide Award dated July 16, 2016, the learned sole arbitrator was of the view that the period of limitation from the date of accrual of the cause of action expired on September 15, 2012 i.e three years after the request for commencement of arbitral proceeding was made. Referring to

Sections 3 and 21 of the 1996 Act and Article 22 of the Schedule-II of the Limitation Act, the learned arbitrator came to the finding that the claims of the claimants in the arbitration proceedings/respondents in the present appeal were barred by the laws on limitation. He also came to the finding that counter claims of the appellant herein were also time barred as they were not lodged before the learned arbitrator within 3 years from the date of accrual. As the date of accrual of cause of action was not specifically stated in the counter claim, the learned arbitrator held that for the purpose of calculation of limitation period, the date of May 14, 2009 could be taken as a reference point as the first letter qua the dispute and *curing* of the defects was given on that day by the claimant. Receipt of the said letter was undisputed and the same was *deemed* to be received by the appellant on May 15, 2009. Since the period for *curing* the defects was ninety days extendable by another 30 days, the learned Arbitrator was of the view that limitation would start to either from May 15, 2009 or at best from September 15, 2009.

3. Brief facts of the case are that the parties entered into an agreement vide Letter of Intent (“hereinafter referred to as “LOI”) dated May 18, 2006. Pursuant to the same, the appellant/counter claimant was to construct a retail store and lease out the same to the claimants. On execution of LOI, the claimant paid a sum of Rs.10 lakhs to the appellant and it was agreed between the parties that a lease deed would be executed. The agreement to lease was executed on August 27, 2007 between the parties whereby the appellant was to grant lease of the premises measuring approximately 2,25,000 square feet carpet area to the claimants. The disputes in the arbitration proceedings relate to and arise out of the said lease agreement. The tenure of the lease agreement was of 24 years commencing from date of expiry of fit-outs period. The claimant made a security deposit of Rs.86,48,756/- on August 22, 2007. It was

clearly stipulated in the said agreement that the lessor shall hand over the possession of the leased premises to the lessee/claimant for carrying out fit-out work latest by January, 2010. Clause 6.01 of the agreement reads as under:

“6.01 Subject to Force Majeure, the Lessor shall hand over possession of the said premises to the Lessee for carrying out its fit-out works latest by January 2010, (time being of the essence) after duly completing the items of work set out “Annexure IV” hereto. The Lessor will give the Lessee 60 days prior notice, in writing, of its intention to hand over possession of the said premises to the Lessee for fit-out works;”

4. The contention of the claimant was that the respondent did not commence construction on the plot at all. Accordingly, on May 14, 2009, the claimant served upon the respondent a **Cure Notice** calling upon the respondent to cure the defects as per Clause 18.01 of the lease agreement. Clause 18.01 of the lease agreement is set out herein after :

“18.01 In the event of a breach of any of the representations made by the Lessor to the Lessee hereinabove and/or it coming to the knowledge of the Lessee that any of the representations by the Lessor hereinabove are incorrect and/or partly incorrect and/or in the event of the Lessor failing to make out a clear and marketable title to the said land and/or the Shopping Mall and/or the said premises this Agreement shall be terminable at the option of the Lessee after giving a cure notice period of 90 days to the Lessor in writing to remedy the said default, failing to rectify such default the Lessee after giving to the Lessor 30 days written notice of the same could terminate this Agreement. In the event of such a termination the Lessor shall be liable to refund and shall forthwith refund to the Lessee all and any sums of money received by the Lessor from the Lessee including Security Deposit and/or any part thereof after adjusting any outstanding recoverable from the Lessee for consumables, utilities, charges, lease rent, outgoings etc. on the date of refund. The Lessor however shall be entitled to terminate the lease Deed only in the event of default by Lessee to pay monthly lease rental for a continuous period of two months or the payment of CAM charges, utility charges etc. for a continuous period of three months by giving 30 days cure notice to the Lessee and the default is not rectified within the cure notice period. If the default is rectified by the Lessee within the cure period, the said notice shall stand withdrawn.”

5. As per the agreement, the appellant/Lessor had 90 days period to cure the breaches and to comply from the date of the *Cure Notice* with the terms and conditions. The *Cure Notice* specified that after a period of 30 days from the expiry of the period of 90 days, the LOI and the lease agreement would stand terminated and the appellant would be bound and liable to refund the security deposit of Rs.96,48,756/- by pay orders/ demand draft in case of said termination. Receipt of the *Cure Notice* dated May 14, 2009 was not denied by the appellant.

6. It was the claimants' contention that since the respondent did not *cure* the defects within 90 days from May 14, 2009, the agreement stood terminated on and from September 14, 2009 (90 days + 30 days). The appellant also failed to refund the security deposit and therefore, the claimants were constrained to send the legal notice dated May 08, 2012 requiring the matter to be referred to the arbitration. In the legal notice the claimant nominated Hon'ble Justice H.S. Bedi (retired) as the sole arbitrator to adjudicate the disputes between the parties since there was no response from the appellant. In 2014, the claimant filed an application under Section 11 (6) of the 1996 Act as there was no response from the appellant. The present learned arbitrator was appointed by the Hon'ble High Court vide order dated 25.04.2014.

7. The Hon'ble the Chief Justice of this Court while appointing learned sole arbitrator vide order dated 25.04.2014 clearly indicated that the issue of limitation whether to be adjudicated as a preliminary one would be decided by the learned arbitrator. The learned arbitrator took up the issue of limitation as a preliminary one because in the event the claims and the counter claims were barred by the limitation, he would not have to delve into or go into the merits of the respective cases of the parties.

8. The learned arbitrator held that the *Cure Notice* dated May 14, 2009 was of significance as for the first time the claimant made a demand for refund of Rs.96,48,756/- vide the said *Cure Notice*, which was the initiation of the dispute. As per the contractual stipulation, a cure period of 90 days was provided and thereafter a further period of 30 days was given to the appellant prior to the termination of the lease agreement. Since the receipt of notice was not denied by the appellant it was presumed by learned arbitrator that it was served upon it on May 15, 2009. He added a period of four months to the said date and held that the date of demand would be on September 15, 2009 if not May 15, 2009 itself for the purpose of computing the period of limitation under Article 22 of the Schedule II of the Limitation Act, 1963. Therefore, he came to the conclusion that the period of limitation would at the latest begin to run from September 15, 2009 and it was within three years from that date the claimants' request for referral of the dispute to arbitration was required to be received by the respondent.

9. Under Section 21 of the 1996 Act, it has been clearly stipulated that arbitral proceedings would commence on the date on which a request for that dispute would be referred to arbitration was received by the respondent.

Section 21 of the 1996 Act is reproduced hereinafter :

“Section 21 Commencement of arbitral proceedings.

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

10. It was contended on behalf of the claimants before the learned Arbitrator that claim has been lodged within the period of limitation i.e within

three years from May 14, 2009 (date of *Cure Notice*) since the legal notice for referral of the dispute to arbitration dated May 8, 2012 was received by the appellant prior to May 14, 2012. The first notice was sent through a courier on May 09, 2012 and was received back with a report “shifted”. The second notice was sent on May 15, 2012 which was received back with a report “no such person at House No.301/9-D”. The third notice was sent through speed post on May 23, 2012 at House No.302, Sector-9 D which was again received by the claimants as “unclaimed”.

11. The learned arbitrator refused to accept the contention of the claimants on the ground that sole witness of the claimants made only a bald statement and the evidence was not sufficient to prove that the counter claimant/appellant herein was actually served or could be *deemed* to be served in the last known place of business, habitual residence or mailing address as per Section 3 (i)(b) of the 1996 Act. Furthermore, it was noticed by him that the claimants did not think it necessary to send the notice by e-mail even after three attempts of serving the appellant failed. Admittedly, the claimant had in its possession the e-mail id of the appellant which was in fact used for correspondence between the parties.

12. Therefore, it was held that the limitation period expired for the claimant on September 15, 2012 after holding that the 1996 Act was a special statute and Section 3 of the 1996 Act, will have an over-riding effect of Section 27 of the General Clauses Act which was a general statute. It was also noticed by the Arbitrator that the counter claim was filed before him for the first time on May 04, 2015 but the respondent in the arbitration proceedings did not mention the date of the accrual of the cause of action or the date on which limitation would start to run in their statement of defence/reply.

Therefore, the learned arbitrator came to the conclusion that the limitation with

regard to counter claim would start on September 15, 2009 and the same was also time barred.

13. The learned Additional District Judge, after recording the findings made by learned arbitrator in the award held that the same was not against the public policy of India nor have the parties been able to establish any of the grounds mentioned in Section 34 of the 1996 Act for setting aside the award. After analyzing the evidence it was found by the learned Arbitrator that the notice of initiation of arbitration proceedings was not received by September 15, 2012 and the Court in Section 34 of the proceedings could not reassess the evidence of the parties like the learned arbitrator nor could the Court substitute the findings of the learned arbitrator. Therefore, both the arbitration petitions were dismissed with costs on December 03, 2022.

14. After a detailed discussion, the learned Additional District Judge refused to interfere with the Award passed by the Arbitrator under Section 34 of the 1996 Act as the Court could not sit in appeal to set aside the same.

15. Mr. Jhanji, learned Senior Advocate, appearing for the appellant argued that the claimant being the lessee had violated clauses IV and VI of the agreement. Clauses IV and VI of the agreement is reproduced herein below:

“IV Pursuant to such request, the Lessor has agreed to grant to the Lessee, lease in respect of premises admeasuring approximately 225,000 square feet carpet area, in the said Shopping Mall (more particularly described in Schedule III hereto and marked in blue coloured boundary line on the Plan annexed hereto and marked Annexure I and hereinafter referred to as “the said premises”);

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VI After the execution of the said LOI, the Lessor has commenced work on the said Shopping Mall in accordance with the appropriate sanctions/approvals. The Government of Punjab, Department of Housing and Urban Development (Housing II Branch) has by and under Letter bearing Memo No.18/94/2006-5HG-II/7398 dated August 11, 2006 granted to the Lessor, a permission for Change of Land Use to Commercial with respect of the said Land subject to the terms and conditions mentioned therein (“the said permission”);”

16. He further contended that the appellant vide letters dated March 7, 2008, April 22, 2008 and August 4, 2008 apprised the claimants about the environmental clearances not being granted despite necessary applications being made on July 7, 2007 still the claimants illegally issued the ***Cure Notice*** dated May 14, 2009 for *curing* the defects within a period of 90 days extendable by a further period of 30 days. The said tactics was adopted by the claimants in order to wriggle out of the lease agreement as a later agreement was executed between the claimant and the management of Elante Mall on October 17, 2011. Being fully aware of the fact that the environment clearance was given on October 22, 2008 still the legal notice was issued on May 14, 2009 arbitrarily and illegally. The appellant never received the purported notices dated May 8 2012, May 15, 2012 and May 23, 2012 and therefore, the question of commencement of limitation from the aforesaid dates did not and could not arise. Since the appellant was apprised of the disputes only in January 2014 when the application under Section 11 of the 1996 Act was filed, therefore, limitation should have been calculated from the aforesaid date. The limitation for the claimant started four months after the notice dated May 14, 2009 but since the claimant failed to take any action for invoking the arbitration proceedings till January 2014, the limitation for the appellant's counter claim could only commence from January, 2014 and not from a prior point in time.

17. The arbitration proceedings before the learned Arbitrator commenced on March 15, 2015 and the appellant made a counter claim before the learned Arbitrator on May 4, 2015 for an award of Rs.84,02,26,556/-. Therefore, the question of counter claim being barred by limitation did not and could not arise. He referred to Order VIII Rule 6 A of the Code of Civil

Procedure, 1908 to argue that like a defendant in the suit, the appellant herein/respondent in the arbitration proceedings had the right to file the counter claim before it filed its defence or before the time stipulated for delivering its defence expired.

18. Since the appellant made a counter claim along with filing of his statement of defence, the learned Arbitrator and the learned Additional District Judge erred in law and misappreciated the facts by holding that the counter claim had been barred by limitation.

19. Next he argued that the impugned Award and the impugned order were in conflict with the Public Policy of India as the learned Sole Arbitrator and the learned Additional District Judge failed to appreciate that the terms and conditions of the lease agreement were not adhered to by the claimants, themselves. Since environmental permission was not received by the appellant within due time it should have been given the protection of *Force Majeure* clause. Reliance was placed on the Hon'ble Apex Court's judgment reported in *2015(3) SCC 49 Associate Builders Vs. Delhi Development Authority* to contend that Public Policy of India as used in Section 34 of 1996 Act should be given a wider meaning.

20. The rejection of the counter claim in the present one was patently illegal was in violation of the Public Policy and as such it should have shocked the conscience of the Court and, therefore, should have been set aside in proceedings under Section 34 of 1996 Act.

21. Learned Senior counsel placed reliance on Apex Court's judgment reported in *2012 (12) SCC 581, State of Goa Vs. M/s Praveen Enterprises* to contend that the counter claim of the appellant need not have been placed in Section 11 proceedings for appointment of the Arbitrator. Even if such claims were not referred to by the Court taking up Section 11

application, the same could be raised for the first time before the learned Arbitrator and Section 11 did not contemplate reference of the disputes by the learned Chief Justice or his designate.

22. The learned Arbitrator should not have refused to entertain the counter claim as it has been filed immediately after commencement of the arbitration proceedings while filing the statement of defence. He has also referred to Apex Court's judgment reported in *Praveen Enterprises (supra)* to bring on record the Apex Court's views that the counter claim has to be decided as an independent cause of action.

23. The learned Senior counsel relied on *Praveen Enterprises (supra)* to contend that under Section 11 of the 1996 Act, the Hon'ble Chief Justice or his designate was only required to appoint learned Arbitrator. Section 11 of the Act does not require him or his designate to identify the disputes or refer them to the Arbitral Tribunal for adjudication. Reference is made to the relevant paragraph of the said judgment

24. The position that emerged from the said case is summed up herein below :

“41. The position emerging from the above discussion may be summed up as follows :

(a) Section 11 of the Act requires the Chief Justice or his designate to either appoint the arbitrator(s) or take necessary measures in accordance with the appointment procedure contained in the arbitration agreement. The Chief Justice or the designate is not required to draw up the list of disputes and refer them to arbitration. The appointment of the Arbitral Tribunal is an implied reference in terms of the arbitration agreement.

(b) Where the arbitration agreement provides for referring all disputes between the parties (whether without any exceptions or subject to exceptions), the arbitrator will have jurisdiction to entertain any counterclaim, even though it was not raised at a stage earlier to the stage of pleadings before the arbitrator.

(c) *Where however the arbitration agreement requires specific disputes to be referred to arbitration and provides that the arbitrator will have the jurisdiction to decide only the disputes so referred, the arbitrator's jurisdiction is controlled by the specific reference and he cannot travel beyond the reference, nor entertain any additional claims or counterclaims which are not part of the disputes specifically referred to arbitration."*

25. However, the finding in paragraph 43 of the said judgment cannot be lost sight off, which is reproduced herein below :

"43. Counterclaim (3) in regard to which Rs.2,94,298 has been awarded by the arbitrator relates to the cost of pipes entrusted by the appellant for carriage from store to site, which were not accounted for by the respondent. It is not shown to be barred by limitation. We find no error in the reasoning of the arbitrator in awarding Rs.2,94,298 under Counterclaim (3). (emphasis supplied)"

26. Therefore, it is clear that the counterclaim of the respondent In ***Praveen Enterprises (supra)*** even though not raised before the Hon'ble Chief Justice in an application under Section 11 of the 1996 Act was allowed only because it was not barred by the laws of limitation.

27. Neither the case of ***Praveen Enterprises (supra)*** nor the case of ***Associate Builders (supra)*** can be relied upon by the appellant for the proposition that the period of limitation in filing the counterclaim would start to run from the date on which request for referring the dispute to arbitration is received by the respondent in the Arbitral proceedings or from the date when the statement of claim is actually filed before the learned Arbitrator.

28. After considering the submissions made by the learned Senior Counsel appearing on behalf of the appellant and materials placed on record, it appears that admittedly the appellant received the ***Cure Notice*** dated May 14, 2009 which the claimant served upon it calling the appellant to *cure* the defects within a period of 90 days which was extendable by a further period of 30 days in terms of the lease agreement. It is also not in dispute that a sum of

Rs.96,48,750/- was paid by the claimant/Lessee to the respondent and could be claimed to be refunded under Clause 18.1 of the agreement. The appellant was required to hand over the possession of the premises to the lessee/claimant for carrying out the fit-out works latest by January 2010. Admittedly, despite getting environment clearance on October 22, 2008 no construction work commenced till the ***Cure Notice*** for curing of defects on May 14, 2009 was served or till the expiry of the period stipulated in the '***Cure Notice***'.

29. It could be safely presumed that at least in May 2009, the appellant was aware of the fact that the respondents/claimants were not willing to continue with the contract beyond 120 days from the date of notice. Despite such knowledge they not only preferred not to pursue their purported substantial claim of Rs.84,02,26,556/- but also strongly opposed the application of the claimant under Section 11 of the 1996 Act by filing a written statement and contending that the claim of the claimants was barred by the limitation. Furthermore, the appellant chose not to respond or oppose the claim of the claimants or whisper about their counter-claim by replying to the '***Cure Notice***'

30. The Hon'ble Chief Justice by an order dated April 25, 2014 appointed Justice H.S.Bedi retired Judge of Supreme Court of India as the sole Arbitrator as proposed by the petitioner and allowed the appellant herein to take the issue of limitation amongst other defences before the learned Arbitrator and gave liberty to learned Arbitrator to decide whether the issue of limitation would be treated as a preliminary one. A review petition was filed from the said order and the same was dismissed as not pressed. Thereafter by consent of the parties, the Hon'ble Justice V.K.Gupta, former Chief Justice of Jharkhand High Court was appointed as the sole Arbitrator by the Hon'ble Acting Chief Justice on January 09, 2015 in Arbitration Case No.16 of 2014.

31. The learned Arbitrator came to the finding that there is no specific averment in the statement of defence/counter claim as to the date when the cause of action for the counter claim arose. Furthermore there was also no dispute with regard to the receipt of the **Cure Notice** dated May 14, 2009 by the appellant. Since there was no specific averment in the statement of defence that for the purpose of calculating the limitation with regard to the counter claims a specific date should be taken and therefore, the date of September 15, 2009 could be taken as a starting point as the appellant herein could not be placed differently compared to the claimant which this Court finds to be a plausible view.

32. If the argument of Mr. Jhanji is accepted then it would have the effect of extending the period of limitation for a defendant in a suit and for a respondent in an arbitration proceeding till such time the period for filing of written statement under the Code of Civil Procedure and the period for filing of statement of defence under the 1996 Act would not expire, even if the plaint was hopelessly barred by limitation and also the counter claim of the defendant-respondent which was an independent cause of action was also barred by limitation. Whenever a plaint would be filed, the limitation for raising the counter claim would automatically be extended as long as the defendant filed a written statement within the period stipulated in the Code, which cannot be the correct proposition of law.

33. In 2023 (2) *ArbiLR 63 titled Super Diamond Tools Vs. K. Mohan Rao*, it has been held that the time to file the counter claim was 3 years from the date of accrual of the cause of action for such claim and even if there was an alleged fraud no claim beyond period of 03 years from the date of knowledge of the alleged fraud could be made. This Court also notices that the appellant after strongly opposing the petition under Section 11 of the 1996 Act

on the ground of limitation sought to raise a substantial claim which otherwise it chose not to pursue since the termination of the contract in 2009. It is a well settled proposition of law that a petitioner should not be allowed to ‘*approve and reprobate*’ or ‘*blow hot and cold*’ at the same time. The beneficial reference is made to *Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.*, (2013) 5 SCC 470. Relevant whereof is reproduced herein below:-

“I. Approbate and reprobate

15. A party cannot be permitted to “blow hot-blow cold”, “fast and loose” or “approve and reprobate”. Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience. [Vide Nagubai Ammal v. B. Shama Rao [AIR 1956 SC 593]

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16. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approve and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppels in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.”

34. The said common law principle has been relied upon in an arbitration matter by the Hon’ble Supreme Court of India reported in 2023 SCC online SC 1378 in *Mumtaz Yarud Dowla Wakf Vs. Badam Balakrishna Hotel Pvt. Ltd. and others* to hold that the conduct of the party assumes significance. In the present case only because the plaintiff had chosen to file a Section 11 application for referral of the disputes of arbitration, the appellant could file the counter claim. From the conduct of the appellant, it becomes clear that it would not have ventured to raise such a plea unless the application

under Section 11 was allowed and the parties were referred to arbitration. Therefore, the said counter claim was in the nature of an afterthought and to suit its convenience.

35. After seriously opposing the Section 11 application, the appellant should not be allowed to ‘*approbate and reprobate*’ by now seeking to allege that the limitation period for filing of the counter claim would start to run from the time stipulated for filing of the counter statement/statement of defence in the 1996 Act as well as in the CPC.

36. The order of the Arbitrator is a well reasoned one, which cannot be held to be against the Public Policy of India or is so perverse that it shocks the conscience of the Court. Therefore, this Court is of the opinion that the learned Additional District Judge justifiedly and correctly refused to interfere with the same and dismissed both the Section 34 petitions.

37. Accordingly, FAO-CARB-11-2023 is **dismissed** without any order as to costs.

(G.S. SANDHAWALIA)
JUDGE

(LAPITA BANERJI)
JUDGE

February 13, 2024
Vandana

Whether speaking/reasoned:	Yes
Whether reportable:	Yes