



2024:DHC:8913-DB



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 20.11.2024

+ **FAO (OS) (COMM) 13/2024**

GILLANDERS ARBUTHNOT AND CO. LIMITED Appellant

versus

**STEEL AUTHORITY OF INDIA LIMITED
& ORS.**

..... Respondents

Advocates who appeared in this case:

For the Appellant : Mr Raj Shekhar Rao, Senior Advocate with
Mr Gaurav Juneja, Mr Arjit Oswal, Mr Soorya
B. and Mr Rajarshi Roy, Advocates.

For the Respondents : Mr Shaiwal Srivastava, Advocate.

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**HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE SACHIN DATTA**

JUDGMENT

VIBHU BAKHRU, J.

1. M/s Gillanders Arbuthnot and Co. Limited (hereafter *GACL*), a company incorporated under the Company Act, 1956 has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning a judgment dated 06.12.2023 (hereafter *the impugned judgment*) delivered by the learned Single Judge in O.M.P.(COMM) 269/2023 captioned *Steel Authority of India Limited v. Beijing Sino Steel Industry and Trade Group Corporation, China and Ors.*, Respondent no.1 (hereafter *SAIL*)



had preferred the said application [O.M.P.(COMM) 269/2023] under Section 34 of the A&C Act for setting aside an arbitral award dated 11.04.2023 (hereafter *the impugned award*) rendered by an Arbitral Tribunal (hereafter *the Arbitral Tribunal*) comprising of three members. The learned Single Judge allowed the said petition and has set aside the impugned award. Aggrieved by the same, GACL has filed the present appeal.

2. The arbitral proceedings were conducted under the Rules of Arbitration of the International Chamber of Commerce (hereafter *the ICC Rules*). The parties had agreed to the place of arbitration as New Delhi. There is no dispute that the A&C Act is applicable in this case and the challenge to the impugned award was maintainable under Section 34 of the A&C Act.

3. The disputes between the parties arise out of an agreement dated 13.10.2007 entered into between SAIL and a consortium of contractors comprising of M/s Beijing Sino Steel Industry and Trade Group Corporation (hereafter respondent no.2 – *SSIT* in short), M/s Tangshan Iron and Steel Design & Research Institute Company Limited, China (respondent no.3 – *TISD* in short) and GACL. The said consortium of contractors is collectively referred to as *the Consortium*. The agreement in question was for executing the work of installation of a Top Pressure Recovery Turbine (TRT) (PKG-18) under 2.5 MT New Stream Expansion at SAIL's IISCO Steel Plant, Burnpur, India. The said agreement is hereafter referred to as the *Contract*.



4. Whilst, SSIT and TISD are companies existing and organized under the laws of China, GACL is an Indian company incorporated under the Companies Act, 1956. SAIL is a Government company incorporated under Section 617A of the Companies Act, 1956.

5. The Contract was for execution of work on a divisible turnkey basis for an aggregate consideration (Contract Price) of USD 6,051,350.00 and ₹14,92,69,000/-.

6. The works under the Contract were to be completed within a period of twenty-four months from the effective date of the Contract, that is, within two years from 13.10.2007. Thus, the Contract was required to be completed on or before 12.10.2009. However, the term of the Contract was extended to 30.11.2012. Undisputedly, the execution of the works under the Contract was delayed. According to SAIL, the Contract was delayed on account of reasons attributable to the Consortium. SAIL claimed that the drawings were finalized as late as 25.08.2008 and there were unilateral changes in the design by SSIT and TISD.

7. SAIL terminated the Contract by a letter dated 29.11.2012, alleging breach of the Contract on the part of the Consortium. SAIL further informed the consortium members (SSIT, TISD and GACL) that the balance works would be completed at their risk and cost by engaging another contractor. Thereafter, on 07.10.2011, SAIL invited tenders for completion of the balance work (referred to as *the Risk Purchase Contract*).



8. SAIL raised a claim for damages. Additionally, it also claimed interest and costs. The parties were unable to resolve their disputes amicably. SAIL made a request for arbitration to the Secretariat of the International Chambers of Commerce (ICC) on 03.12.2018 but the same was abandoned as SAIL did not deposit the necessary costs. On 07.01.2020, SAIL initiated the arbitration proceedings by sending a fresh request to the ICC Secretariat. Thereafter, the Arbitral Tribunal was constituted in accordance with the ICC Rules.

9. SAIL had initially made a claim of ₹17.29 crores in its notice for arbitration and a statement of claim. However, SAIL amended the same to ₹17.02 crores and filed an amended Statement of Claim. In addition, SAIL also claimed interest at the rate of 12% per annum from 29.03.2018 till the date of payment as well as costs for arbitration.

10. GACL and SSIT contested the arbitral proceedings, *inter alia*, on the ground that the same was barred by limitation. SSIT and GACL also raised counter claims. SSIT raised a counter claim of USD 504,600.53 alleging wrongful termination and encashment of the bank guarantees. In addition, SSIT also claimed interest. GACL raised a counter claim aggregating a sum of ₹39,645,424/- on account of wrongful termination of the Contract and wrongful encashment of the bank guarantees amongst others, along with interest and costs.

11. The arbitral proceedings culminated in the impugned award, whereby the Arbitral Tribunal rejected SAIL's claim as being time barred under Section 3 of the Limitation Act, 1963 (hereafter *the*



Limitation Act). The Arbitral Tribunal also awarded costs quantified at ₹1,16,92,032/- in favour of GACL with the direction that the same be paid within a period of fourteen days from the date of the impugned award.

12. SAIL challenged the impugned award under Section 34 of the A&C Act, which was allowed by the impugned order. The learned Single Judge held that the Arbitral Tribunal had committed an error by not recognizing SAIL's right under Clause 44.2.6 of the General Conditions of the Contract (GCC) and also faulted the Arbitral Tribunal for deciding the issue of limitation without conducting a trial. The learned Single Judge held that this was not a case where this issue could have been decided without trial.

13. In the aforesaid facts, the only question to be decided is whether the Arbitral Tribunal's decision that SAIL's claims are barred by limitation, is liable to be interfered with under Section 34 of the A&C Act.

THE IMPUGNED AWARD

14. The Arbitral Tribunal had on the basis of the defence and the counter claims struck several issues. In the first instance, the Arbitral Tribunal considered the question whether SAIL's claims are barred by limitation under the Limitation Act. The said issue was addressed in the affirmative and therefore, the Arbitral Tribunal did not proceed to render its decision on the other issues.



15. Before the Arbitral Tribunal, SAIL accepted that the Limitation Act was applicable. It also, *inter alia*, accepted that Article 55 of the Limitation Act would determine the period of limitation in respect of its claims. There was also no cavil that 07.01.2020 being the date of the notice issued by SAIL, was required to be considered as the date of commencement of the arbitral proceedings for the purposes of the Limitation Act.

16. Before the Arbitral Tribunal, it was contended by SAIL that although the breach of the Contract occurred on the date when the Contract was terminated on 29.11.2012; however, the same could not be considered as the date from which the period of limitation was required to be reckoned. SAIL relied on Clause 44.2.6 of the GCC and contended that the breach was a continuing one and therefore, the limitation would begin to run from the date on which the breach ceases. SAIL claimed that the amount due to it could only be determined after the completion of facilities, that is, after the Risk Purchase Contract was completed. In the alternative, SAIL claimed that limitation would begin to run from 'the breaking point' of negotiations between the parties and thus its claims were within the period of limitation.

17. The Arbitral Tribunal held that SAIL's cause of action accrued on 29.12.2012, when it terminated the Contract. The arbitral proceedings were commenced on 07.01.2020, which was beyond the period of three years from the date of cause of action and therefore, SAIL's claims were barred under Section 3 of the Limitation Act. The relevant extract from the said impugned award is set out below:



“146. It is common ground between SAIL and GAC that Article 55 to the Schedule of the Limitation Act, 1963 determines the limitation period for SAIL’s claims. Article 55 provides a 3-year limitation period from:

- a. When the contract is broken.
- b. Where there are successive breaches – when the breach in respect of which the claim is brought occurs.
- c. Where the breach is continuing – when it ceases.

147. It is also common ground between SAIL and GAC the date of the notice of arbitration (7 January 2020) is the date SAIL commenced action for the purposes of the Limitation Act, 1963.”

18. Insofar as SAIL’s reliance on Clause 44.2.6 of the GCC is concerned, the Arbitral Tribunal held that the same did not extend the period of limitation. The Arbitral Tribunal rejected SAIL’s contention that there was a continuing breach of the Contract. The Arbitral Tribunal held that once the Contract had been terminated, there could be no further breaches of the Contract. The relevant extract of the said decision is set out below:

“152. GCC 44.2.6 does not extend the period of limitation:

- a. Once the contract is terminated there can be no further breaches of the contract and the question of successive or continuing breach cannot arise.
- b. In *Ancient InfraTech* the Delhi High Court held the right to claim for breach was not postponed



by completion of works by an alternate contractor. Retendering of the work at risk and costs does not extend the period of limitation. The period of limitation does not continue while the risk and cost works continues.

c. Likewise, in *KLA Construction* the Delhi High Court held:

i. Retendering the contract and engagement of alternate contractors does not extend the limitation period. Amounts that alternate contractors may charge affect, at best, the quantum of damages or compensation. This does not change the date when the cause of action arose.

ii. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage from the act may continue (approving *Bal Krishna Savalram Pujari v Sh. Dayaneshwar Maharaj Sansthan*, AIR 1959 SC 798).

d. And in *Delta Foundation* the Division Bench of the Kerala High Court held retendering of the work does not extend the period of limitation – this goes against the law on limitation.

e. Further, GC 44.2.6 of the Contract only provides a mechanism for determining the value of the works under the risk purchase contract. It does not specify the date or time when the difference in value of work is to be paid, or any consequence for non-payment. GC 44.2.6 does not give rise to a cause of action independent from SAIL's right to terminate the Contract under CG 44.2.2. The presence or absence of GC 44.2.6 does not distinguish



Ancient InfraTech, KLA Construction or Delta Foundation from this case.

153. For the reasons given above, the limitation period did not start to run from the dates below as SAIL submits:

- a. The date the alternate contractor completed the risk purchase contract (29 March 2018).
- b. A date between 9 November 2017 to 5 January 2018.
- c. 5 May 2018 when SAIL provided the documents on risk purchase to SSIT and GAC.”

SUBMISSIONS

19. Mr. Srivastava, the learned counsel appearing on behalf of SAIL contended that the impugned award was in conflict with public policy of India and therefore, it was rightly set aside by the learned Single Judge.

20. He referred to the decision of the Supreme Court in ***Renusagar Power Co. Ltd. v. General Electric Co.***,¹ and on the strength of the said decision contended that the arbitral award, which is contrary to the fundamental policy of Indian law; the interest of India; or justice and morality would be in conflict of public policy of India and therefore, would be liable to be set aside under Section 34(2)(b)(ii) of the A&C Act. He also referred to the decision in the case of ***Associate Builders v. Delhi Development Authority***², in support of his contention that the

¹ AIR 1994 SC 860

² (2015) 3 SCC 49



expression ‘fundamental policy of India’ has to be construed as explained in the decision in *Renusagar Power Co. Ltd. v. General Electric Co.*¹

21. He relied on the decision of the Supreme Court in *Pundlik Jalam Patil (dead) by LRs v. Executive Engineer, Jalgaon Medium Project and Anr.*³ and drew the attention of this Court to the observations made by the Supreme Court to the effect that the object of fixing time limit for litigation is based on public policy. He also referred to the observations to the effect that a court would bear in mind the public interest parameters while exercising its discretion in dealing with obligations filed under the Limitation Act.

22. Lastly, he contended that the impugned award was contrary to the decision of the Supreme Court in *Indian Oil Corporation Limited v. SPS Engineering Limited*⁴. He submitted that in the said case, the Supreme Court had explained that the cause of action would arise once the risk and cost tender is issued and the amount is crystalized. However, the Court has also clarified that in case where there is a specific clause, which requires the contractor to pay the difference between the amounts, which would have been payable and those that are paid to the alternate contractor, the period of limitation would begin later.

³ (2008) 17 SCC 448

⁴ (2011) 3 SCC 507



23. He submitted that in the present case, the Arbitral Tribunal had erred in not following the ruling of the Supreme Court in *Indian Oil Corporation Limited v. SPS Engineering Limited*⁴ and therefore, the impugned award was rightly set aside.

24. The learned counsel also referred to various dates to establish that the parties were attempting to resolve the disputes amicably and therefore, SAIL had invoked the arbitration within the period of three years of what could be considered as ‘breaking point’ of negotiations between the parties. He also referred to the decision of the Supreme Court in *Geo Miller & Co. Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.*⁵; *Hari Shankar Singhania & Ors. v. Gaur Hari Singhania & Ors.*⁶; *Shri Ram Mills Ltd. v. Utility Premises (P) Ltd.*⁷ in support of his contention. He submitted that the Arbitral Tribunal had not undertaken any exercise to determine the said breaking point. In view of the above, the learned Single Judge has rightly found that the Arbitral Tribunal was required to undertake a trial and had erred in not doing so.

REASONS & CONCLUSIONS

Non-maintainability of Patent illegality exception

25. At the outset it is relevant to note that the impugned award was rendered in an international commercial arbitration. Concededly, the ground of patent illegality under Section 34 (2A) of the A&C Act is not

⁵ (2020) 14 SCC 643

⁶ (2006) 4 SCC 658

⁷ (2007) 4 SCC 599



available to set aside an arbitral award in an international commercial arbitration. Thus, SAIL's challenge to the impugned award on the ground that it is vitiated by patent illegality, was not maintainable.

26. A bare perusal of the grounds as set out in SAIL's application under Section 34 of the A&C Act clearly indicate that SAIL's challenge was founded on the basis that the Arbitral Tribunal had erred in not appreciating the import of Clause 44.2.6 of the GCC. SAIL contends that any disagreement in regard to the compensation as payable would also give rise to a cause of action to invoke the arbitration. According to SAIL, since the Contract specifically provided for computing the quantum of compensation after the amount expended to complete the balance work at the risk and costs of GACL, was determined. And, SAIL had commenced arbitral proceedings within a period of three years of completion of facilities. Therefore, its claim was not barred by Section 3 of the Limitation Act. SAIL also claims that its cause of action was continuing one. Thus, its claims were not barred by limitation. It is contended on behalf of SAIL that the Arbitral Tribunal had erred in relying on the decision of *KLA Construction Technologies Pvt Limited v. Chadha Sugar and Industries Pvt Limited & Anr.*⁸ and the same was inapplicable in the facts of the present case.

SAIL's grounds of challenge

⁸ 2018 SSC OnLine Del 10226



27. It is relevant to refer to the grounds of challenge as set out by SAIL in its application under Section 34 of the A&C Act to set aside the impugned judgment. The same are reproduced below:

“A. Because the Ld. Arbitral Tribunal failed to appreciate that the General Conditions of Contract clause 44.2.6 specifically provided for risk purchase action that may have been undertaken by the petitioner and thereafter, claiming the damage/loss suffered by it to be claimed from the respondents.

B. Because the Ld. Arbitral Tribunal failed to appreciate that Clause 44.2.6 of the General Conditions of Contract was in the nature of a “survival” clause which continued to operate even after termination of the contract and parties agreed to be bound by the same.

C. Because the Ld. Arbitral Tribunal failed to recognize the nature of Clause 44.2.6 of the General Conditions of Contract which obligated the parties to perform further obligations agreed under the contract. Clause 44.2.6 of the general Conditions of Contract read “*The Employer and Contractor shall agree in writing on the compensation described above and the manner in which any sums shall be paid.*”

D. Because the Ld. Arbitral Tribunal failed to appreciate that in case there was a dispute amongst the parties as regards the compensation payable after termination of the Contract, the dispute would still have been referred to the arbitral tribunal constituted under the Contract. Thus, any disagreement upon the compensation would also have been a cause of action for any of the parties to invoke arbitration.

E. Because the Ld. Arbitral Tribunal wrongly held that the cause of action accrued upon termination of contract on 29.12.2012. The Contract specifically provided further obligation of the parties even after termination of the Contract and therefore, the cause of action to invoke arbitration was continuing one.

F. Because the Ld. Arbitral Tribunal wrongly relied upon the matter of *Ancient Infratech (Pvt.) Ltd. vs. National Buildings Construction Corporation Ltd. & Ors.* (2019) 175



DRJ 380 as the facts were clearly distinguishable from the facts of the present matter .

- the above judgment dealt with the Contractor's claims of unpaid invoices wherein, it was held that cause of action for the Contractor to claim for unpaid invoices commenced upon termination of the contract \. The present case is where the Employer's claim of damages /compensation arising out of risk purchase action under Clause 44.2.6 is in question.

- The above judgment did not deal with a case was being adjudicated on the basis of a clause similar to clause 44.2.6 existing in the subject Contract It was in absence of a similar clause as that of Clause 44.2.6 the Hon'ble Court in the above matter held that "*Retendering of the work at risk and cost does not extend the period of limitation. The period of limitation does not continue while the risk and cost works continues.*"

G. Because the Ld. Arbitral tribunal wrongly relied upon the matter of *KLA Construction Technologies Pvt. Ltd. vs. Chadha Sugar and Industries Pvt. Ltd.* 2018 SCC Online Del 10266 for that the facts of the said case nowhere dealt with the issue of limitations where a clause similar to clause 44.2.6 of the subject Contract, existed in the contract.

H. Because the Ld. Arbitral Tribunal wrongly held that "*Once the contract is terminated there can no longer be any completion of work by the contractor as envisaged under the contract*". For that the Ld. Arbitral Tribunal clearly failed to recognize Clause 44.2.6 of the General Conditions of Contract which was also an agreed obligation under the contract between the parties and a breach of which would have given a cause of action to either of the parties to invoke arbitration.

I. Because the Ld. Arbitral Tribunal wrongly held that Clause 44.2.6 does not give rise to a cause of action independent from SAIL's right to terminate the Contract under Clause 44.2.2. For that in case Ld. Tribunal's finding is to be accepted, there would be multiplicity of arbitral proceedings i.e. upon termination; and thereafter, in case, losses cannot be ascertained within three years of termination- upon crystallization of claims once facilities are completed by alternate Contractor.



J. Because the Ld. Arbitral Tribunal wrongly held that “*the presence or absence of GCC 44.2.6 does not distinguish Ancient Infratech, KLA Construction or Delta Foundation from this case*”. For that the matter of *Delta Foundation & Constructions Kochi vs. Kerala State Construction Corporation Ltd.* AIR 2003 Ker 201 clearly referred to the decision of *Bell Alloy Steels (P) Ltd. vs. National Small Industries Corporation Limited* 1980 (1) Legal Serv (Mad) 85 in which the agreement provided a specific clause similar to Clause 44.2.6 and therefore, it was held that “*right to recover loss arises out of the contract and the said right can accrue only on re- sale and not before under such circumstances it was held that the suit was not hit by the law of limitation.*”

K. Because the Ld. Arbitral Tribunal wrongly considered that “*Bell Alloy Steels was a case involving a hire -purchase agreement, which is different in nature from a construction contract*”. For that the hire purchase agreement is also a contract between the parties and cannot be differentiated from construction contract for limitation purposes.

L. Because the Ld. Arbitral Tribunal wrongly held that “*Delta Foundations did not distinguish Bell Alloy Steels on the basis that the case contained an express clause governing contractual relations post termination, and Delta Foundations did not*”. For that the sole reason for referring Bell Alloy Steels case was to show a different fact situation where there existed a specific clause pursuant to which right to sue for loss under the contract accrued.

M. Because the Ld. Arbitral tribunal misconstrued the reference “*we are of the view the decision in the above case is in a different fact situation*” appearing in the case of *Delta Foundations* and applied to distinguish between a hire-purchase agreement and a construction contract . For that the reference was made not to distinguish between a hire-purchase agreement and construction contract but existence and non -existence of a clause similar to that of Clause 44.2.6 of the subject Contract.

N. For that the Ld. Arbitral Tribunal failed to take cognizance of the fact that Final Acceptance Certificate was issued by the petitioner to the alternate contractor only on 29.03.2018 and therefore, the cause of action to recover the



damages under the Contract commenced from 29.03.2018. The Request for Arbitration having been filed on 07.01.2020, the claims were within the limitation period of three years.

O. Because the Ld. Arbitral Tribunal failed to take into account the respondent's own conduct in seeking risk purchase documents from the petitioner so as to give effect to Clause 44.2.6 of the Contract. The Respondents clearly understood that the petitioner had a right to invoke arbitration under Clause 44.2.6 of the Contract.

P. Because the Ld. Arbitral Tribunal also failed to appreciate that upon furnishing all the risk purchase documents to the respondents, the parties were giving effect to Clause 44.2.6 of the Contract and therefore, the petitioner had the right to invoke arbitration.”

28. It is apparent from the above that SAIL had not challenged the impugned award on the ground that it is in conflict with public policy of India. SAIL’s challenge to the impugned award rests mainly on its assertion that the Arbitral Tribunal had erred in accepting that its claims were barred by Section 3 of the Limitation Act.

29. The learned Single Judge had proceeded to discuss SAIL’s challenge on merits without considering whether such a challenge falls within the scope of Section 34(2)(b)(ii) of the A&C Act. In our view, the impugned judgment is liable to be set aside for this reason alone.

SAIL’s Contentions

30. Having stated above, we consider it apposite to consider the contentions advanced on behalf of SAIL, to examine whether the impugned award falls foul of the public policy of India. It is contended on behalf of SAIL that limitation is a matter of public policy and public



interest and therefore, a decision erroneously rejecting claims as barred by limitation, would fall foul of the public policy of India.

31. Mr Srivastava, learned counsel appearing for SAIL stoutly relied upon the decision of the Supreme Court in ***Pundlik Jalam Patil (dead) by LRs v. Executive Engineer, Jalgaon Medium Project & Another***³ in support of the aforesaid contention.

32. He contended that the question as to when the period of limitation would commence in the context of a case where the contract contains a specific provision such as Clause 44.2.6 of the GCC, was explained by the Supreme Court in the case of ***Indian Oil Corporation Limited v. SPS Engineering Limited***⁴. However, the Arbitral Tribunal had erred in not following the said binding judicial precedent.

33. Since, the controversy centres around the question whether SAIL's claim was barred by limitation, it would be necessary to refer to certain relevant dates and events to briefly examine the same.

Material Dates and Events

34. SAIL terminated the Contract by a letter dated on 29.11.2012. The said letter expressly provided as under: -

“iv) Further please be informed that we shall enter upon the site on or after 01.12.12 for causing alternative execution of balance job as per our procedure, rule, practice.

v) After assessment of loss, we shall be entitled to recover cost and damages due to your negligence and failure in due performance of the contract and first by adjusting the amount available, if any, to



your credit and thereafter recovery through due process of law without further reference to you.”

[emphasis added]

35. Thereafter on 13.02.2013, SAIL entered into a ‘Contract Agreement’ with the consortium comprising of M/s. Nicco Corporation Limited (hereafter *NICCO*) and M/s Mitsui Engineering and Shipbuilding Co. Limited with NICCO as the lead member (hereafter the *alternate contractor*). The consideration for completing the works was agreed at 497,000,000 Yen (Four Ninety Seven Million Yen) and ₹27,06,67,000/- (Rupees Twenty Seven Crore Six Lakhs and Sixty Seven Thousand). The subject work was to be completed within the period of eleven months from the effective date, which was fixed as 30.12.2012.

36. Although SAIL had fixed the value to be paid for the balance work, it did not take any immediate steps for making a claim against the Consortium and its members for the differential amount as agreed with the alternate contractor and what would be payable to the Consortium for the balance work, in terms of the Contract.

37. On 26.09.2015, SAIL issued a letter alleging that it had terminated the Contract due to negligence and failure on the part of the Consortium members to perform the Contract. SAIL also informed the Consortium that it had placed a separate order for completing the balance work on the alternate contractor (consortium comprising of NICCO and M/s Mitsui Engineering and Shipbuilding Co. Limited) for



a sum of 497,000,000 Yen and ₹27,06,67,000/-. It also set out the computation of damages / losses incurred for execution of the balance work through the alternate contractor and called upon the Consortium members to pay the differential amount of ₹17.29 Crores.

38. It is apparent from the above that as on 26.09.2015 if not earlier, SAIL had crystalized its demand of losses and had claimed the same. It had also referred to Clause 44.2.6 of the GCC for making the said claim.

39. On receipt of the aforesaid letter dated 26.09.2015, GACL sent a letter dated 29.09.2015 acknowledging the receipt of the said letter. It stated that it would revert back in due course of time and further stated that the claim was not admitted by it. Thereafter, GACL sent a letter dated 15.10.2015, *inter alia*, stating in unambiguous terms that SAIL's claim for ₹17.29 Crores on account of 'risk purchase' is untenable, and is rejected.

40. On 25.07.2016, SAIL sent a letter referring to Article 10 of the Contract, which was set out in the said letter. The same is reproduced as under:-

“Any disputes, differences, whatsoever, arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this Contract shall be settled between the Employer and the Contractor amicably. If however, the Employer and the Contractor are not able to resolve their disputes / differences amicably as aforesaid the said disputes / differences shall be settled by Conciliation, failing which, through Arbitration.”



41. Article 10 of the Contract required the parties to attempt to settle the disputes amicably and if unsuccessful to refer the disputes, to be settled by Conciliation, failing which through arbitration.

42. GACL accepted SAIL's invitation for an amicable resolution of the disputes and sent an email dated 29.07.2016 proposing to conduct the meeting for an amicable settlement at SAIL's office at Burnpur on 03.08.2016. In response to the said communication, SAIL sent an email dated 02.08.2016 asking GACL to come to Burnpur on 03.08.2016 along with the Consortium leader (SSIT) or with its authorisation. GACL responded to the same by stating that it was neither in a position to come along with Consortium leader nor able to secure an authorisation to attend the meeting.

43. Thereafter, on 03.12.2016, SAIL informed GACL about failure of the process of amicable settlement and invoked the Conciliation. It proposed Conciliation proceedings under the rules of the SCOPE Forum of Conciliation and Arbitration and called upon GACL to inform SAIL about its consent for conciliation proceedings latest by 19.12.2016. The penultimate paragraph of the said letter reads as under:

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“Therefore as per the terms and condition of the contract, we hereby invoke the conciliation proceedings under the rules of the SCOPE Forum of Conciliation and Arbitration. You are requested to intimate us your consent to the conciliation proceedings latest by 19.12.2016 positively, failing which it will be treated that the conciliation proceedings has failed and further steps will be taken as per the terms and conditions of the contract for settlement of disputes.



This is without prejudice to the rights and contentions arising out of the subject contract matter.”

44. SSIT responded to the invitation for Conciliation and by a communication dated 14.12.2016 conveyed its consent to attend the conciliation proceedings, but also requested that proceedings for amicable settlement be conducted simultaneously. GACL responded on 16.12.2016 and stated that it was ready to attend the conciliation proceedings with the Consortium leader (SSIT) and called upon the SAIL to decide the time of the meeting. In response to the aforesaid letter, SAIL sent a letter dated 16.02.2017 and called upon the Consortium members to propose a suitable date in the month of March, 2017 for attending the meeting for an amicable settlement. It also stated that if the parties failed to arrive at an amicable settlement, conciliation proceedings would be initiated.

45. Thereafter, on 02.03.2017, SSIT confirmed that it would send its delegation to attend the meeting in the last week of March 2017. SSIT also then sent an email dated 08.03.2017 once again intimating SAIL of its consent to attend the *“conciliation proceedings and requested to make the amicable settlement and conciliation simultaneously”*. Thereafter, a meeting was held between SAIL, SSIT and GACL on 28th to 29th March, 2017. The minutes of the said meeting indicate that the parties could not arrive at any consensus.

46. On 21.07.2017, SAIL sought to initiate the conciliation proceedings and called upon the Consortium member to consent for the



same within thirty days, failing which it would be considered that they had rejected the invitation to Conciliation.

47. GACL sent the communication letter dated 16.08.2017 stating that it was ready and willing for conciliation under the SCOPE Forum of Conciliation and Arbitration. However, SAIL did not take necessary steps to initiate the conciliation proceedings. However, it sent a communication dated 09.11.2017 stating that it had not received the assent from the Consortium members for initiation of the conciliation proceedings and if it did not receive the same, it would be presumed that the conciliation has failed. GACL sent a letter dated 27.11.2017 reiterating that it was ready and willing for conciliation and SSIT may also participate in the proceedings. However, the conciliation proceedings were not commenced.

48. On 03.12.2018, SAIL issued its request for arbitration to the ICC. A copy of such request letter is not filed along with the appeal and it does not appear to have been placed on record. However, it is admitted that SAIL did not pursue the said request.

49. Thereafter, SAIL issued a notice requesting for arbitration on 07.01.2020.

50. It is also relevant to mention that on 18.01.2016, SAIL issued a preliminary acceptance certificate to the consortium led by NICCO (the alternate contractor) and it is not disputed that the plant in question was commissioned on 12.02.2016. SAIL issued the final acceptance certificate to the said alternate contractor on 29.03.2018.



ANALYSIS

51. It is material to note that SAIL does not dispute that the arbitral proceedings commenced on 07.01.2020. This was also conceded by SAIL before the Arbitral Tribunal. It is not disputed that the first request for arbitration was abandoned. Paragraph no.106 of the statement of claim is set out below:-

“106. On 07.01.2020, SAIL filed a Request for Arbitration and the arbitral proceedings commenced on such date.”

52. It is also not in dispute that SAIL’s principal claim was based on breach of the Contract. SAIL had claimed that in view of the breach on the part of the Consortium members and various defaults, it terminated the contract on 29.11.2012. The Arbitral Tribunal noted that SAIL had relied upon Article 55 of the Schedule to the Limitation Act and had agreed that the same would determine the limitation period for its claim. It also agreed that the request for arbitration was lodged with the ICC secretariat on 07.01.2020, and that date should be construed as date on which SAIL commenced its action for the purpose of the limitation.

53. SAIL’s contention that the impugned award is liable to be set aside as the parties were in negotiations and therefore, it was essential for the Arbitral Tribunal to determine the ‘breaking point’, is also unpersuasive. Section 9 of the Limitation Act clearly provides that “once a time is begun to run, no subsequent disability or inability to institute a suit or make an application stops it.” In **B&T AG v. Ministry**



*of Defence*⁹, the Supreme Court had referred to the earlier decision in the case of *Inder Singh Rekhi v. DDA*¹⁰ and noted that a dispute would arise when there is a claim on one side and its denial / repudiation by the other and “*bilateral discussions for an indefinite period of time would not save the situation so far as accrual of cause of action and the right to apply for appointment of an arbitrator is concerned*”.

54. In the present case, SAIL terminated the Contract on account of alleged breach on the part of Consortium. The cause for recovering any damages on account of that breach has thus arisen. As noted above, SAIL thereafter engaged the alternate contractor on 13.02.2013 for completing the balance work at a fixed price. Clearly, the cause for claiming differential amount between the amount that would have been payable to the Consortium for completing the balance work and the amount agreed with the alternate contractor was crystallized. However, SAIL did not make any immediate claim for the differential amount but waited for more than two and a half years to raise the claim in terms of a letter dated 26.09.2015. As noticed above, GACL disputed the said claim by its letter dated 15.10.2015. Even at that stage, SAIL did not take any immediate steps for seeking an amicable resolution of the disputes. Its letter inviting the Consortium for an amicable settlement was issued nine months later, on 25.07.2016. At that stage, SAIL insisted that SSIT should also participate in the meeting or GACL does it with its authorization. The said condition was not satisfied and

⁹ (2024) 5 SCC 358

¹⁰ (1988) 2 SCC 338



therefore, the amicable meeting which is scheduled on 03.08.2016 did not take place. However, four months later SAIL sent a letter informing the Consortium of the failure of the process for an amicable settlement and sought to invoke Conciliation. The communications thereafter indicate that although SSIT and GACL were agreeable to conciliation before the SCOPE Forum of Conciliation and Arbitration; SSIT had also made a request to the effect that talks for an amicable settlement may also be held simultaneously. However, SAIL took a stand that the conciliation proceedings and talks for amicable settlement could not take place simultaneously. Clearly, the said stand on the part of SAIL was *ex facie* untenable as commencement of conciliation proceedings does not preclude the parties from resolving the disputes amicably. On the contrary, conciliation is to facilitate an amicable settlement. The officials of the parties met on 28th and 29th March, 2017 but could not arrive at a settlement. Yet it took SAIL more than four months to inform as to the failure of negotiations for an amicable settlement. SAIL once again sought to invoke Conciliation by its letter dated 21.07.2017. GACL once again accepted to proceed with the conciliation proceedings under SCOPE Forum of Conciliation and Arbitration and, communicated the same by its letter dated 16.08.2017. However, SAIL took no steps to proceed with the Conciliation. Plainly, the few intermittent communications spread over a protracted length of time cannot extend the period of limitation. It is relevant to refer to the



following passages from the decision of the Supreme Court in ***BSNL v. Nortel Networks (India) (P.) Ltd.***¹¹

“15. It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days from issuance of the notice invoking arbitration. In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.

16. The period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognised even under Section 20 of the Arbitration Act, 1940. Reference may be made to the judgment of this Court in *J.C. Budhraja v. Orissa Mining Corpn. Ltd.* [*J.C. Budhraja v. Orissa Mining Corpn. Ltd.*, (2008) 2 SCC 444: (2008) 1 SCC (Civ) 582] wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator. Para 26 of this judgment reads as follows: (SCC p. 460)

¹¹ (2021) 5 SCC 738



“26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4-6-1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Act. Insofar as a petition under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition under Section 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in *Inder Singh Rekhi v. DDA* [*Inder Singh Rekhi v. DDA*, (1988) 2 SCC 338] , *Panchu Gopal Bose v. Port of Calcutta* [*Panchu Gopal Bose v. Port of Calcutta*, (1993) 4 SCC 338] and *Utkal Commercial Corpn. v. Central Coal Fields Ltd.* [*Utkal Commercial Corpn. v. Central Coal Fields Ltd.*, (1999) 2 SCC 571] also make this position clear.”

51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, [*S.S. Rathore v. State of M.P.*, (1989) 4 SCC 582 : 1990 SCC (L&S) 50; *Union of India v. Har Dayal*, (2010) 1 SCC 394; *CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd.*, (2020) 5 SCC 185] or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not



exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that:“where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it.” There must be a clear notice invoking arbitration setting out the “particular dispute” [Section 21 of the Arbitration and Conciliation Act, 1996.] (including claims/amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail.”

55. The impugned award cannot be faulted on the ground that the Arbitral Tribunal has not accepted SAIL’s contention that its right to apply for arbitration is extended on account of negotiations/efforts for conciliation.

56. The learned counsel appearing for SAIL does not dispute that the Arbitral Tribunal had correctly noted the stand of SAIL in the impugned award. Article 55 of the Schedule to the Limitation Act, which prescribes the period of limitation for bringing an action for breach of a contract, is set out below:

	Description of suit	Period of limitation	Time from which period begins to run
55.	For compensation for the breach of any contract, express or implied not herein specifically provided for.	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or



			(where the breach is continuing) when it ceases.
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57. As noted above, SAIL's claim was based on the allegations that the Consortium had broken the Contract and thus, it was required to institute an action within the period of three years from the date of the breach.

58. However, it was contended on behalf of SAIL that the breach was a continuing breach. The said contention is unmerited. Rejection of a demand of damages does not, by any stretch, constitute a continuing breach of the Contract on the part of the Consortium after the same was terminated. Some secondary obligations may survive termination, but the same are not continuing.

59. It is important to note that before the Arbitral Tribunal, it was contended on behalf of SAIL that its cause of action was based on the main Contract on account of the Consortium not completing the Contract within the time, resulting in SAIL terminating the Contract. It was also contended that the period of limitation is required to be computed in terms of Article 55 of the Schedule to the Limitation Act. However, the said period was not required to be computed under the first two limbs but on the basis that there was a continuing breach. The transcript of the proceedings held before the Arbitral Tribunal, which is placed on record indicates that the learned counsel appearing for SAIL had relied on the third limb of Article 55 of the Schedule to the



Limitation Act, which pertains to a continuing breach. The period of limitation in this case is three years from the date on which the said breach ceases. According to SAIL, the breach was a continuing breach. The Arbitral Tribunal has rightly rejected the said contention. This is not a case of continuing wrong. SAIL had terminated the Contract alleging failure on the part of the Consortium to perform the Contract within the stipulated time and in accordance with its terms.

60. In *Balkrishna Savalram Pujari Waghmare & Ors. v. Shree Dhyaneshwar Maharaj Sansthan & Others*¹², the Supreme Court had explained that if the “*wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue*”

61. In view of the above, we find no infirmity with the decision of the Arbitral Tribunal rejecting SAIL’s contention that there was a continuing breach of Contract on the part of the Consortium.

62. We must also note that the learned counsel appearing for SAIL did not seriously pursue the line of argument that there was continuing breach of the Contract on the part of the Consortium, before us.

63. The learned counsel rested SAIL’s case mainly on the interpretation of Clause 44.2.6 of the GCC and the decision of the Supreme Court in *Indian Oil Corporation Limited v. SPS Engineering Limited*⁴. In this case, the designate of the Chief Justice of this Court

¹² 1959 SCC OnLine SC 68



had rejected the petition filed by Indian Oil Corporation Limited (hereafter *IOCL*) under Section 11 of the A&C Act praying for the appointment of an arbitrator, *inter alia*, on the ground that its claim was barred by limitation and *res judicata*. The designate of the Chief Justice found that “*once a risk cost tender is issued at the risk and cost of a person, then, the amount which is to be claimed from the person who is guilty of breach becomes crystalized when the risk purchase tender at an higher cost is awarded.*” After reproducing the said finding, the Supreme Court observed as under: -

“24. This may be true a general proposition. But it may not apply if there is a specific provision in the contract (like Clause 7.0.9.0) which requires that the employer should claim as extra cost, only the difference between the “amounts as would have been payable to the contractor in respect of the work” and “the amount actually expended by the owner for completion of the entire work.”

64. According to SAIL, this observation authoritatively holds that in view of the contractual clause in that case (clause 7.0.9.0.), the period of the limitation would run from the date when the actual amount expended by the owner (IOCL in that case) in completion of the entire balance work is determined. Undisputedly, the Supreme Court had doubted the findings of the High Court, given the language of the contractual clause in that case. However, the issue as to when does a cause of action arises is fact centric and would necessarily require to be viewed in the context of the facts of each case.



65. It is necessary to note that in the case of ***Indian Oil Corporation Limited v. SPS Engineering Limited***⁴, IOCL had made a claim for risk and cost before the Arbitral Tribunal and the same was rejected on the ground that it was premature. IOCL thus, claimed that it was entitled to re-agitate the issue of ‘risk and cost’ in the arbitral proceedings after the amounts have been paid. However, the designate of the Chief Justice rejected the IOCL’s application under Section 11(6) of the A&C Act. The designate of the Chief Justice held that the amount, which can be claimed from a person who is guilty of breach of contract becomes crystalized when the contract for completion of the balance work at his risk and costs, is awarded. It is in the aforesaid context that the Supreme Court had observed that in a case where a contract specifically provides for adjustment to be made on the basis of amount actually expended, the amount would be crystallized once the amounts are spent. The decision in the case of ***Indian Oil Corporation Limited v. SPS Engineering Limited***⁴ – which is the main foundation of the arguments advanced for assailing the impugned award – is not applicable in the facts of the present case for several reasons.

66. First of all, the clause in question in the present case, Clause 44.2.6 of the GCC, is not similarly worded as the clause which was referred to by the Supreme Court in ***Indian Oil Corporation Limited v. SPS Engineering Limited***⁴. Clause 44.2.6 of the GCC states that “*the cost of completing the Facilities by the Employer shall be determined.*” It does not use the expression “the amount actually expended by the owner for completion of the entire work”. The expression “actually



expended” would necessarily require the amount to be expended before the same can be determined. But “*the cost of completing the Facilities*” can be determined when the fixed price contract for the completion of facilities is awarded. In the former case, unless the amount is actually expended no demand for the ascertained sum can be made.

67. Secondly, in the present case, SAIL had, in fact, made a claim of damages under Clause 44.2.6 of the GCC, in terms of the letter dated 26.09.2015 for an amount of ₹17.29 Crores, which it claimed that it had incurred for execution of the balance job. However, in ***Indian Oil Corporation Limited v. SPS Engineering Limited⁴***, the first arbitral tribunal, had rejected the claim as premature. Thus, IOCL was constrained to invoke arbitration once again for agitating its claim.

68. We also consider it relevant to refer to the relevant extract of the said letter dated 26.09.2015 setting out the tabular statement for computing the said losses incurred and the demand made in this regard. The same is reproduced below: -

Sl. No	Description	Rate of PE	Value	INR(Cr.)	Eqv. INR(Cr)
1.	Original contract value of Pkg-18		6051350 USD	14.92	...
2.	Amount already paid to the contractors against Pkg-18		601340 USD	10.24	...
3.	Balance amount available against Pkg-18(1-2)	USD @61.64 as on 06.12.13	5450010 USD	4.68	38.27
4.	Encashment of BG for TRT (18) (15.12.12)	USD @ 54.225 as on	302568 USD	0.746	2.387



		15.12.12			
5.	Total amount from Pkg-18 in lieu of Encashment of BG already done and non-payment of balance contract value (3+4).		...	...	40.66
6.	Order value of balance job for Top Pressure Recovery Turbine (Package No.18R-01)	YEN @ 0.6213 as on base date	497000000 YEN	27.067	57.95
7.	Extra cost to ISP for completing the project (i.e., Damages/ Losses to be recovered) (6-5)		...	...	17.29

As per clause 44.2.6 of GCC of the contract, you are requested to pay ISP, the excess amount of Rs.17.29 Crore **incurred** for execution of the balance job for completion of the project.”

[emphasis added]

69. It is material to note that SAIL had made its claim for an ascertained sum, specifically referring to Clause 44.2.6 of the GCC. Since, SAIL had made such claim on 26.09.2015, it is not open for the SAIL to now contend that it could not have done so and its right to claim damages would arise only on completion of the project. It is material to note that the Statement of Claims filed by SAIL was also for a sum of ₹17.29 Crore and on the basis as specified in the aforementioned letter dated 26.09.2015. Subsequently, during the course of arbitration proceedings, SAIL amended its claim to ₹17.02 Crores, by filing an amended Statement of Claims.



70. It is also necessary to ascertain the date on which the dispute arises for considering whether an action which is founded on the said dispute, is barred by limitation. It is thus necessary to note GACL's response to SAIL's notice of demand dated 26.09.2015. Immediately on receipt of the said demand, GACL issued a letter dated 29.09.2015 stating that it would revert back in due course of time. However, it also stated that "*needless to add that your claim is not being admitted by us*".

71. Thereafter, on 15.10.2015, GACL sent a letter rejecting the SAIL's claims in its entirety. It asserted that no claim could be made on account of risk and costs on GACL as it could not be held responsible for any default on the part of other members of the Consortium. GACL also asserted that if SAIL was to take a view that all Consortium members were jointly and severally liable for completion of the Contract, the same would not be tenable as GACL could not be entitled to take advantage of its own wrong / default. GACL claimed that when SSIT was found to be defaulting, it had on several occasions called upon SAIL to permit it to take over SSIT's portion of the Contract for completing the same, however, SAIL had not responded to its communications. SAIL had not made any attempt to find a mutually agreeable solution. Without prejudice to all its contentions, GACL also claimed that SAIL could not claim any damages as it had not undertaken reasonable steps for mitigating all such damages or losses. More importantly, GACL pointed out that Clause 44.2.6 of the GCC required the parties to agree on the computation of the amount payable/receivable by the Contractor in case the balance works were completed



at the risk and cost of the Consortium. However, no such agreement was arrived at. In that context, GACL also demanded copies of the contract entered into with the alternate contractor and the copy of the approved billing schedule. It also sought the confirmation that the Contract had been performed and the payments had been made.

72. It is not necessary to examine the merits of the contentions and the grounds on which GACL had rejected the claim made by SAIL. The important point to note is that GACL had in unambiguous terms disputed SAIL's right to claim any damages from GACL. The dispute between SAIL and GACL had clearly arisen on that date if not earlier. SAIL's contention that its cause of action to file a claim had not arisen till the completion of the facilities is thus unmerited.

73. It is also relevant to note the last sentence of Clause 44.2.6 of the GCC which reads as "*The Employer and Contractor shall agree in writing, on the computation described above and the manner in which any sums shall be paid.*"

74. The parties had arrived at no such agreement. On the contrary, GACL outrightly rejected the claim made by SAIL in its letter dated 26.09.2015. GACL had also called upon SAIL to furnish certain documents in confirmation that the Contract had been completed by the alternate contractor. However, it is clarified that the said demand was without prejudice to its assertion that SAIL had no right to claim any loss on account of risk and costs. Thus, the cause of action premised on any failure on the part of GACL to perform its obligations in terms of



Clause 44.2.6 of the GCC had arisen on the date, that is on 26.09.2015, when GACL had in unambiguous terms rejected SAIL's demand in this regard. Thus, breach of this secondary obligation, if any, also occurred on 29.09.2015

75. It is material to note that SAIL had not premised its request for arbitration in its initial statement of claim on the basis that it had paid the consideration.

76. As observed earlier, we find the Arbitral Tribunal's conclusion that there was no continuing wrong and therefore third limb of Article 55 of the Limitation Act did not apply cannot be faulted.

77. The Arbitral Tribunal also relied upon the decision of this Court in the case of *Ancient InfraTech (Pvt) Ltd. v. National Buildings Construction Corporation Ltd & Ors.*¹³; *KLA Construction Technology Pvt Ltd v. Chadha Sugar and Industries Pvt Ltd*⁸; as well as Kerala High Court in *Delta Foundation and Construction, Kochi & Ors. v. Kerala State Construction, Corporation Ltd, Ernakulum*¹⁴ and concluded that SAIL's claim was barred by limitation as it was beyond the period of three years from the date when the Contract was broken. The said date was construed as the date on which SAIL had terminated the Contract –29.11.2012.

78. The Arbitral Tribunal further reasoned that Clause 44.2.6 of the GCC concerns the quantification of damages and not the cause of action for claiming the same. This view clearly finds support from the decision

¹³ 2019 SCC OnLine Del 8153

¹⁴ AIR 2003 Kerala 201



of the Single Bench of this Court in *KLA Construction Technologies Pvt Limited v. Chadha Sugar and Industries Pvt Limited*⁸. In the said case, the Court held that engagement of a new contractor for completing the contract cannot logically extend the limitation period. The Court had held that the conduct of the parties after the termination of the contract is purely within their own discretion. As to when the balance work is to be awarded to the third party contractor or the manner in which it is to be completed is at the discretion of the concerned party. Thus, the engagement of a new contractor for completion of the contract does not extend the limitation period.

79. The said view is clearly a plausible view, if not the correct view.

80. At this stage, it is also relevant to note the alternate interpretation of Clause 44.2.6 of the GCC as advanced on behalf of GACL. Mr Rao, the learned counsel appearing on GACL had also contended that Clause 44.2.6 of the GCC was inapplicable and reliance on Clause 44.2.6 of the GCC was misplaced. According to him, the said clause only contemplates a case where SAIL (referred as Employer) would complete the facilities on its own. He also referred to Clause 44.2.4 and 44.2.5 of the GCC and submitted that same were required to be read conjointly. Clause 44.2.4, 44.2.5 and 44.2.6 of the GCC are set out below: -

“44.2.4

The Employer may enter upon the Site, expel the Contractor, and complete the Facilities itself or by employing any third party at the risk and cost of the Contractor. The Employer may, to the exclusion of any right of the Contractor over the same, take over



and use any Contractor's Equipment owned by the Contractor and on the Site in connection with the Facilities for such reasonable period as the Employer considers expedient for the supply and installation of the Facilities.

Upon completion of the Facilities or at such earlier date as the Employer thinks appropriate, the Employer shall give notice to the Contractor that such Contractor's Equipment will be returned to the Contractor at or near the Site and shall return such Contractor's Equipment to the Contractor in accordance with such notice. The Contractor shall thereafter without delay and at its cost remove or arrange removal of the same from the Site

44.2.5

Subject to **Sub-Clause 44.2.6** hereto the Contractor shall be entitled to be paid the Price attributable to the Part of the Facilities, executed as at the gate of termination, and the costs, if any, incurred in protecting the Facilities and in leaving the Site in a clean and safe condition pursuant to paragraph (a) of **Sub-Clause 44.2.3 hereof** and rent of the Contractor's equipment, if any, used by the Employer pursuant to **Clause 44.2.5** hereof. Any sums due to the Employer from the Contractor accruing prior to the date of termination shall be deducted from the amount to be paid to the Contractor under this Contract

44.2.6

If the Employer completes the Facilities, the cost of completing the Facilities by the Employer shall be determined.

If the sum that the Contractor is entitled to be paid, pursuant to **Sub-Clause 44.2.5** hereof, plus the reasonable costs incurred by the Employer in



completing the Facilities, exceeds the Contract Price, the Contractor shall be liable for such excess.

If such excess is greater than the sums due to the Contractor under **Sub-Clause 44.2.5** hereof the Contractor shall pay the balance to the Employer, and if such excess is less than the sums due the Contractor under **Sub-Clause 44.2.5** hereof, the Employer shall pay the balance to the Contractor.

The Employer and Contractor shall agree, in writing, on the computation described above and the manner in which any sums shall be paid.”

81. Mr Rao, submitted that the opening line of Clause 44.2.4 of the GCC indicates that in the event of termination of the Contract on account of the default on the part of the Contractor, the Employer shall be entitled to enter the site and complete the work itself or by employing a third party at the risk and cost of the Contractor. He submitted that where the work is contracted to a third party (an alternate contractor) at the risk and cost of the Contractor, the Contractor would be liable to pay the amount on the basis of the agreement of the Employer with the third party contractor. However, in the event that the Employer completed the facilities on its own, it would be necessary to undertake the exercise and determine the cost incurred by the Employer. He submitted that Clause 44.2.6 of the GCC seeks to address a situation where the Employer completes the facilities on its own.

82. The aforesaid contention is not insubstantial. In a case where the contract is awarded to a third party at the risk and cost of the contractor, it may not be necessary to determine the actual cost incurred. This is because the contractor would not be liable for a cost overrun or an



additional expenditure that may result on account of the alternate contractor in not performing the contract. In the present case, SAIL had engaged the alternate contractor (consortium led by NICCO) to complete the balance work in eleven months. However, the plant was commissioned on 12.02.2016. The final acceptance certificate was issued subsequently on 29.03.2018. It is perhaps for this reason, that SAIL had crystallised its claim after entering into the contract with the consortium led by NICCO, without waiting for the plant to be commissioned. It is not necessary for this Court to examine the aforesaid alternate interpretation of Clause 44.2.6 of the GCC in any further details. This is because the Arbitral Tribunal had not proceeded on the basis of the aforesaid interpretation. And, it is impermissible for this Court to re-adjudicate the disputes between the parties and supplement its opinion in place of the Arbitral Tribunal. The scope of the examination in the proceedings under Section 34/37 of the A&C Act are limited to examining whether the arbitral award is required to be set aside on the grounds as set out under Section 34 of the A&C Act.

83. The Arbitral Tribunal examined the admitted facts and also construed the contractual clauses relied upon by SAIL. The findings of the Arbitral Tribunal cannot be assailed on the ground of offending public policy by reappreciation of the material and re-adjudicating the disputes merely because the dispute also involves interpretation of a statutory provision, which find its rationale in matters of public interest.

84. Undeniably, the provisions of the Limitation Act are in furtherance of public interest. It is in the public interest to put a quietus



to old disputes, which have not been actioned for a considerable period of time. The principle to foreclose remedies for stale disputes is a matter of public policy. Thus, even in cases where the Limitation Act does not apply, the Courts have held that the steps are to be taken within the reasonable period¹⁵. However, it would be erroneous to proceed on the basis that the decisions of the Arbitral Tribunal are required to be re-adjudicated on merits to ascertain whether the view of the Arbitral Tribunal is incorrect on the assumption that an incorrect view would fall within the public policy exception.

85. There is no scope for re-adjudicating or undertaking a merits review of the disputes that are subject matter of arbitration. This is because the Arbitral Tribunal is the sole adjudicator of the disputes between the parties, which are covered under an arbitration agreement.

86. The scope of examination under the public policy exception is very narrow. It is only in cases where the arbitral award shocks the conscience of the Court or offend the most basic notions of justice and morality that an arbitral award can be impeached as being in conflict with the public policy of India. The said exception would also apply in cases where the arbitral award is obtained by fraud or by means of corruption. In *OPG Power Generation Pvt. Ltd. v. Enxio Power Cooling Solutions India Pvt. Ltd.*¹⁶, the Supreme Court had observed as under: -

¹⁵ State of Punjab & Ors. v. Bhatinda District Cooperative Milk Producers Union Ltd.: (2007) 11 SCC 363

¹⁶ 2024 SCC OnLine SC 2600



“52. The legal position which emerges from the aforesaid discussion is that after the ‘2015 amendments’ in Section 34 (2)(b)(ii) and Section 48(2)(b) of the 1996 Act, the phrase “in conflict with the public policy of India” must be accorded a restricted meaning in terms of *Explanation 1*. The expression “in contravention with the fundamental policy of Indian law” by use of the word ‘fundamental’ before the phrase ‘policy of Indian law’ makes the expression narrower in its application than the phrase “in contravention with the policy of Indian law”, which means mere contravention of law is not enough to make an award vulnerable. To bring the contravention within the fold of fundamental policy of Indian law, the award must contravene all or any of such fundamental principles that provide a basis for administration of justice and enforcement of law in this country. Without intending to exhaustively enumerate instances of such contravention, by way of illustration, it could be said that (a) violation of the principles of natural justice; (b) disregarding orders of superior courts in India or the binding effect of the judgment of a superior court; and (c) violating law of India linked to public good or public interest, are considered contravention of the fundamental policy of Indian law. However, “while assessing whether there has been a contravention of the fundamental policy of Indian law, the extent of judicial scrutiny must not exceed the limit as set out in *Explanation 2* to Section 34(2)(b)(ii).”

[emphasis added]

87. The scope of violation of laws linked to the public interest or public good has to be construed narrowly. This ground cannot be conflated with an erroneous interpretation of an enactment. The threshold for applying this ground is very high. It is only in the cases where the court concludes that the arbitral award militates against the public interest or public good that this expression can be invoked. This is apparent from the scope of the public policy ground as explained by



the Supreme Court in *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Others*¹⁷.

88. Clearly, a contentious issue as to whether the claim falls within the limitation period or is stale, is not a matter that would warrant a merits review of an arbitral award, on the ground of conflict with the public policy of India. It is impermissible for this Court to undertake a merit review of arbitral award in proceedings under Sections 34 and 37 of the A&C Act. It is relevant to refer to Explanation 2 to Section 34(2)(b)(ii) of the A&C Act, which reads as under: -

“34. Application for setting aside arbitral award.–

(1) ***

(2) ***

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.”

89. The aforesaid explanation amply clarifies that a merit review of the arbitral award to examine a challenge on the ground of public policy is impermissible and the courts must refrain from doing so. This was reiterated by the Supreme Court in *OPG Power Generation Pvt. Ltd. v. Enexio Power Cooling Solutions India Pvt. Ltd.*¹⁶, as noted above.

90. In the present case, SAIL invites this Court to examine the question whether its claims are barred by limitation on merits to press home its challenge to the impugned award, which is impermissible. The aforesaid analysis only highlights that the Arbitral Tribunal had taken a

¹⁷ (2020) 11 SCC 1



view regarding a disputed question on merits. The Arbitral Tribunal had also construed the contractual clause – Clause 44.2.6 of the GCC – on which SAIL’s contention that its claims are not barred by limitation is founded. The Arbitral Tribunal’s interpretation is a plausible one. However, even if it is accepted – which we do not – that the Arbitral Tribunal’s view is perverse, the impugned award cannot be set aside. This is because perversity in a case such as this, is a facet of patent illegality and an arbitral award in an international arbitration cannot be set aside on this ground.

91. As noted above, in the present case, we find that the Arbitral Tribunal’s view that the period of limitation for compensation for breach of contract would run from the date on which it is broken cannot be interfered with. In *ONGC Ltd. v. Western Geco International Ltd*¹⁸, the Supreme Court held that perversity was a ground to set aside an arbitral award. The Court held that the Wednesbury principle - that no reasonable person could have possibly arrived at the said conclusion - as applicable for examining whether an arbitral award could be set aside on the ground of perversity. The said decision prompted the Chairman of the Law Commission of India to send a communication to supplement the 246th Report of the Law Commission, which is the basis for enabling the Arbitration and Conciliation (Amendment) Act, 2015. Explanation to Section 34(2)(b) (ii) of the A&C Act was substituted to expressly provide for the examination whether the award is in conflict with the fundamental policy of India, would not entail a merits review.

¹⁸ (2014) 9 SCC 263



Thus, the decision of the Supreme Court in *ONGC Ltd. v. Western Geco International Ltd*¹⁸ was statutorily diluted in this aforesaid regard. This is also noted by the Supreme Court in the decision of *HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited*¹⁹ and subsequently in the case of *Associate Builders v. Delhi Development Authority*².

92. Explanation I to Section 34(2) of the A&C Act abundantly clarify that an award would be in conflict with public policy of India –(i) if the award is induced or effected by fraud or corruption or is in violation of the Section 75 or 81 of the A&C Act; (ii) is in contravention with the fundamental policy of Indian law; and (iii) is in conflict with most basic notions of morality or justice.

93. In *Ssangyong Engineering and Construction Co. Ltd. v. National Highways Authority of India*²⁰, the Supreme Court explained the scope of the expression “fundamental policy of Indian law”. The Court held that this would necessarily have to be understood as explained in *Renusagar Power Co. Ltd. v. General Electric Company*¹ and as explained in paragraphs 18 and 27 of the judgment in the case of *Associate Builders v. Delhi Development Authority*². We also consider it apposite to refer to the following extracts from the said decision:

“34. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of *Associate Builders* [Associate

¹⁹ (2018) 12 SCC 471

²⁰ (2019) 15 SCC 131



Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to “Renusagar” understanding of this expression. This would necessarily mean that *Western Geco* [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, *Western Geco* [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as explained in paras 28 and 29 of *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, **the Court's intervention would be on the merits of the award, which cannot be permitted post amendment.** However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204].

39. To elucidate, para 42.1 of *Associate Builders* [Associate Builders v. DDA, (2015) 3 SCC 49:(2015) 2 SCC (Civ) 204] , namely, **a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 204]** , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.



41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders*, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. **Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.** Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.

69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent “errors of jurisdiction”, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as “disputes” within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. **If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of “patent illegality”, which, as we have seen would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996**



Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal”.

76. However, when it comes to the public policy of India argument based upon “most basic notions of justice”, it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. ... However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.”

[emphasis added]

94. The decision in the case of *Renusagar Power Co. Ltd. v. General Electric Company*¹ was rendered in the context of enforcement of the foreign award under Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961. In terms of the said provision a foreign award may not be enforced if it was held that it was contrary to the public policy. The Supreme Court held that an award



would be contrary to the public policy, if it is contrary to; (i) the fundamental policy of Indian law; (ii) the interest of India, and (iii) justice or morality.

95. The A&C Act was extensively amended by virtue of the Arbitration & Conciliation (Amendment) Act, 2015, pursuant to the 246th Report of the Law Commission of India. The said amendment included introduction of Explanation 2 to Section 48 of the A&C Act, which clarify the question whether there was any contravention of a fundamental policy of Indian Law would not entail a review on the merits of the dispute. A similar explanation was also added to Section 34(2)(b) of the A&C Act, which expressly clarifies that the question ‘whether there is a contravention with the fundamental policy of Indian Law shall not entail a review on the merits of the dispute.

96. More importantly, Sub-Section 2A was introduced in Section 34 of the A&C Act, which would be applicable to the arbitral awards other than those resulting from international commercial arbitration. All awards other than those emanating from international commercial arbitration would be liable to be set aside on the ground of patent illegality, if the award is vitiated by patent illegality appearing on the face of the award. However, an award rendered in international commercial arbitration would not be amenable to challenge on the ground of patent illegality. With the said assignment, explanation of the public policy of India as set out in Section 34(2)(b) of the A&C Act aligned with meaning of the said expression as used under Section 48 of the A&C Act.



97. We also consider it apposite to refer to the decision of the Supreme Court in *Vijay Karia & Others v. Prysmian Cavi E Sistemi SRL & Others*¹⁷ which further clarifies the scope of the public policy exception. The Supreme Court had referred to the decision of the Singapore High Court in *Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co. (Pte) Ltd.*, which had construed the public policy exception, very narrowly. It was relevant to note the following passages from the said decision: -

“42. At this stage it is important to advert to amendments that were made by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as “the 2015 Amendment Act”). Section 48 was amended to delete the ground of “contrary to the interest of India”. **Also, what was important was to reiterate the *Renusagar* position, that 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 [vide Explanation 2 to Section 48(2)].**

43. It will be noticed that in the context of challenge to domestic awards, Section 34 of the Arbitration Act differentiates between international commercial arbitrations held in India and other arbitrations held in India. So far as “the public policy of India” ground is concerned, both Sections 34 and 48 are now identical, so that in an international commercial arbitration conducted in India, the ground of challenge relating to “public policy of India” would be the same as the ground of resisting enforcement of a foreign award in India. Why it is important to advert to this feature of the 2015 Amendment Act is that all grounds relating to patent illegality appearing on the face of the award are outside the scope of interference with international commercial arbitration awards made in India and foreign awards whose enforcement is resisted in India. In this respect, it is



important to advert to paras 41 and 69 of *Ssangyong* as follows:

“41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders*, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

* * *

69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent “errors of jurisdiction”, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as “disputes” within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of “patent illegality”, which, as



we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2) (a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal.”

This statement of the law applies equally to Section 48 of the Arbitration Act.

44. Indeed, this approach has commended itself in other jurisdictions as well. Thus, in *Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co. (Pte) Ltd.*, the Singapore High Court, after setting out the legislative policy of the Model Law that the “public policy” exception is to be narrowly viewed and that an arbitral award that shocks the conscience alone would be set aside, went on to hold:

“48. It is clear, therefore, that in order for SSGC to have succeeded on the public policy argument, **it had to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice.** Nothing of the sort had been pleaded or proved by SSGC, and its ambiguous contention that the award was “perverse” or “irrational” could not, of itself, amount to a breach of public policy.”

[emphasis added]



98. In *Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd.*²¹, the Supreme Court rejected the challenge to the enforcement of a foreign award, which was premised on the public policy of India exception under Section 48 of the A&C Act. The Court held that the public policy exception did not include perversity of an award for declining the enforcement of a convention award. We consider it apposite to refer to the following extract from the said decision:

“60. The judgment in *Ssangyong* [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] noted in para 29 that Section 48 of the Act has also been amended in the same manner as Section 34 of the Act. The ground of “patent illegality appearing on the face of the award” is an independent ground of challenge which applies only to awards made under Part I which do not involve international commercial arbitrations. **Thus, the “public policy of India” ground after the 2015 Amendment does not take within its scope, “perversity of an award” as a ground to set aside an award in an international commercial arbitration under Section 34, and concomitantly as a ground to refuse enforcement** of a foreign award under Section 48, being a pari materia provision which appears in Part II of the Act. This argument must therefore stand rejected.”

[emphasis added]

99. The dispute essentially relates to the date as to when the cause of action had arisen. If we consider this controversy in the perspective of the law relating to the challenge of the arbitral award on the ground that it being in conflict with the public policy of India, we find that it does not fall within the ambit of such a challenge.

²¹ (2022) 1 SCC 753



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100. As noted above, it is apparent that the learned Single Judge has not examined the challenge to the impugned award in the aforesaid perspective. The learned Single Judge erred in not noticing that the ground of patent illegality was not available in case of an arbitral award in an international commercial arbitration. The impugned judgment is erroneous and no interference with the impugned award was warranted in the proceedings under Section 34 of the A&C Act.

101. In view of the above, the impugned judgement setting aside the impugned award, is set aside.

102. The appeal is allowed in the aforesaid terms.

103. The parties are left bear their own costs.

VIBHU BAKHRU, J

SACHIN DATTA, J

NOVEMBER 20, 2024
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