



2024:DHC:1738



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 01st March, 2024

+ O.M.P. (COMM) 106/2024 & I.A. 4873/2024 (*stay*)

THOMAS AND COMPANY PRIVATE LIMITED Petitioner

Through: Mr. Gursat Singh Vachher & Mr.
Pranav Khanna, Advocates.

versus

THAPAR BUILDERS PVT LTD Respondent

Through: Mr. Pankaj Kumar Singh, Mr. Ben
Daniel Mathew & Ms. Bimla
Sharma, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner assails an order of the learned Sole Arbitrator, dated 19.02.2024, by which the counter claims filed by the petitioner have been dismissed on the ground of limitation.
2. The disputes between the parties arose out of an agreement dated 10.05.2014 ["the Agreement"], by which the petitioner undertook to construct a tower in a project being built by the respondent. The Agreement was for a period of three years, expiring on 10.05.2017.
3. The petitioner filed its counter claims on 19.10.2022, raising claims on account of refund of retention money, rental for its machinery deployed in the project and interest.
4. The counter claims were originally not considered by the learned Arbitrator on the ground that they have been filed belatedly. By an order



dated 08.01.2024 passed in O.M.P.(COMM) 13/2024, filed by the petitioner herein, this Court recorded an agreement between the parties that the counter claims will be taken on record by the learned Arbitral Tribunal, subject to payment of costs by the petitioner. It was *inter alia* directed that the learned Arbitral Tribunal may, at the request of either side, consider the question of limitation with regard to the counter claims as a preliminary issue, if it was, in the opinion of the learned Arbitrator, possible to decide the same without evidence. The impugned order dated 19.02.2024 has been made in this context.

5. The Arbitral Tribunal has found the counter claims to be beyond the period of limitation, on the reasoning that the cause of action for filing of the counter claims had, according to the petitioner, arisen on 08.01.2017 and the counter claims had been filed only on 19.10.2022.

6. I have heard Mr. Gursat Singh Vachher, learned counsel for the petitioner, and Mr. Pankaj Kumar Singh, learned counsel for the respondent, who appears on advance notice.

7. Mr. Vachher's principal submission is that the claim of the petitioner was on account of refund of retention money, which was to be refunded by the respondent to the petitioner only after the expiry of the defect liability period. According to him, the defect liability period of one year under the Agreement, ended on 31.03.2019, giving rise to the cause of action on 01.04.2019, and the counter claim was therefore to be filed by 01.04.2022. However, he cites the order of the Supreme Court dated 10.01.2022 in *Suo Moto Writ Petition (Civil) 3/2020 [In Re: Cognizance for Extension of Limitation]*, by which the Supreme Court had granted an extension of limitation for the period of the COVID-19 pandemic.



8. Mr. Singh opposes this submission, on the ground that it is entirely beyond the pleadings in the counter claim filed by the petitioner. He submits that the counter claim itself stated that the amounts were payable in January 2017, and that the learned Arbitrator has correctly found that the counter claims were therefore barred by limitation. Mr. Singh has also drawn my attention to an order of the National Company Law Tribunal [“NCLT”] dated 18.05.2023, in proceedings instituted by the petitioner against the respondent [IB-494(ND)/2020] under Section 9 of the Insolvency and Bankruptcy Code, 2016. He submits that the counter claims raised by the petitioner before the learned Arbitral Tribunal were identical to those asserted in the petition filed before the NCLT, which was dismissed on the ground that the claims were barred by time. In these circumstances, Mr. Singh urges that the findings of the learned Arbitrator in the impugned order, cannot be considered as arbitrary or irrational, so as to warrant interference under Section 34 of the Act.

9. In rejecting the petitioner’s counter claims on this ground, the learned Arbitrator has noticed paragraph 5 of the counter claim filed by the petitioner, and the aforesaid order of the NCLT. It may be noted that the petitioner has not placed on record either the counter claim or the order of the NCLT, although both are expressly referred to in the reasoning of the learned Arbitrator. I am unable to find any justification for withholding these basic documents, including the counter claim itself. In commercial cases, such as this one, the statement of truth contains an averment that all documents in the power, possession, control or custody of the deponent pertaining to the facts and circumstances of the proceedings have been disclosed and that the deponent is aware of the



liability for action to be taken in law in the situation of any false statement or concealment. The petitioner does not appear to have followed this requirement in the present case. However, copies of the said documents have been handed over in Court by Mr. Singh, and the contents thereof are not disputed.

10. Paragraphs 5 and 6 of the counter claims are reproduced below: -

“5) That till 07.01.2017, the Respondent had made certain ad-hoc payments, in response to the constant communications which were underway between the Parties. However, after 07.01.2017, till date, no running account bill payments whatsoever had been credited in favour of the Claimant, thereby resulting in an outstanding operational debt of Rs.40,55,769/- in favour of the Claimant. Moreover, a , one of the diesel generators (62 KVA) of the Claimant was also misappropriated by the Respondent, the total amount of which comes to tune of Rs.44,05,000/- (equipment rental of Rs.39,45,000 + Diesel generator of Rs. 4,60,000). That as a matter of practice, any delay in clearance of invoices attracts interest at 18% per annum. Consequently, as of Ledger Closing for 2020, a total outstanding amount of Rs. 80,97,501/- was due and payable by the Respondent in favour of the Claimant.

6) That until the last invoice raised by the Claimant i.e. RA Bill no.21 dated 20.05.2017 the Respondent had to also pay the rent for machinery and other construction material at the project site which was installed by the Claimant in adherence of the Agreement. This rent has accrued owing to the fact that after foreclosure of the Agreement from a period of January, 2017 to September, 2019, the machinery and other equipment's were being used by the Respondent even after repeated requests of the Claimant to return the same. Ancillary to the same, one of the diesel generators (62 KVA) of the Claimant was also misappropriated by the Respondent, the total amount of which comes to tune of Rs. 44,05,000 (equipment rental of Rs. 39,45,000 + Diesel generator of Rs. 4,60,000). Hence, the total amount of claim that is left unpaid by the Respondent is Rs.1,63,87,567.23/- (Inclusive of Interest of Rs. 82,90,066.23/-). The copy of interest calculation sheet is annexed as ANNEXURE-6.”¹

11. On the basis of these averments, the petitioner has asserted a claim

¹ Emphasis supplied.



of ₹80,97,501/- on account of principal and a claim of ₹82,90,066.23/- on account of interest, amounting to a total claim of ₹1,63,87,567.23/-. It is clear from paragraph 5 above, that the petitioner's contention was that the payments were due to it from 07.01.2017.

12. The computation of interest contained in Annexure 6 to the counter claim is reproduced below:

S.NO.	Description	Amount (Rs.)	Remark
1	Release of Retention Monies = "A"	33,05,769.00	
2	With-held amount up to Ra Bill 21 to be reimbursed = "B"	7,50,000.00	
3	Add receivable on a/c of equipment rental for TCPL owned equipment used by TBPL after our RA bill no. dated 21 was raised (to be considered as final bill) = "C"	39,45,000.00	
4	Add receivable value of equipments taken away without consent - (62 KVA DG) = "D"	4,60,000.00	
5	Total = "E"	84,60,769.00	
6	Less Amount to be returned to Thapar Builders on finalisation of 21st Bill = "F"	3,63,268.00	
7	Balance = "G"	80,97,501.00	
8	Add interest @ 18% (Considering period February 2017 till 14 October 2022) = "H"	82,90,066.23	
9	TOTAL RECEIVABLE = "I" = (G+H)	1,63,87,567.23	

Interest Period Calculation		
Start Date	Finish	No. of
01-Feb-17	01-Feb-18	365
02-Feb-18	01-Feb-19	364
02-Feb-19	01-Feb-20	364
02-Feb-20	01-Feb-21	365
02-Feb-21	01-Feb-22	364
02-Feb-22	14-Oct-22	254
Total days		2076

The table on the right, titled "Interest Period Calculation", also shows that interest on the entire amount has been computed by the petitioner from 01.02.2017. The necessary corollary is that the petitioner's own assertion was that the amount was due on or before 01.02.2017.

13. Once that is so, the finding of the learned Arbitrator that the counter claims were barred by limitation when filed, cannot be faulted. The arguments to the contrary, with reference to the defect liability period, are entirely beyond the scope of the pleadings. Mr. Vachher states that these submissions were made orally and in writing before the learned Arbitrator, but I am of the view that the learned Arbitrator's reliance upon the petitioner's own pleadings to meet the case argued, can certainly not be categorised as manifestly irrational or perverse.

14. On this understanding, Mr. Vachher's reliance upon the order of



the Supreme Court in *Suo Moto Writ Petition (Civil) 3/2020 [In Re: Cognizance for Extension of Limitation]*, is also in vain. The order excludes the period from 15.03.2020 until 28.02.2022 from the period of limitation for all legal actions. But, in the present case, the period of limitation would already have run out prior to 15.03.2020.

15. The order of the NCLT is to the same effect. The claims which were asserted by the petitioner herein were admittedly the same claims. The petitioner's arguments on limitation have been dealt with in paragraphs 5 to 9 of the order of the NCLT as follows:-

“5. It is contended that the Operational Creditor raised certain invoices from 25.07.2014 onwards as per the terms of agreement. As per the terms of the agreement the Corporate Debtor would retain of 5% of the total value of work done as a security measure, which would be released after 12 months from the date of completion of the project. The Operational Creditor raised several invoices between 07.08.2014 and 20.05.2017 amounting to Rs. 40,55,769/- towards the release of retention money which is duly reflected in the ledger account maintained by the Operational Creditor, in respect of account of Corporate Debtor for the period 01.04.2013 till 31.03.2019. It is also contended that after 07.01.2017, no payments have been credited in favour of the Operational Creditor and the outstanding Operational Debt of Rs. 40,55,769/- is due for payment with an interest @ 18% per annum.

6. The date of default as declared by the Operational Creditor in Part IV of the application is 08.01.2017. The Operational Creditor issued a demand notice under Section 8 of IBC, 2016 on 17.10.2019 to which the Corporate Debtor sent a reply on 26.10.2019.

7. The Corporate Debtor filed reply affidavit wherein a preliminary objection with regard to limitation has been raised. The Corporate Debtor contended that as per Part IV of the Section 9 petition, an amount of Rs. 40,55,769/- outstanding towards the retention amount was due since 08.01.2017. Therefore, the claim is barred under Article 137 of the Limitation Act, 1963, since, the present application has been filed after a period of three years. Learned Counsel appearing for the Corporate Debtor submitted that preliminary issue with regard to the limitation should be decided first before deciding the matter on merits.

8. Learned Counsel appearing for the Operational Creditor



submitted that the demand notice was issued on 17.10.2019 and the Corporate Debtor gave a reply to the demand notice on 26.10.2019. Therefore, the date of default ought to be calculated from 26.10.2019.

9. We do not find any force in the submissions of the Learned Counsel appearing for the Operational Creditor. It is settled law that the date of limitation for filing an Application under Section 9 would accrue from the date of default as stated by the Applicant in Part IV of the petition in the present case which is 08.01.2017. The present application under Section 9 of IBC having been filed on 14.02.2022 which is beyond the period of three years since the date of default, this Application is barred by limitation.”

16. This order was also placed before the learned Arbitrator, and has been cited in the reasons contained in the impugned order.

17. The learned Arbitrator has also held that the petitioner's contention, that the cause of action also arose upon lapse of extended period of the Agreement on 01.04.2018 and subsequent dates, is misconceived as the period of limitation would start running on the date when the claims first became due. For this purpose, he has relied upon the judgment of the Supreme Court dated 18.05.2023 in ARB.P. 13/2023 [*B and T AG vs. Ministry of Defence*]. It is clear therefrom that the cause of action for commencing arbitration proceedings begins to run on the date when the claimant *first* acquired the right of action or, in the absence of an arbitration clause, the date on which the cause of action would have first accrued. This, according to the petitioner, was 08.01.2017.

18. For the aforesaid reasons, I do not find any ground to interfere with the findings of the learned Arbitrator that the counter claims were barred by limitation, much less so in exercise of the limited jurisdiction conferred by Section 34 of the Act.

19. The petition is therefore dismissed. All pending application also stand disposed of.



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20. In view of the petitioner's failure to place on record crucial documents, including the counter claim itself, the petitioner will pay costs of ₹25,000/- to the respondent.

PRATEEK JALAN, J

MARCH 1, 2024

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