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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **OMP (ENF.) (COMM.) 199/2021****M/S JAIPRAKASH HYUNDAI
CONSORTIUM(JHC)**

.....Decree Holder

Through: Mr. Lovekesh Sawhney, Sr.
Advocate with Mr. Rohit Kumar, Adv.

versus

M/S SJVN LIMITED

.....Judgement Debtor

Through: Mr. Uttam Dutt, Ms. Sonakshi
Singh, Mr. Kumar Bhaskar and Mr. Aman
Sanjeev Sharma, Advs.**CORAM:****HON'BLE MR. JUSTICE C.HARI SHANKAR****JUDGMENT (ORAL)**

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11.07.2024**OMP (ENF.) (COMM.) 199/2021**

1. This execution petition seeks execution of the recommendation dated 21 November 2006 of the Dispute Review Board (DRB), as modified on 27 June 2007, rendered in terms of Clause 67 of the General Conditions of the Contract (GCC) executed between the petitioner and the respondent. The execution has been filed treating the recommendation of the DRB as arbitral award in view of the judgment dated 27 August 2018, passed by a learned Single Judge of this Court in CS (OS) 1511/2013¹, which was subsequently upheld by a Division Bench of this Court by judgment dated 18 February 2019 in

¹ **SJVN Ltd v. Jaiprakash Hyundai Consortium, 2018 SCC OnLine Del 10863**



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RFA (OS) 15/2019².

2. The respondent has advanced a preliminary submission that the present execution petition is beyond time, having been preferred more than 12 years after the recommendation of the DRB, even if the date of the said recommendation were to be reckoned as 27 June 2007.

3. Having heard Mr. Sawhney, learned Senior Counsel for the petitioner and Mr. Dutt, learned Counsel for the respondent, I am inclined to agree with the respondent. In that view of the matter, no detailed allusion of facts is necessary.

4. Suffice it, therefore, to state that the petitioner was awarded a contract by the respondent. The contract envisaged resolution of disputes by a detailed procedure, contained in Clause 67, of which the relevant sub clause read thus:

“i) If the Contractor considers any work demanded of him to be outside the requirements of the Contract or considers any decision of the Engineer-in-Charge on any matter in connection with or arising out of the Contract or carrying out of work to be unacceptable, he shall promptly ask the Engineer-in-Charge in writing for written instructions or decision. There-upon the Engineer-in-Charge shall give his written instructions or decision within a period of thirty days of such request.

Upon receipt of the written instructions or decision, the Contractor shall promptly proceed without delay to comply with such instructions or decision.

If the Engineer-in-Charge fails to give his instructions or decision in writing within a period of thirty days after being requested for or if the Contractor is dissatisfied with the instructions or decision of the Engineer-in-Charge, the Contractor may within thirty days

² **SJVN Ltd v. Jaiprakash Hyundai Consortium, 2019 SCC OnLine Del 7293 (DB)**

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after receiving the instructions or decision, file a written appeal with the CMD, NJPC (SJVN) stating clearly, and in detail, the basis for the objection. The CMD will consider the written appeal and make his decision on the basis of the relevant Contract provisions, together with the facts and circumstances involved in the dispute.' The decision will be furnished in writing to the Contractor within thirty days after the receipt of the Contractor's written appeal.

If the Contractor is dissatisfied with this decision, the Contractor, within a period of fifteen days from the receipt of the decision, shall indicate to the CMD, NJPC (SJVN) his intention to refer the matter to the Disputes Review Board (ORB) and within a period of another fifteen days shall formally appeal to the Disputes Review Board.

The constitution of the Disputes Review Board and the procedure to be adopted by it for resolving the disputes is elaborated in the Annexure-A, provided, however, all such disputes which may arise to the Constitution of the Board, shall be taken up for consideration at its first meeting convened not later than 30 days upon its constitution. As specified under Para 1 of Annx-A, the disputes involving the individual claims up to Rs.50.00 (fifty) million shall be binding on the NJPC (SJVN) and the Contractor. In the case of the dispute involving individual claim beyond Rs.50.00 (fifty) million, if inspite of the recommendations/decision of the Disputes Review Board, the dispute remains unresolved, either party, within 15 days of the receipt of the aforesaid recommendations/decision of the Board, may appeal the decision back to the Board for review. However, if even after this review of its recommendations/decision by the Disputes Review Board, the two parties still fail to resolve the dispute, either party may resort to arbitration. In that case, within a period of 30 days of the receipt of the Disputes Review Board's final recommendations/decision, the party desiring to resort to arbitration shall indicate its intention to refer the dispute to Arbitration, failing which, the said final recommendations/decision of the Disputes Review Board shall be conclusive and binding.”

5. The petitioner, as a contractor, raised disputes against the respondent which, after they had unsuccessfully travelled the corridors of the Engineer In charge and the CMD of the respondent, were referred to the DRB. The DRB, by its recommendation dated 21



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November 2006, decided the issue in favour of the petitioner. This recommendation was subsequently modified on 4 May 2007 and on 27 June 2007.

6. The respondent filed CS (OS) 1708/2008, challenging the said recommendation of the DRB before this Court.

7. Before, however, adverting to the said suit, it merits mention that certain other contractors, in whose favour the DRB had taken similar decisions with respect to other contracts, had moved the High Court of Himachal Pradesh under Article 226 of the Constitution of India, for a declaration that recommendation of the DRB, if it involved an amount of less than ₹ 50 million (₹ 5 crores), constituted an “award” within the meaning of Arbitration and Conciliation Act, 1996³. The High Court of Himachal Pradesh, by judgment dated 7 June 2006 in OMP 113/2005 in Civil Suit 56/2004⁴ held that the decision of the DRB constituted an award to the extent, it did not involve an amount in excess of ₹ 5 crores, which was amenable to challenge under Section 34 of the 1996 Act.

8. While CS (OS) 1708/2008 was pending before this Court, CS (OS) 1511/2013, also instituted by the respondent against the petitioner, came to be decided by Manmohan J. by judgment dated 27 August 2018 *supra*, agreeing with the judgment dated 7 June 2006 of the High Court of Himachal Pradesh and holding that the recommendation of the DRB constituted an award within the meaning

³ “the 1996 Act” hereinafter
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of the 1996 Act. Paras 9 to 15 of the judgment of Manmohan J read thus:

“9. Having heard learned counsel for the parties, this Court is of the view that the issues raised in the present application are not *res integra*. The High Court of Himachal Pradesh after interpreting the same dispute resolution Clause 67 and after hearing the plaintiff and the defendant has already held that the decision of the DRB amounts to an arbitral award. The said judgment has attained finality and cannot be challenged by filing a separate proceeding in another High Court.

10. The fact that in the present case the plaintiff does not challenge the decision of the DRB but only seeks a declaration that the decision of the DRB is factually and legally correct makes no difference to the nature of the decision of the DRB.

11. Even though the DRB's decision in the present case is in excess of Rs. 5 crores, the remedy is provided in Clause 67 itself if the parties are unable to resolve their disputes despite DRB's decision/recommendations. Under Clause 67 either of the parties can take recourse to arbitration.

12. Consequently, in view of the judgment in *Satluj Jal Vidyut Nigam Ltd v Nathpa Jhakri Joint Venture*, this Court is of the view that the relief sought by plaintiff for declaration that the decisions of the DRB dated 20th September, 2008 and 12th August, 2009 are factually and legally correct, is not maintainable.

13. This Court is further of the view that it cannot decree the amount that has already been awarded by the DRB as the said dispute had already been adjudicated in favour of the plaintiff and against the defendant. Grant of such a relief would also amount to re-litigation and re-determination of disputes that had already been adjudicated upon by a Forum agreed upon between the parties.

14. In the event, the defendant refuses to pay to the plaintiff for any reason whatsoever, the remedy lies with the plaintiff in filing appropriate proceedings in accordance with law.

15. Consequently, the present suit is dismissed with liberty to the plaintiff to file appropriate legal proceedings in accordance with law. The rights and contentions of all the parties are left open.



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For the sake of accuracy, it needs to be noted (as is observed in para 9 of the order) that the respondent SJVN did not, in CS (OS) 1511/2013, *challenge* the recommendations of the DRB in that case, but sought their enforcement, contending that they were partly in its favour.

9. As already noted, the judgment dated 27 August 2018 of Manmohan, J. was challenged by the respondent before the Division Bench of this Court by way of RFA (OS) 15/2019, which came to be dismissed by the Division Bench by order dated 18 February 2019.

10. Relying on the judgment dated 27 August 2018 of Manmohan, J. in CS (OS) 1511/2013, the present petitioner filed IA No. 15852/2021 in CS (OS) 1708/2008 under Order VII Rule 11 of the CPC. The said application was allowed, and CS (OS) 1708/2008 was dismissed by a coordinate Bench of this Court on 2 December 2021, relying on the judgment dated 27 August 2018 of Manmohan, J.

11. The present execution petition was filed shortly thereafter, on 16 December 2021, seeking execution of the recommendation of the DRB, rendered in 2006/2007. Irrespective of whether the recommendation of the DRB is to be treated as having been rendered in 2006 or 2007, therefore, the present execution petition has clearly been filed beyond 12 years from the said recommendation. In these circumstances, Mr. Uttam Dutt, learned Counsel for the respondent, submits that the execution petition is barred by time and cannot be entertained.

Submissions of Mr. Sawhney, for the petitioner



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12. Mr. Sawhney, learned Senior Counsel for the petitioner, contests Mr Dutt's submission that the present Execution Petition is barred by time. He submits that the issue regarding the status of the DRB recommendation was in a state of flux till 27 August 2018, on which date alone this Court had clarified that the DRB recommendation has to be treated as an award. According to Mr. Sawhney, therefore, as this legal position was crystalized only on 27 August 2018, the period of 12 years provided under Article 136 of the Limitation Act should be reckoned from 27 August 2018 and not from 2006 or 2007.

13. Mr. Sawhney submits, secondly, that the petitioner cannot, in any event, be non-suited on the ground of limitation in view of the liberty granted by para 15 of the judgment dated 27 August 2018 of Manmohan J in CS (OS) 1511/2013. He points out that, in para 14, this Court had specifically held that if the respondent refused to pay the petitioner the amount awarded to it for any reason whatsoever, the petitioner was at liberty to institute appropriate proceedings in accordance with law. Though the recommendations, of which enforcement is being sought in the present petition, were not subject matter of challenge in CS (OS) 1511/2013, the liberty granted to the petitioner, in that case, to proceed for execution of the recommendations would apply, *mutatis mutandis*, to the present case as well.

14. To buttress the submission that the legal position was in a state



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of flux, Mr. Sawhney submits that, relying on judgment dated 7 June 2006 of the High Court of Himachal Pradesh in *Satluj Jal Vidyut Nigam*, the petitioner had filed IA 5988/2009 in CS (OS) 1708/2008, under Order VII Rule 11 of the CPC, seeking dismissal of the suit as not maintainable. As this Court, however, expressed its inability to agree with the view of the High Court of Himachal Pradesh, the petitioner withdrew IA 5988/2009 on 12 March 2010. Thereafter, in CS (OS) 1708/2008, a specific issue, as to whether the recommendation of the DRB was an “award” under the 1996 Act, was framed. This indicated that, at least till the judgment dated 27 August 2018 of Manmohan, J. in CS (OS) 1511/2013, the issue was disputed. No occasion arose, therefore, for the petitioner to move for execution of the recommendation of the DRB, treating it as an award under the 1996 Act.

15. Finally, Mr. Sawhney submits that, if the Court were to take a hypertechnical view of the matter, it would render the recommendation of the DRB, admittedly, in favour of the petitioner, unenforceable. This, he submits, would be a complete travesty of justice.

Analysis

16. Having heard learned Counsel for both sides and considered legal position, it is clear that the petitioner cannot maintain the present execution petition for the simple reason it is beyond the period of 12 years provided under Article 136 of the Limitation Act, and, by virtue



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of the express exclusion contained in Section 5⁵ thereof, delay in preferring an execution petition under Order XXI of the CPC cannot be condoned and there is no provision for condonation of delay in filing an execution petition. Section 43(1)⁶ of the 1996 Act makes the provisions of the Limitation Act applicable, *mutatis mutandis*, to arbitrations. Any execution petition, which is preferred beyond a period of 12 years from the date of the order, which is sought to be executed, has therefore necessarily to be dismissed. The Court has no latitude in that regard.

17. Mr. Dutt also points out that no stay was granted by this Court, of the recommendation of the DRB, in CS (OS) 1708/2008. Ergo, it is clear that the recommendation of the DRB was enforceable immediately. Proceedings for execution of the recommendation had, therefore, to be initiated within 12 years of the recommendation.

18. The judgment dated 27 August 2018 was merely declaratory of the position in law. There is no observation, much less any finding in the judgment dated 27 August 2018, which makes it applicable only prospectively. The period of limitation, therefore, for filing an application for execution of the recommendation of the DRB rendered in 2006-2007, therefore, was not extended or postponed in any manner

⁵ 5. **Extension of prescribed period in certain cases.** – Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation. – The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

⁶ 43. **Limitations.** –

(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.



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by the judgment dated 27 August 2018.

19. The judgment dated 27 August 2018 of Manmohan, J. was challenged by the respondent before the Division Bench of this Court by way of RFA (OS) 15/2019, which also came to be dismissed by the Division Bench on 18 February 2019.

20. I am unable to agree with any of the contentions advanced by Mr. Sawhney.

21. Mr. Sawhney's contention that the period of 12 years can be reckoned in the present case from 27 August 2018, i.e. when this Court dismissed CS (OS) 1511/2013 and held the DRB recommendation to amount to an award, does not commend itself to acceptance. The mere fact that this position may have been declared by this Court on 27 August 2018, cannot rewrite Article 136 of the Limitation Act. Article 136 of the Limitation Act envisages reckoning of the period of 12 years from the date when the decree or order, of which execution is sought, becomes enforceable. Inasmuch as the recommendation of the DRB became enforceable immediately on its being rendered, there is no question of postponing the *terminus ad quem*, for reckoning the starting point for computing limitation for the petitioner to move for execution of the recommendation, to 27 August 2018.

22. No "liberty", as contended by Mr. Sawhney, was granted by Manmohan J in his judgement dated 27 August 2018. In that case, it



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was SJVN, the respondent herein, who was seeking enforcement of the recommendations of the DRB by way of a civil suit, but that fact was not of consequence, as noted by Manmohan J in para 9 of the order. In paras 14 and 15, Manmohan J merely observed that, in the event of non-compliance by the petitioner with the recommendations of the DRB, the remedy with the respondent (the plaintiff in that case) lay in filing an execution. The said observation cannot be understood as grant of *liberty*, by this Court, to the respondent to do so. Para 15 of the order removes all ambiguity by *actually* granting liberty to SJVN to file appropriate legal proceedings *in accordance with law*. This would, clearly, also factor in the aspect of limitation. A time-barred execution petition cannot, quite obviously, be regarded as having been preferred in accordance with law.

23. Thus, quite apart from the fact that the judgment dated 27 August 2018 of Manmohan J did not even deal with the DRB recommendations of which the petitioner seeks enforcement in the present case [as it was rendered in CS (OS) 1511/2013, not CS (OS) 1708/2008], the order cannot, even otherwise, postpone the date from which the period of 12 years for filing execution, under Article 136 of the Limitation Act, would have to be reckoned.

24. Mr. Dutt also points out that there was no stay, at any point of time, of the recommendation of the DRB. There was, therefore, no impediment in the petitioner filing for execution of the said recommendation.



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25. It also bears mention that as far back as on 7 June 2006, the High Court of Himachal Pradesh had already declared that a recommendation of the DRB was an award within the meaning of the 1996 Act. There was nothing which prevented the petitioner, thereafter, to seek enforcement of the recommendation of the DRB by moving an execution petition. If the petitioner chose to wait till 2021, and the passing of the order by this Court on 2 December 2021 in CS (OS) 1708/2008, the petitioner has itself to blame. It cannot, on that basis, now seek to submit that the execution petition filed much beyond 12 years from the date of DRB recommendation should be entertained. The Court can do so only by rewriting the statute and reckoning the period of limitation for Article 136 of the Limitation Act from 2021, instead of 2007, when the DRB came to render its recommendation. That is obviously impermissible.

26. For all these reasons, the Court is constrained to hold that the present execution petition, having been filed more than 12 years beyond 27 June 2007 – treating that to be the date of the DRB recommendation of which execution is sought – is not maintainable, as it is barred by time.

27. The petition is accordingly dismissed.

C.HARI SHANKAR, J

JULY 11, 2024

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