



2024:DHC:3969-DB

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

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Judgment delivered on: 16.05.2024

+ **FAO (OS)(COMM) 340/2019****KARAM CHAND THAPAR & BROS. (CS) LTD. Appellant**

versus

**NATIONAL HYDROELECTRIC POWER
CORPORATION LTD.**

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Darpan Wadhwa, Senior Advocate
with Mr Avinash Menon, Mr Rishabh
Saxena, Mr.Amer Vaid and Ms Meghna
Maji, Advocates.

For the Respondent : Mr Kailash Vasudev, Senior Advocate with
Mr Ajit Puduserry, Advocate.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MS TARA JUSTICE VITASTA GANJU

JUDGMENT**VIBHU BAKHRU, J.**

1. The appellant, M/s Karam Chand Thapar and Bros. (CS) Ltd., has filed the present intra court appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning a judgement dated 11.02.2010 (hereafter *the impugned judgement*) rendered by the learned Single Judge in Arbitration Petition No. 3OBJ./2004 captioned *National Hydroelectric Power Corp. Ltd. v. M/s. Karam Chand Thapar and Bros. (CS) Ltd. & Another.*



2. The respondent (National Hydroelectric Power Corporation Ltd. – hereafter *NHPC*) had filed the afore-mentioned petition [Arb.P. No. 3 OBJ/2004] under Section 34 of the A&C Act, *inter alia*, impugning an arbitral award dated 09.09.2000 (hereafter *the impugned award*) and orders dated 23.04.1999, 24.11.1999 and 06.05.2000 rendered by the Arbitral Tribunal comprising of a Sole Arbitrator (hereafter *the Arbitral Tribunal*) appointed by the Chief Engineer, Salal Hydroelectric Project, NHPC.

3. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with an Agreement dated 07.03.1990 (hereafter *the Agreement*) in respect of construction Package at Salal Hydroelectric Project, Stage-II (hereafter *the Project*).

4. NHPC had filed an application under Section 16 of the A&C Act claiming that the disputes raised by the appellant (claimant before the Arbitral Tribunal) were not arbitrable. According to NHPC, the same were excepted matters and the decision of Engineer-in-Charge in regard to the said matters was final. The Arbitral Tribunal dismissed the said application by an order dated 23.04.1999 and held that the disputes raised were arbitrable and not excepted matters.

5. On 25.05.1999, NHPC filed a petition under Section 34 of the A&C Act [OMP No. 172/1999] impugning the order dated 23.04.1999 dismissing its application under Section 16 of the A&C Act. However, on 20.09.2000, the said petition was withdrawn with liberty to assail the order dated 23.04.1999 passed by the Arbitral Tribunal along with the



petition to challenge the impugned award. Accordingly, NHPC also impugned the said order in its petition [ARB. P. 3OBJ/2004].

6. Although NHPC had not raised any defence before the Arbitral Tribunal that the subject claims made by the appellant were barred by limitation, it had, at the stage of final hearing, moved an application to raise the said plea as an additional ground. The impugned award indicates that with the consent of the parties, the said question was examined in the first instance. The learned counsel for the parties were heard and the Arbitral Tribunal rendered a decision on 06.05.2000 rejecting NHPC's claim in the said regard.

7. Concededly, the order dated 06.05.2000 was in the nature of an interim award. The caption of the said order also indicates that it is an *“ORDER OF THE ARBITRATOR ON THE ADDITIONAL GROUND OF ‘BAR OF LIMITATION’ AS RAISED BY THE RESPONDENTS, NHPC VIDE THEIR APPLICATION DATED 29.04.2000”*. NHPC also impugned the said interim award in its petition under Section 34 of the A&C Act [ARB.P. No. 3OBJ/2004].

8. By the impugned award, the Arbitral Tribunal awarded an amount of ₹1,94,32,794/- along with simple interest at the rate of 21% per annum in favour of the appellant.

FACTUAL CONTEXT

9. By a tender notice dated 11.08.1989, NHPC invited tenders for execution of the Project [‘Construction of Tail Race Tunnel-II Outlet Package at Salal Hydroelectric Project (Stage-II)’]. The appellant



submitted its tender for the Project and the work was awarded to it by a Letter of Award dated 11.01.1990 for a total contract price of ₹11,49,75,090/-. The appellant communicated its acceptance to the Letter of Award on 12.01.1990 and the parties entered into the Agreement on 07.03.1990. The Project was to be executed/ completed within thirty-eight months from the date of issue of the Letter of Award.

10. The design of the Project dam was constructed in terms of a “run-of-the-river” scheme and, in adherence with the Indus Valley Treaty a continuous downstream discharge was maintained. The reservoir water level was to be maintained at 467.36 metres and if the water exceeded this level, the dam would overflow equal the inflow to maintain the water level.

11. On 09/10.09.1992, NHPC opened all the gates of the Dam without sufficient warning as the water level was rising rapidly due to rains. The appellant was carrying on work downstream and work front suffered the fury of the flood that ensued. The site was inundated and the appellant suffered loss of property. Some of workers lost their lives as well.

12. The appellant addressed letters to NHPC informing it of the flooding at the work site and the subsequent suspension of work. It conveyed by various letters during September 1992 that most of the machinery at the site was damaged, the site office and stores were washed away and that labourers/ staff working at the site were missing.

13. The appellant by its letter dated 12.09.1992 sent to the General Manager of NHPC communicated that the work was suspended on



account of the flood that occurred on 09/10.09.1992. By a letter dated 13.09.1992 addressed to the Manager TRT Works Complex, Salal Project the appellant intimated that most machinery at the site was damaged and, the temporary structures constructed at the site were washed away.

14. The appellant also addressed letters dated 13.09.1992, 18.09.1992 and 24.09.1992 to the Manager TRT Works Complex, Salal Project (NHPC) seeking formal instructions under Clauses 34.2 (ii)(a) & (b) of the General Conditions of Contract (GCC), for clearing the site and resuming work. It confirmed by letter dated 24.09.1992 that it had resumed work at the site. By the said letter it also conveyed that the cost of re-execution/restoration of the work would be payable to it under Clauses 34.2 (ii)(a) & (b) of the GCC. NHPC responded by a letter dated 29.09.1992 communicating its approval for the appellant to continue with the re-execution of the work and confirming that the same would be dealt with under the *Force Majeure* clause (Clause 32) of the GCC.

15. By a letter dated 08.11.1992, the appellant recounted that on 10.09.1992, the works under TRT-II Outlet Package comprising the entire tunnel and the access road up to the batching plant was submerged under water. The water at the site had risen by 5 meters (from El. 399 to El. 404 meters) within a matter of minutes. Consequently, all machinery and stores, which were listed in its earlier letter dated 18.09.1992, were submerged and washed away. One of the workmen had expired and six were missing and feared to have drowned. The appellant stated that they were rendered unable to perform their



obligations under the contract and had, accordingly, issued a Notification under Clause 32 of the GCC regarding suspension of work. It confirmed that pursuant to the direction issued by NHPC, the appellant had taken up re-execution of the work.

16. The appellant also claimed that in terms of Clause 34.2(ii)(a) & (b) of the GCC, the entire cost of re-execution was payable by NHPC. The appellant also set out in detail the loss suffered by it. It further claimed that it was entitled to payment of compensation for off-setting the loss suffered by it. It further reported that “*the financial implications of the damages and loss due to sudden unprecedented flooding and consequent suspension of work will be intimated to you in due course*”. The appellant also referred to Clause 34.2(i) of the GCC and pointed out that in terms of said Clause neither party would be liable to the other “*provided such a loss could not have foreseen OR avoided*”. It claimed that loss suffered by it could have been avoided by adoption of certain measures as set out in the said letter.

17. The appellant continued to execute the works. However, prior to completion of the works, it sent a letter dated 04.09.1995 demanding an amount of ₹2,11,51,505/- on account of damages suffered by it and called upon NHPC to decide the matter and complete the payment within a period of one month, failing which the appellant would be compelled to seek recourse to arbitration. NHPC did not respond to the said letter.



18. The appellant sent a letter dated 01.05.1996 to NHPC seeking reference of disputes to arbitration under Clause 55 of the GCC. It requested that an arbitrator may be appointed by NHPC at the earliest.

19. The reference to arbitration was initially denied by NHPC by its letter dated 09.10.1996 but subsequently, an arbitrator was appointed by a letter dated 24.06.1998 and the Arbitral Tribunal was constituted.

20. As noted above, before the Arbitral Tribunal, NHPC filed an application under Section 16 of the A&C Act asserting that the disputes were not arbitrable. The said application was rejected by an order dated 23.04.1999. NHPC challenged the said order by filing a petition under Section 34 of the A&C Act on 25.05.1999 [being OMP No.172/1999]. The same was withdrawn in terms of the order dated 20.09.2000 with liberty to challenge the same along with the impugned award. At the stage of final argument, NHPC raised an issue regarding limitation, which was decided on 06.05.2000. NHPC did not file any petition under Section 34 of the A&C Act to challenge the said decision at the material time. The Arbitral Tribunal delivered the impugned award on merits on 09.09.2000.

21. On 25.01.2001, NHPC filed an objection petition (Arbitration Application No.2/2001) seeking setting aside of the impugned award before the High Court of Jammu and Kashmir. NHPC also challenged the order dated 06.05.2000 rendered by the Arbitral Tribunal in addition to challenging the orders dated 23.04.1999 and 24.11.1999 passed by the Arbitral Tribunal in regard to the arbitrability and the challenge to the Arbitrator. The appellant raised an objection as to the



maintainability of the said petition in view of Section 42 of the A&C Act. The said application (being CMP No.17/2001) was dismissed by the Hon'ble Jammu and Kashmir High Court on 30.03.2001. The appellant appealed the said decision before the Supreme Court.

22. By an order dated 11.03.2003, the Supreme Court transferred NHPC's petition pending before the High Court of Jammu and Kashmir (AA No. 2/2001) to this Court.

23. The same was allowed in terms of the impugned judgment.

PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL

24. The appellant had filed a Statement of Claim, *inter alia*, claiming several claims on account of losses suffered as a consequence to the actions of NHPC of opening eleven gates of the upstream dam on 10.09.1992 at about 02:30 a.m. The appellant claimed an aggregate amount of ₹2,11,51,219/- under various heads including loss suffered due to the infrastructure built at site being swept away; loss of stores; loss of materials; compensation for loss of machinery and plant; compensation paid to the families of the workers who had lost their lives etc.

25. As noted hereinbefore, NHPC filed an application challenging the arbitrability of the said dispute. NHPC claimed that the disputes were not arbitrable as the disputes were excepted matters and were covered under Clause 55 of the GCC. The Arbitral Tribunal rejected the



said contention and dismissed NHPC's application under Section 16 of the A&C Act by an order dated 23.04.1999.

26. The parties led their evidence. NHPC produced documents including the layout plan of the works, diagram of the cross-section of the flood protection wall, report of flood discharge on 10.09.1992, records of the expected flood discharge during the construction period and record of manual/standing orders for spillway gauge operations before the Arbitral Tribunal. Affidavits of Shri G.S. Mukherjee, Vice President, Karam Chand Thapar & Bros (C.S.) Ltd. and Shri G.C. Sardana, DGM, Ticil Salal were submitted by the appellant and the affidavit of Shri A.K. Chaudhary was furnished by NHPC. The witnesses were cross examined.

27. After completion of recording of evidence, the Arbitral Tribunal placed the matter for final hearing. At that stage, NHPC filed an application dated 29.04.2000 seeking to raise the additional ground that the claims raised were barred by limitation. NHPC claimed that in terms of Section 43(1) of the A&C Act, the Limitation Act, 1963 (hereafter *the Limitation Act*) was applicable to arbitral proceedings. It claimed that the cause of action for raising the subject claims arose on 10.09.1992, but the request for arbitration was made on 01.05.1996, which was beyond the period of three years from the date of the incident (that is, 10.09.1992). NHPC claimed that no further evidence or material was required for raising the said objections.



28. The appellant objected to NHPC raising the said issue on several grounds. First, it claimed that the question of limitation was a mixed question of law and fact and, NHPC could not raise the same without pleadings or any other material.

29. Second, the appellant contested NHPC's contention that the claims were barred by limitation on merits. The appellant also claimed that the cause of action for reference of the disputes arose on 04.09.1995, which was the first time that the appellant had quantified their claims. They also claimed that the final bill in respect of the work had not even been prepared prior to the appointment of the Arbitrator on 24.06.1998. The appellant contended that the right for payments would arise on completion of the works. However, at that stage, the final bill had not been prepared. Thus, the claims in any event could not be considered as barred by limitation. The appellant also relied on the decision of the Supreme Court in *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority Ltd.: (1988) 2 SCC 338*. NHPC, on the other hand, relied on the decision of the Supreme Court in *Steel Authority of India v. J.C. Budhiraja: 1999 (8) SCC 122*.

THE INTERIM AWARD

30. With the consent of the parties, the Arbitral Tribunal decided the said question of limitation in the first instance before proceeding to examine the merits of the appellant's claims.



31. The Arbitral Tribunal accepted that by virtue of Section 43(1) of the A&C Act, the Limitation Act was applicable to arbitral proceedings.

32. The Arbitral Tribunal had examined the correspondence on record and rejected NHPC's contention that the appellant had preferred the claim *vide* their letter dated 02.11.1992. The Arbitral Tribunal held that NHPC had reported that they had suffered the losses and expressly mentioned that the financial implications would be intimated in due course. The Arbitral Tribunal accepted the appellant's contention that it had quantified its claims and damages for the first time on 04.09.1995. However, NHPC had not responded to the said letter and therefore, the appellant had invoked the Arbitration Clause on 01.05.1996. The Arbitral Tribunal referred to the decision in the case of ***Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority*** (*supra*) and found that the observations made in the said decision established that the cause of arbitration would arise once there is an assertion of claim and denial of the same. The Arbitral Tribunal also considered the other decisions referred by the parties and after hearing the parties, the Arbitral Tribunal delivered the interim award, rejecting NHPC's case that the claims raised by the appellant were barred by limitation. The Arbitral Tribunal concluded that the cause of action had arisen on 04.09.1995, when the first notice of demand was raised. In the aforesaid view, the claims raised by the appellant were not barred by limitation. The Arbitral Tribunal delivered the interim award and called upon the parties to commence their arguments on merits.



THE IMPUGNED AWARD

33. The Arbitral Tribunal held that the losses were caused to the appellant due to the negligent act of NHPC and it was entitled to compensation with the following observations:

“4.11 It is held that

1. The losses were suffered by the claimant due to discharge of huge quantity of water from the Dam Reservoir by the NHPC by opening of 11 gates on 10.9.92 at or about 2:30 AM.
2. There was no justification for opening of all the gates at a time to discharge the water. The NHPC has failed to establish/prove that there was imminent danger to the Dam Structure which instigated them to open all the Gates at the same time.
3. NHPC has failed to prove their prudence in opening of the gates at that time and without giving any advance signal or warning for the same.
4. Protection wall which was provided by NHPC was of inadequate height, to withhold the water which was discharged by the NHPC in the early hrs of 10.9.92 causing losses of men and material to the claimant.”

34. The Claims sought by the appellant were decided as described below:

Claim No.	Claim Sought	Amount claimed (₹)	Outcome
1	Loss suffered due to washing away of the claimants service sheds and offices.	17,18,713	Rejected



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2	Losses of store material and their replacement	37,50,033	Amount allowed as claimed.
3	Compensation for machinery / plant and equipment	66,49,106	Amount allowed as claimed.
4	Losses due to impact of suspended deduction of principal amount and interest charges from bills of restoration work and financial losses sustained	7,21,765	Amount allowed as claimed.
5	Payment compensation paid to workers who lost their lives having been washed away due to precededent flood	3,50,000	Amount allowed as claimed.
6	Extra expenses and losses on account of depreciation of accommodation and service sheds which cannot be absorbed by work due to suspension of work at outlet site due to unprecedented flood	4,37,636	Amount allowed as claimed.
7	Expenses and losses incurred by the claimants for the protection, supervision, inspection, planning, safety and for maintaining service facility for the work site in spite of no work being there for the time period from 10.09.92 to 31.03.93 completed and from 01.04.93 to 31.07.93 only 50% of the work started.	46,59,483	Amount allowed as claimed.
8	Extra expenses and losses suffered by the Claimants from 10.09.92 on account of depreciation on machinery plant and equipment etc due to suspension of work with effect from 10.09.92	27,54,483	Amount allowed as claimed.



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9	Extra expenses and losses incurred for repatriation and recruitment expenses on piece workers for suspension of work from September 92 to March 93 and 50% from 01.04.93 to 31.07.93	1,10,000	Amount allowed as claimed.
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35. The Arbitral Tribunal awarded a total sum of INR 1,94,32,794/- along with simple interest at the rate of 21% per annum with effect from 02.11.1992 till the date of payment.

THE IMPUGNED ORDER

36. NHPC assailed the impugned award and the interim awards dated 23.04.1999, 24.11.1999 and 06.05.2000 rendered by the Arbitral Tribunal on several grounds. The learned Single Judge found that the observations of the Arbitral Tribunal to the effect that the loss/damage caused by the flood was unavoidable were based on sufficient evidence and could not be interfered within the limited scope of challenge under Section 34 of the A&C Act¹.

37. The learned Single Judge rejected the contention raised by NHPC that the claims raised were not arbitrable in terms of Clauses 32, 34 and 55.1 of the GCC read with Clause 6 of the Special Conditions of Contract. It was observed, with reference to Clause 53 of the GCC that the finality of the decision of the Engineer-in-Charge was limited to matters regarding material, workmanship, removal of improper work,

¹ Ref: Delhi Development Authority v. R.S. Sharma and Company, New Delhi: (2008) 13 SCC 80, McDermott International Inc. v. Burn Standard Co. Ltd. & Ors.: (2006) 11 SCC 181



interpretation of the contract drawings and contract specifications, mode of procedure, and the carrying out of the work and the Engineer-in-Charge could not have decided finally whether the damages were to be awarded under the *Force Majeure* Clause (Clause 32 of the GCC).

38. However, the learned Single Judge accepted NHPC's contention that the claims made by the appellant were barred by limitation. The learned Single Judge referred to the decisions of the Supreme Court in ***Panchu Gopal Bose v. Board of Trustees for Port of Calcutta: AIR 1994 SC 1615*** and ***J.C. Budhraja v. Chairman, Orrisa Mining Corporation Ltd. & Anr.: (2008) 2 SCC 444***, and observed that the cause of arbitration accrues when the claimant acquires the right to refer disputes to arbitration. It was observed that 'action' and 'cause of action' must be construed as 'arbitration' and 'cause of arbitration' and accordingly, the limitation for reference of disputes to arbitration would start running when the right to apply accrues and would continue for a period of three years as prescribed under Article 137 of the Limitation Act. The learned Single Judge held that cause of action arose on 10.09.1992

39. The learned Single Judge observed that in terms of Section 21 of the A&C Act, arbitral proceedings are deemed to commence when a request for reference of disputes to arbitration is received by the respondent. The learned Single Judge noted that that the letter dated 04.09.1995 sent by the appellant was not an invocation for reference of disputes to arbitration, and it merely stated that it would serve notice for arbitration and invoke arbitration in the event of non-payment of



compensation against damages by NHPC. The learned Single Judge held that the arbitral proceedings were not commenced within the period of three years of the cause of action, which arose on 10.09.1992, and, set aside the impugned award.

REASONS AND CONCLUSION

40. As noted above, the learned Single Judge had rejected all contentions raised by NHPC for assailing the impugned award. The learned Single Judge had concluded that the grounds raised by NHPC for seeking setting aside of the impugned award, did not fall within the scope of Section 34 of the A&C Act. However, the learned Single Judge accepted the contention that the claims were barred by limitation and therefore, the impugned award entertaining the same was vitiated by patent illegality.

41. The appellant also contends that NHPC's application under Section 34 of the A&C Act to set aside the award dated 06.05.2000 was time barred and could not be entertained. The said application was maintainable only in respect of the impugned award and the order dated 23.04.1999 (on the issue of arbitrability of disputes) as specific liberty to assail the said order was granted by the court.

42. Thus, the present appeal is confined to examining whether NHPC's application under Section 34 of the A&C Act was time barred and whether the impugned award was liable to be set aside on account of the appellant's claims being barred by limitation.



43. It is material to note that NHPC had filed a consolidated petition challenging the impugned award as well as three other orders, which included an order dated 23.04.1999 whereby NHPC's challenge that the disputes were not arbitrable was rejected and the order dated 06.05.2000 finally deciding NHPC's challenge that the claims raised by the appellant were barred by limitation.

44. As noted hereinbefore, NHPC had filed a separate application under Section 34 of the A&C Act challenging the Arbitral Tribunal's order dated 23.04.1999 holding that the claims raised were not excepted matters and thus, were arbitrable. The said application was withdrawn with liberty to assail the same in the application to set aside the impugned award. However, NHPC had not filed any application to set aside the decision dated 06.05.2000 whereby the issue of limitation was finally decided by the Arbitral Tribunal. Concededly, the said order is an arbitral award as it falls within the inclusive definition of the said term under Section 2(1)(c) of the A&C Act. In terms of Section 34(3) of the A&C Act, NHPC could prefer an application to set aside the said award [order dated 06.05.2000] within a period of three months from the date of the receipt of the said award. However, the application [AA No.2/2001] was filed on or after 08.12.2000. There is no cavil that the period available under Section 34(3) of the A&C Act to seek setting aside of the award dated 06.05.2000 had expired. Further, the delay in filing the application to set aside the said award was beyond the period of thirty days that could be condoned by the Court in terms of the proviso to Section 34(3) of the A&C Act. However, it was contended on behalf of NHPC that the view prevailing prior to the decision in the



case of *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products: (2018) 2 SCC 534* was that the party aggrieved by the rejection of its contention that the claims were barred by limitation, would necessarily have to await the final award before raising any challenge to the same. The learned counsel appearing for NHPC relied heavily on the decision of the learned Single Judge of this Court in *Union of India and Anr. v. East Coast Boat Builders and Engineers Ltd.: 1998 (47) DRJ 333*. He submitted that since the court had held an application under Section 34 of the A&C Act would not be maintainable against an order rejecting the application under Section 16 of the A&C Act, NHPC was justified in awaiting the award.

45. We find no merit in the aforesaid contention.

46. The decision in *Union of India and Anr. v. East Coast Boat Builders and Engineers Ltd. (supra)* was rendered in the context of an order passed under Section 16 of the A&C Act rejecting the challenge that the disputes raised in the claim petition were not arbitrable. The petitioner being aggrieved by the decision holding that the disputes were arbitrable, preferred an application under Section 34 of the A&C Act, treating the same as an interim award under Section 34 of the A&C Act. The Court rejected the challenge on the ground that the said order concluding that the disputes were arbitrable was not an interim award. The Court also reasoned that if an order on the point of jurisdiction of the Arbitral Tribunal was an interim award, Section 37 of the A&C Act would not have provided for an appeal against an order accepting the said challenge. The Court observed that it would not be apposite to



accept the plea that if the Arbitral Tribunal rejects the contention that it has no jurisdiction in the matter, the said order would not be an arbitral award; however, when it accepts the said contention, it would be an arbitral award. A plain reading of the decision indicates that it revolved around the question whether an order rendered in an application under Section 16 of the A&C Act deciding that the disputes was arbitrable, was an arbitral award.

47. It is material to note that the learned counsel appearing for NHPC had contested the petition on the ground that an order deciding the question of arbitrability of the disputes was not an interim award as it did not decide any of the issues or the claims referred. He contended that “interim award must decide some of the issues or some of the claims preferred for the decision to be termed as an award”. In the present case, the order dated 06.05.2000 was passed at the stage of final hearing. NHPC had preferred an additional ground for contesting the appellant’s claim and had requested that the same be taken up in the first instance. The application filed by NHPC for considering the additional ground of limitation was not an application under Section 16 of the A&C Act, which in terms of Section 16(2) of the A&C Act is required to be raised “*not later than the submission of the statement of defence*”. In terms of Section 16(5) of the A&C Act, the Arbitral Tribunal may admit a plea that it does not have jurisdiction even at a belated stage, if it considers the delay to be justified. However, NHPC’s application raising the issue of limitation was an application inviting the Arbitral Tribunal to rule as to whether the appellant was precluded from



availing its remedies in respect of its claims as the same were barred by limitation.

48. It is relevant to refer to the decision of the Supreme Court in *National Thermal Power Corporation Ltd. v. Siemens Atkeingesellschaft: (2007) 4 SCC 451*. The Supreme Court had explained that in a larger sense, refusal to go into the merits of the claim may be in the realm of jurisdiction. Thus, even a dismissal of an application as barred by limitation may, in a sense, touch on the jurisdiction of the Court or Tribunal. However, the decision holding that the claim was barred by limitation, would be an adjudication on merits of the claim and therefore, the only recourse available to a party was under Section 34 of the A&C Act. The relevant extract of the said decision is set out below:

“19. In a case where a counterclaim is referred to and dealt with and a plea that the counterclaim does not survive in view of the settlement of disputes between the parties earlier arrived at is accepted, it could not be held to be a case of refusal to exercise jurisdiction by the Arbitral Tribunal. Same is the position when an Arbitral Tribunal finds that a claim was dead and was not available to be made at the relevant time or that the claim was not maintainable for other valid reasons or that the claim was barred by limitation. They are all adjudications by the Tribunal on the merits of the claim and in such a case the aggrieved party can have recourse only to Section 34 of the Act and will have to succeed on establishing any of the grounds available under that provision. It would not be open to that party to take up the position that by refusing to go into the merits of his claim, the Arbitral Tribunal had upheld a plea that it does not have jurisdiction to entertain the claim and hence the award or order made by it, comes



within the purview of Section 16(2) of the Act and consequently is appealable under Section 37(2)(a) of the Act.”

49. The contention that NHPC had laboured under a view that it did not have an immediate recourse to the award dated 06.05.2000 in view of the decision of the Single Judge of this Court rendered on 25.08.1998 [*Union of India and Anr. v. East Coast Boat Builders and Engineers Ltd. (supra)*], is thus unpersuasive.

50. In *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products (supra)*, the Supreme Court had cited a passage from the decision of the Constitution Bench of the Court in *Ittyavira Mathai v. Varkey Varkey & Anr.: (1964) 1 SCR 495*, where the Supreme Court had drawn a distinction between a decision within its jurisdiction and a decision where the court acts without jurisdiction. The Supreme Court had concluded that the decision on the question of limitation was within its jurisdiction. The relevant passage from the said decision referred to by the Supreme Court in *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products (supra)* is set out below:

“8. The first point raised by Mr Paikedy for the appellant is that the decree in OS No. 59 of 1093 obtained by Anantha Iyer and his brother in the suit on the hypothecation bond executed by Ittiyavira in favour of Ramalinga Iyer was a nullity because the suit was barred by time. In assuming that the suit was barred by time, it is difficult to appreciate the contention of the learned counsel that the decree can be treated as a nullity and ignored in subsequent litigation. If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore



the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities. The learned counsel, however, referred us to the decision of the Privy Council in *Maqbul Ahmad v. Onkar Pratap Narain Singh* [*Maqbul Ahmad v. Onkar Pratap Narain Singh*, 1935 SCC OnLine PC 5 : (1934-35) 62 IA 80 : AIR 1935 PC 85] and contended that since the court is bound under the provisions of Section 3 of the Limitation Act to ascertain for itself whether the suit before it was within time, it would act without jurisdiction if it fails to do so. All that the decision relied upon says is that Section 3 of the Limitation Act is peremptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The Privy Council has not said that where the court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.”



51. Following the aforesaid decision, the Supreme Court held that an order passed by the Arbitral Tribunal on the issue of limitation and holding that the claims were not time barred, was an award and thus, could be challenged under Section 34 of the A&C Act.

52. It is material to note that the facts in the said case were materially similar to the facts in that case inasmuch as one of the parties had invoked the arbitration and an arbitrator was appointed. The arbitrator had then framed the issues including the issue of limitation and had decided to take up the said issue in the first instance. The Arbitral Tribunal had on the basis of documentary evidence concluded that the claim was not time barred. The Supreme Court held that the said order was an award and concluded that the said award could be challenged under Section 34 of the A&C Act. The operative part of the said decision is set out below:

“30. In our view, therefore, it is clear that the award dated 23-7-2015 is an interim award, which being an arbitral award, can be challenged separately and independently under Section 34 of the Act. We are of the view that such an award, which does not relate to the Arbitral Tribunal's own jurisdiction under Section 16, does not have to follow the drill of Sections 16(5) and (6) of the Act. Having said this, we are of the view that Parliament may consider amending Section 34 of the Act so as to consolidate all interim awards together with the final arbitral award, so that one challenge under Section 34 can be made after delivery of the final arbitral award. Piecemeal challenges like piecemeal awards lead to unnecessary delay and additional expense.”



53. It is also important to note that, in fact, NHPC was not under any misconception that an application to set aside the interim award dated 06.05.2000 was not maintainable. As noticed hereinbefore, it had filed an application under Section 34 of the A&C Act challenging the order of the Arbitral Tribunal rejecting NHPC's claim that the disputes were not arbitrable. NHPC had pursued the said application till it was withdrawn with liberty to challenge the same along with the impugned award in a fresh application under Section 34 of the A&C Act. The decision in *Union of India and Anr. v. East Coast Boat Builders and Engineers Ltd.* (*supra*) was rendered in an application to set aside the decision of the Arbitral Tribunal rejecting the contention that the claims were not arbitrable. This is precisely the contention advanced by NHPC in this case yet NHPC did not refrain from filing a petition under Section 34 of the A&C Act to challenge the order dated 23.04.1999 rejecting NHPC's claim that the disputes were not arbitrable.

54. NHPC had not even pleaded the defence that the appellant's claims were barred by limitation in its Statement of Defence, it sought to raise it for the first time, by an application after the evidence was complete and the matter was at the stage of final hearing. It does appear that the issue was raised as an afterthought and it did not wish to assail the interim award rejecting its contention at the material time.

RE: LIMITATION

55. As noted hereinbefore, the learned Single Judge had rejected NHPC's challenge in respect of the impugned award, however, it



accepted that the appellant's claims were barred by limitation. Thus, in essence, the learned Single Judge had accepted the challenge to the interim award but had rejected the challenge to the decision of the Arbitral Tribunal holding the disputes to be arbitrable and the merits of the impugned award, which related to issues other than limitation. NHPC's application under Section 34 of the A&C Act insofar as it includes a challenge to the interim award, was barred by limitation and could not be entertained. The impugned judgment is liable to be set aside on this ground alone. Thus, it is not necessary to address the question whether the learned Single Judge was right in setting aside the impugned award on the ground that the claims raised by the appellant were barred by limitation. However, for the sake of completeness, we consider it apposite to examine the rival contentions in this regard as well.

56. The appellant contends that its claims are not barred by limitation. The project was under execution and the final bill had not been prepared prior to invocation of the arbitration agreement (it was prepared in the year 1999) and therefore, the claims in any event could not be held to be barred by limitation. It is contended that the learned Single Judge had erroneously proceeded on the basis that the cause of action had arisen on the day of the floods (that is, 10.09.1992) and therefore any claim for the loss suffered was required to be raised within a period of three years from the said date. The learned counsel appearing for the appellant relied upon the decisions of the Supreme Court in *J.C. Budhraja v. Chairman, Orissa Mining Corporation &*



Anr. (supra); Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority (supra); Panchu Gopal Bose v. Board of Trustees for Port of Calcutta (supra); Rashtriya Ispat Nigam Limited v. Prathyusha Resources & Infra Private Limited & Anr.: (2016) 12 SCC 405; and EMM ENN Associates v. Commander Works Engineer & Ors.: (2016) 13 SCC 61 in support of their contention.

57. The learned counsel appearing for the NHPC countered the aforesaid submissions and sought to distinguish the aforesaid decisions. He relied on the decision of the Supreme Court in ***Union of India & Anr. v. L.K. Ahuja & Co.:(1988) 3 SCC 76*** as well as the decision in ***State of Gujarat v. Kothari & Associates: (2016) 14 SCC 761***. In addition, he contended that the appellant's reliance on the said decisions was misplaced as the appellant was conflating between limitation for claims and limitation for invoking arbitration. The learned counsel also relied on the decisions of the Supreme Court in ***BSNL v. Nortel Networks (India) (P) Ltd.: (2021) 5 SCC 738*** and ***B&T AG v. Ministry of Defence: 2023 SCC OnLine SC 657*** in support of the said contention.

58. The learned Single Judge had proceeded on the basis that the limitation for making the claim arose on 10.09.1992 and since the arbitration was invoked on 01.05.1996, the claims were barred by limitation.

59. The Arbitral Tribunal held that the appellant had, for the first time, by its letter dated 04.09.1995, quantified the claims and requested



the payments for the same. The Arbitral Tribunal noted that the final bill was prepared in the year 1999 and had not been paid. NHPC had not responded to the letter dated 04.09.1995 and the appellant had proceeded to invoke the Arbitration Clause by a letter dated 01.05.1996. The Arbitral Tribunal referred to the decision in the case of ***Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority*** (*supra*) and observed that the accrual of cause of action in an ordinary matter was different from arbitration matters. The Arbitral Tribunal emphasized that the final bill had not been prepared or paid till 24.06.1998 – the date on which the arbitrator was appointed by NHPC. The first demand to settle the claim was raised on 04.09.1995 and the cause of action for arbitration as well as the claim had accrued on the said date. The Arbitral Tribunal also noted that NHPC had appointed the Arbitrator without any reservation as to the claims being barred by limitation. The Arbitral Tribunal also noted that the Arbitrator was appointed by NHPC within a period of three years of the notice of demand dated 04.09.1995. Accordingly, the Arbitral Tribunal held that the time period of three years as prescribed under Articles 55, 113 and 137 of the Limitation Act had not expired even on the date of the appointment of the Arbitrator.

60. It is material to note that the learned Single Judge had not referred to any Article of the Schedule to the Limitation Act for arriving at the said conclusion. However, it was NHPC's case that Article 55 of the Schedule to the Limitation Act was relevant and the claims being made beyond the period of three years, as specified under the said Article, were barred by limitation.



61. Before proceeding to address the said rival contentions, it is relevant to refer to certain sequence of events. As noted above, the incident had occurred on wee hours of 10.09.1992. The water level of the Chenab river had increased about 5 meters in a short span of time. The water crossed over the protection wall built by NHPC and had filled the “TRT-II Outlet Package Work Site”. The appellant had reported the said incident immediately on 11.09.1992. It informed NHPC that all staff and workers who were on duty at the time had returned safely except seven workers who could not be traced. Obviously, the works were suspended and this was discussed between the representatives of the parties. The concerned officials of NHPC had issued instructions to commence dewatering to restore the site. The appellant sent a letter dated 12.09.1992 recording the above and also seeking an interest free advance of ₹25,00,000/- to repair and overhaul the machinery and replenish the stores that were swept away or damaged.

62. Thereafter on 13.09.1992, the appellant reported that site office and stores had been completely washed away and large quantities of stored materials were damaged. Certain machines were also submerged. It informed NHPC that on verbal instructions of the concerned officials of NHPC, dewatering and de-mucking operations had commenced but formal instructions to clear the site and take other measures under Clause 34.2 (ii)(a)&(b) of the GCC were awaited. The appellant also sent other communications apprising NHPC as to the situation at site and the losses suffered by it.



63. On 18.09.1992, the appellant sent a letter enclosing therewith the list of machinery, stores and the material, which were under water and appeared to be either washed or badly damaged. It is apparent from the communications that the parties had discussions regarding executing of the package works and the damage suffered at site.

64. The appellant sent another letter dated 24.09.1992 referring to meetings held with NHPC authorities to discuss the execution of the works. The said letter also noted the appellant's understanding that the cost of re-execution, restoration of works, removal of debris and slush would be paid by the appellant in the same manner as payments for deviations as provided in Clause 34.2 (ii)(a)&(b) of the GCC.

65. NHPC sent a letter referring to the communications sent by the appellant and instructing the appellant to go ahead with the re-execution of the works, which would be dealt with as a *force majeure* case.

66. On 02.11.1992, the appellant reported that the salvaging of machinery and stores had been carried out to the extent possible and the chances for recovery of recoverable machinery were 90% and stores were about 10%. The appellant also requested NHPC to depute the engineer to inspect the same at the earliest.

67. Thereafter, the appellant sent a communication dated 08.11.1992 informing NHPC that pursuant to the directions issued by NHPC, re-execution of the works for restoration of the works lost and damaged had been taken up. Repairs of the plant and machinery were required for restoration of works as well as for removal of debris as substantial



works had been damaged. The appellant also reported that it had suffered losses under various heads as set out in the said letter. It stated that *“The financial implications of damages and loss due to sudden unprecedented flooding and consequent suspension of works will be intimated to you in due course. We are entitled to payment of compensation by the corporation to offset the loss suffered by us on account of sudden unprecedented flooding, under Clause 32 “FORCE MAJEURE” the liability of either party shall be dealt with in accordance with the provision of Sub-clause 34.2 of the GCC”*. The appellant pointed out that in terms of Clause 34.2(i) of the GCC, neither party would be liable to either in respect of loss or damage arising out of *force majeure* provided that such loss could not have been foreseen or avoided. The appellant stated that the submergence of tunnel outlet works and the resultant loss and damages could be avoided by adopting of certain measures as set out in the said letter. The appellant claimed that by adoption of measures the loss would have been either completely eliminated or substantially mitigated and therefore it was entitled to compensation under Clause 34.2(i) of the GCC.

68. It is stated that NHPC did not, at the material time, repudiate or deny the said claim. However, it appears that the matters remained unresolved and in this context on 04.09.1995, the appellant sent a letter enclosing therewith the details of the loss suffered and requesting that the matter be decided and payment be made within a month failing which, the appellant would be compelled to serve a notice for arbitration and invoke the arbitration clause. Since the payments had not been



made, the appellant by a letter dated 01.05.1996, invoked the arbitration agreement.

69. The learned Single Judge did not accept that the arbitration was invoked on 04.09.1995 and rightly concluded that the arbitration agreement was invoked on 01.05.1996. There is no dispute that the arbitral proceedings commenced on 01.05.1996 in terms of Section 21 of the A&C Act.

70. The disputes between the parties are in a narrow compass, that is, whether the cause of action for the claims arose on 09.10.1992. According to NHPC (as also accepted by the learned Single Judge), the cause of action for making the claim arose on 09.09.1992.

71. At this stage, it is relevant to refer to Articles 55 and 113 of the Schedule to the Limitation Act. The same are 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 specially 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.



	XXXX	XXXX	XXXX
113.	Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years.	When the right to sue accrues.”

72. NHPC rests its case that the appellant’s claims are barred by limitation, on Article 55 of the Schedule to the Limitation Act. The appellant’s claim is anchored on a breach of the agreement on part of NHPC. The appellant claims that it is entitled to compensation as proviso to Clause 34.2(i) of the GCC is applicable but NHPC has failed to pay the same. Thus, Article 55 of the Schedule to the Limitation Act is applicable and the period of limitation would commence when the contract is broken. It is not appellant’s case that the flooding was an event of breach of contract on the part of NHPC. The appellant’s claim is founded on the basis of the loss caused by a *force majeure* event but it was avoidable and therefore it is liable to be compensated for the same. If it is accepted that in terms of the contract between the parties, the loss suffered by the appellant on account of *force majeure* event, which could be avoided, is required to be compensated by NHPC, the contract would be breached when NHPC declines to pay the same.

73. The appellant had informed NHPC that it had suffered losses and had provided details for the same in its communications dated 18.09.1992 and 09.11.1992. As noticed above, these claims were not repudiated or denied by NHPC at the material time. Admittedly, NHPC had not responded to the appellant’s letter of 09.11.1992 informing



NHPC the details of the losses suffered and asserting its right to be compensated for the same. The appellant also indicated that it would subsequently inform NHPC as to the quantum of loss suffered by it. NHPC did not dispute the same at the material time. It is in this context that the appellant sent a communication dated 04.09.1995 quantifying the loss suffered and stating that the matter had remained unresolved and if the amounts were not paid within a period of one month, it would be constrained to take steps for invoking arbitration.

74. It is important to ascertain the date when the breach had occurred. This can be answered by addressing the question: if there was no dispute between the parties that the appellant was entitled to be paid for the loss suffered, which was the date on which NHPC was required to make the payments for the loss suffered? Clearly, it was not the date on which the floods had occurred. The payments were required to be made once the appellant had submitted the details and the quantification for the same. According to the appellant, the payments were to be made by adding the same to the contract sum as in the case of payment for removal of debris and re-execution of work that was destroyed/damaged. Absent any dispute as to the entitlement to receive the amounts against loss of stores, machinery and payment to the families of workmen, the same were required to be made as amounts due under the contract. The failure to settle the payments after receipt of details of the loss or repudiation of the claim, would give rise to the cause of action for the breach of contract on the part of NHPC. The period of limitation under Article 55 of the Schedule to the Limitation Act would commence on such breach.



75. In the present case, the appellant had put NHPC to notice by its communication dated 04.09.1995 that it would invoke arbitration if the amount, which was claimed as due and payable, was not paid within a period of one month as demanded. The failure on the part of NHPC to pay the same would clearly give rise to a cause of action.

76. It is material to note that the contract was continuing at the relevant time and the final bill had not been prepared. The compensation sought by the appellant was in connection with the loss suffered in executing the contract *albeit* on account of a *force majeure* event. The contention that in terms of Article 55 of the Schedule to the Limitation Act, the period of limitation commenced from date of the floods is erroneous and the impugned judgment holding so, cannot be sustained.

77. In ***J.C. Budhraja v. Chairman, Orissa Mining Corporation & Anr.*** (*supra*) – a judgment on which strong reliance was placed on behalf of NHPC – the Supreme Court was concerned with a case where a contractor had made a claim for additional payments in respect of a contract. In that case, the work was completed on 15.06.1975, the final measurement was taken on 16.06.1975 and the final bill was signed by the contractor on 14.04.1977, *albeit* under protest. Apparently, the discussions in regard to additional payment continued even after the final bill was signed. The claims for additional payments were considered by the employer – Orissa Mining Corporation (OMC). OMC formed a committee to examine the claims of the contractor for settling the dues. In the aforesaid context, OMC sent a letter dated



28.10.1978 in regard to the pending claims and informed the contractor that a committee was constituted to examine the same. The contractor sent a letter dated 16.11.1978 enclosing therewith a statement which indicated that in all a sum of ₹50,15,820/- was due. The committee constituted by OMC examined the claims and admitted claims to the extent of ₹3,52,916/- in terms of its final report dated 07.12.1979 and an amount of ₹3,50,000/- was thereafter paid on 04.03.1980. However, the contractor being unsatisfied invoked arbitration by a notice dated 04.06.1980. Before the Arbitral Tribunal, the contractor made claims aggregating ₹95,96,616/-. Out of the said amount only claims amounting to ₹28,32,128/- were included in the claims aggregating ₹50,15,820/- which were subject matter of consideration by the committee constituted by OMC. The remaining pending claims of ₹21,83,692/-, which were part of the original claims aggregating ₹50,15,820/-, were not raised before the arbitrator.

78. In the aforesaid context, the Supreme Court held that the claims for only ₹28,32,128/- that formed a part of claims of ₹50,15,820/- were not barred by limitation but the balance amount of ₹67,64,488/- were fresh claims, which were barred by limitation. The Supreme Court had explained that as the payment of ₹3,50,000/- made on 04.03.1980 was in respect of claims of ₹50,15,820/-, the same extended the period of limitation in respect of only those claims that formed part of claims considered (claims of ₹50,15,820/-) but were rejected. The said decision, if at all, supports the case of the appellant and not of NHPC. In that case, the Supreme Court had accepted that the cause of action



for payment of the amounts due under the contract would arise on the date when the final bill was signed. In the present case, the final bill was prepared after the appellant had invoked the arbitration agreement on 01.05.1996 and the payments claimed by NHPC are in respect of the contract.

79. In *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority* (*supra*), the Supreme Court had considered the question of limitation in respect of claims of a contractor made after the work was completed. In that case Delhi Development Authority (DDA) had awarded the contract for construction of Janta houses to the petitioner [Major (Retd.) Inder Singh Rekhi]. The works were to commence on 15.10.1976 and required to be completed on or before 14.07.1977. The contract was finally completed on 02.04.1980. Thereafter, between February, 1983 to December, 1985, the contractor sent several letters to DDA, requesting them to finalize the bills. The first such letter was sent on 28.02.1983 and final on 04.09.1985. The contractor sent a notice requesting for release of the security amount and reference of the dispute to arbitration. DDA did not refer the disputes to arbitration. Consequently, in January, 1986, the contractor filed an application under Section 20 of the Arbitration Act, 1940 seeking reference of the disputes to arbitration. The learned Single Judge of this Court dismissed the said application as barred by limitation. The contractor preferred an appeal to the Division Bench but was unsuccessful. He carried the matter to the Supreme Court. The principal question that fell for consideration of the Supreme Court was whether the application



filed by the contractor under Section 20 of the Arbitration Act, 1940 was barred by limitation, since the residuary Article 137 of the Schedule to the Limitation Act was applicable.

80. This Court had held that since the works were completed in the year 1980 therefore the cause of action had arisen on the completion of the works. The application under Section 20 of the Arbitration Act, 1940 was filed in January, 1986, which was beyond the period of three years from the date of cause of action. Thus, the same was barred by time. In the appeal filed by the contractor, the Supreme Court observed as under:

“4. It is true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on 28-2-1983 and there was non-payment, the cause of action arose from that date, that is to say, 28-2-1983. It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action.....”

81. It is contended by NHPC that the said decision was rendered only in the context of the cause of action for filing a petition under Section 8 or under Section 20 of the Arbitration Act, 1940. It is submitted that in order to apply for instituting an action for reference of the disputes to arbitration for appointment of an arbitrator, the cause of action would be the day when the disputes arise and not on the date when the cause for filing a claim arises. There is merit in the contention that the



question of limitation for filing an application under Section 11 of the A&C Act would either be the refusal on the part of the counterparty to appoint an arbitrator or failure to do so within the period as stipulated in the notice invoking arbitration. Any application to the court for appointment of the arbitrator would necessarily have to be made within the period of three years in terms of Article 137 of the Schedule to the Limitation Act. In this regard, the Supreme Court in the case of **J.C. Budhraja v. Chairman, Orissa Mining Corporation & Anr.** (*supra*) had explained that “*The existence of a dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Act*”. The said observations are clearly relevant for determining whether the application under Section 8 or under Section 20 of the Arbitration Act, 1940 was made within the period of limitation.

82. The decision in the case of **Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority** was referred to by the Supreme Court in **B & T AG v. Ministry of Defence** (*supra*), and the Supreme Court had observed as under:

“37. Three principles of law are discernible from the aforesaid decision of this Court. First, ordinarily on the completion of the work, the right to receive the payment begins. Secondly, a dispute arises when there is a claim on one side and its denial/repudiation by the other and thirdly, a person cannot postpone the accrual of cause of action by repeatedly writing letters or sending reminders. In other words, ‘bilateral discussions’ for an indefinite period of time would not save the situation so far as the



accrual of cause of action and the right to apply for appointment of arbitrator is concerned.”

83. In ***Panchu Gopal Bose v. Board of Trustees for Port of Calcutta*** (*supra*) the matter had travelled to Supreme Court from the decision of the Division Bench upholding the decision of the learned Single Judge to the effect that the claims made by the contractor in respect of works executed pursuant to a contract entered into on 27.05.1978 were barred by limitation. The said decision was referred in an arbitration suit instituted by the respondent (employer). The parties had entered into an agreement on 27.05.1978 which provided that the contractor (appellant before the Supreme Court) was to execute the works within a period of nine months. The appellant claimed that while executing the works, he had sent bills on 12.07.1979 but the payments were not made. He sent a notice for the first time on 28.11.1989 seeking reference to arbitration. The appellant contended that Clause 68 of the contract between the parties provided for appointment of an arbitrator and he had legally invoked the said clause by issuing a notice and the respondent was duty bound to appoint an arbitrator and on failure to do so, it was open for the appellant to approach the Court under Section 8 of the Arbitration Act, 1940 for appointment of an arbitrator. However, the High Court had scuttled the procedure by exercising the power under Section 5 of the Arbitration Act, 1940. The Supreme Court held that the Court had the power under Section 5 and under Section 12(2)(b) of the 1940 Act to revoke an arbitration agreement. The Supreme Court was thus concerned with the decision of the High Court to rescind the arbitration agreement. In the given facts, the Supreme Court found that



the claim was hopelessly barred by limitation and therefore the exercise of discretionary power by the Court did not warrant any interference. The concluding paragraph of the said judgment is relevant and is reproduced below:

“16. The case on hand is clearly and undoubtedly a hopelessly barred claim as the petitioner by his conduct slept over his right for more than 10 years. Statutory arbitrations stand apart. In these circumstances it is an exceptional case and the courts below have justifiably exercised their discretionary power and jurisdiction under Section 5 and 12(2)(b) to permit the respondent to rescind the arbitration agreement and declared that the arbitration agreement shall cease to have effect with respect to the difference or dispute referred to in the notice of the petitioner and relieved the parties from the arbitration agreement. The special leave petitions are accordingly dismissed without costs.”

84. While considering the controversy, the Supreme Court also explained as under:

“11. Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

13. *The Law of Arbitration* by Justice Bachawat in Chapter 37 at p. 549 it is stated that just as in the case of



actions the claim is not to be brought after the expiration of a specified number of years from the date when the claim accrues, so also in the case of arbitrations, the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) 'action' and 'cause of action' in the Limitation Act should be construed as arbitration and cause of arbitration. The cause of arbitration, therefore, arises when the claimant becomes entitled to raise the question, i.e. when the claimant acquires the right to require arbitration. The limitation would run from the date when cause of arbitration would have accrued, but for the agreement."

85. In *Union of India & Anr. v. L.K. Ahuja & Co. (supra)* the dispute between the parties related to four agreements which were entered into on or about 18.09.1969 for construction of certain quarters. A supplementary agreement was entered into sometime in 1972. The works under the four contracts were completed on due date. The last one was 30.05.1971. The final bills were prepared in respect of the work done and were accepted by the contractor between the period 29.05.1972 to 19.06.1972. The contractor also gave a declaration that it had no claims in respect of the four agreements, however, thereafter the contractor wrote a letter stating that a sum of ₹1,91,137/- was due on account of the works executed and requested that an arbitrator be appointed. The employer responded on 04.06.1976 asserting that there were no disputes between the parties and therefore there was no question of an arbitrator being appointed. On 13.12.1976, the contractor filed an application before the Allahabad High Court for appointment of an arbitrator under Section 20 of the Arbitration Act, 1940. The High Court dismissed the said application on 10.02.1978 as being barred by



limitation. The contractor appealed the said decision before the Division Bench of the Allahabad High Court, which was allowed by an order dated 14.08.1986. The Supreme Court dismissed the appeal and upheld the decision of the Division Bench of the High Court. The Supreme Court noted that since the appellant had filed an application requesting for appointment of an arbitrator in June, 1976 and an application was filed before the Civil Judge, Allahabad for appointment of an arbitrator on 13.12.1976, the same was within the period of limitation from the date when the disputes have arisen. The claim for a reference under Section 20 of the Act was within limitation. The Supreme Court also observed that the question “*whether the claim to be adjudicated by the arbitrator, was barred by lapse of time*” would be decided by the arbitrator unless it is found that at the time of making an order under Section 20 of the Arbitration Act, 1940 the same is barred by limitation.

86. There can be no cavil with the proposition that the cause for arbitration commences when the cause of action for filing a suit arises. Invoking arbitration and commencing arbitral proceedings are akin to instituting a suit in a case where there is no arbitration agreement. The cause of action for instituting the suit would be the same as the cause of action for commencing arbitration. After the parties had issued notice invoking arbitration (which in terms of Section 21 of the A&C Act commences arbitral proceedings), it is also necessary for the said party to take steps within the specified period to ensure that an arbitral tribunal is appointed. Failure to take steps within the period of three



years (Article 137 of the Limitation Act) would result in foreclosure of the right to avail of remedies before courts in this regard. The period of limitation for setting up claims and the period of limitation for availing remedies for referring the disputes to arbitration are different. It is possible that the claims are barred by limitation – the arbitration agreement is invoked after expiry of the period of limitation – but the remedies for appointing an arbitrator are not foreclosed. The said difference was also explained by the Supreme Court in ***Bharat Sanchar Nigam Ltd. v. M/s Nortel Networks India Pvt. Ltd.:* (2021) 5 SCC 738.**

87. It is apparent that the Arbitral Tribunal has conflated the question of limitation for approaching the Court for reference of the parties / disputes to arbitration and the period of limitations for the claims. The remedy of raising claims in arbitration would be foreclosed if the arbitral proceedings were not commenced within the period of the limitation as prescribed under the Limitation Act. In case of breach of contract, the arbitral proceedings are required to be commenced within a period of three years from the date on which the contract is broken in terms of Article 55 of the Schedule to the Limitation Act. Under Article 113 of the Schedule to the Limitation Act, arbitral proceedings are required to be instituted within a period of three years from the date on which the right to sue has accrued. As noted above, in terms of Section 21 of the A&C Act, unless parties have agreed otherwise, the arbitral proceedings would commence on the receipt of the request for arbitration by the respondent. The recourse to courts for appointment of arbitrators would necessarily have to be taken within a further period of



three years from the service of the notice invoking arbitration agreement in view of Article 137 of the Schedule of the Limitation Act.

88. The Arbitral Tribunal had also erred in proceeding on the basis that limitation for cause of action in ordinary matters was different from the period of limitation as applicable to arbitral proceedings.

89. As explained by the Supreme Court in ***Panchu Gopal Bose v. Board of Trustees for Port of Calcutta*** (*supra*) and ***Bharat Sanchar Nigam Ltd. vs. M/s. Nortel Networks India Pvt. Ltd.*** (*supra*), the cause of action for invoking arbitration would be the same as the cause of action for instituting a suit if there was no arbitration agreement between the parties. Thus, notice under Section 21 of the A&C Act is required to be issued within the period of limitation available for instituting an action in respect of the claims. It is erroneous to assume that a notice under Section 21 of the A&C Act could be issued within a period of three years of the dispute having arisen notwithstanding the period of limitation for instituting an action in respect of a claim has expired. The period for availing the remedies in Court where an Arbitral Tribunal is not constituted after the party had invoked arbitration is a separate matter. The Court would deny the parties the recourse to remedies before Court if a party had not approached the Court within the period of three years for appointment of an arbitrator.

90. However, we are unable to accept that the operative conclusion that the cause of action for making a claim for payment of compensation had arisen on the date of the floods. As noted above, the Arbitral



Tribunal had noted that the final bill payable under the contract had not been prepared till the year 1999.

91. The decision of the Supreme Court in ***B & T AG v. Ministry of Defence*** (*supra*) is also instructive. The Supreme Court had noted that a petition under Section 11(6) of the A&C Act was required to be filed within a period of three years as Article 137 of the Schedule to the Limitation Act would apply. The starting point of limitation under Article 137 to the Schedule to the Limitation Act is “when the right to apply accrues”. The Supreme Court observed that the expression “right to apply” is an expression of broad common principle and should be interpreted according to the circumstances of each case. The cause of action, in the context of Section 11(6) of the A&C Act, would arise where parties have agreed to appointment procedure for constitution of an Arbitral Tribunal and any party fails to act as per the required procedure; or the arbitrators fail to reach on an agreement expected of them under the procedure, or a person, including an institution, required to perform any functions entrusted to him under the procedure fails to do so.

92. In the context of Section 11(5) of the A&C Act, a right to apply would arise when the parties fail to agree on an arbitrator within a period of thirty days from the receipt of the request by a party for appointment of an arbitrator. However, the cause of action for commencing the arbitral proceedings (which unless parties have agreed otherwise would commence on the date when the request for a dispute to be referred to arbitration is received by the counterparty) would be the same as the



cause of action for filing a civil suit in the event an arbitration agreement did not exist between the parties. Thus, the arbitral proceedings must commence within the period of limitation as provided for instituting an action in respect of a particular cause of action.

93. The answer to the question as to when such cause of action has arisen is fact centric.

94. In ***B & T AG v. Ministry of Defence*** (*supra*), the Supreme Court in the aforesaid context observed as under:

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

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



have maintained his action to a successful result.

....”

(Emphasis supplied)

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

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

(Emphasis supplied)

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

72. Whether any particular facts constitute a cause of action has to be determined with reference to the facts of each case and with reference to, the substance, rather than the form of the action. If an infringement of a right happens at a particular time, the whole cause of action will be said to have arisen then and there. In such a case, it is not open to a party to sit tight and not to file an



application for settlement of dispute of his right, which had been infringed, within the time provided by the Limitation Act, and, allow his right to be extinguished by lapse of time, and thereafter, to wait for another cause of action and then file an application under Section 11 of the Act 1996 for establishment of his right which was not then alive, and, which had been long extinguished because, in such a case, such an application would mean an application for revival of a right, which had long been extinguished under the Act 1963 and is, therefore, dead for all purposes. Such proceedings would not be maintainable and would obviously be met by the plea of limitation under Article 137 of the Act 1963.”

95. In the present case, there is no ambiguity that the issue involved is whether the appellant’s claim was barred by limitation. The question is, when did the cause of action accrue for the appellant to sue for compensation for loss suffered on account of floods. In the event there was no agreement between the parties, the cause of action to file a suit would arise on NHPC declining to pay the amount claimed or failing to do so after the appellant had submitted the invoice. NHPC had not denied the appellant’s entitlement to claim the loss suffered, which was informed by the appellant in its letter dated 02.11.1992. The appellant had quantified the claim in full in its letter dated 04.09.1995 and demanded that the same be paid within a period of thirty days. However, NHPC did not pay the said amount. Thus, the cause of action to sue NHPC arose on expiry of the said period of thirty days. At the cost of repetition, the payments demanded were in relation to a contract, the final bill of which had not been prepared at the material time.



96. The execution of the works was continuing and it is not disputed that the contract had not been completed as on the date of the commencement of the arbitral proceedings, that is, as on 01.05.1996. As noticed above, the compensation demanded by the appellant was in respect of the contract and the payment due under the contract had not been finalized. Admittedly, the final bill was prepared in the year 1999 and was not paid till the date of the rendering of the impugned award.

97. It is also material to note that NHPC had responded to the appellant's letter dated 04.09.1995 by its letter dated 09.10.1996. It claimed that since the disputes raised by the appellant were in respect of Clauses 32 and 34 of the GCC, the same were covered under Clause 53 of the GCC (Finality Clause).

98. Neither the Arbitral Tribunal nor the learned Single Judge had accepted that Clause 53 of the GCC would apply to the appellant's claim for compensation.

99. Whilst, we agree with NHPC's contention that the question whether a claim based on breach of contract is barred by limitation, is required to be considered in reference to Article 55 of the Schedule to the Limitation Act (three years from the date on which contract is broken). However, we do not accept that in this case the period of limitation is required to be reckoned from the date of the floods (that is, 10.09.1992). Considering that the payments due under the contract had not been finalized and the final bill was under preparation, it is difficult



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to accept that the appellant's claim, for payment of compensation, was barred by limitation.

100. The appeal is, accordingly, allowed and the impugned judgment is set aside.

101. The parties are left to bear their own costs.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

MAY 16, 2024
RK/ gsr