NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Civil Revision No.115 of 2008

M/s Amar Engineering Works A partnership concern through Partner Shri Kedar Nath Singhal, son of Late Shri Motilal Singhal aged about 73 years, resident of 162, New Civic Centre, Bhilai District Durg, Chhattisgarh

---- Applicant

Versus

1. State of Chhattisgarh, Through the Secretary, Public Works Department (B & R), D.K.S. Bhawan, Mantralaya, Raipur, Chhattisgarh
2. The Executive Engineer, P.W.D. (B&R), Division Rajnandgaon, Chhattisgarh

---- Respondents

For Petitioner	:	Mr. Amrito Das, Advocate.
For Respondents	:	Mr. Vinod Deshmukh, Dy.Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

ORDER (C.A.V.)

29/07/2016

1. Invoking Section 19 of the Chhattisgarh Madhyastham Adhikaran Adhiniyam, 1983 (for short 'the Act of 1983'), the petitioner contractor has filed this revision questioning legality, validity and correctness of the award dated 17-03-2008 passed by the Chhattisgarh Madhyastham Adhikaran, Raipur (for short 'the Arbitration Tribunal') in Reference Case No.112/2005, whereby the reference petition instituted by the petitioner herein has been rejected on the ground that it is barred by limitation as provided in Section 7-B of the Act of 1983.

2. The petitioner preferred the reference petition under Section 7 of the Act of 1983 demanding ₹ 2,56,411/- towards refund of deposit money, refund of recovery etc. The said reference petition was admitted for hearing under Section 7-B of the Act of 1983 and thereafter after conclusion of hearing it was dismissed holding to be hopelessly barred by limitation.

3. Mr. Amrito Das, learned counsel appearing for the petitioner contractor, would submit that the learned Arbitration Tribunal has committed grave legal error by dismissing the reference on the basis of limitation. He would further submit that Section 7-B of the Act of 1983 prescribes limitation for admission of the reference petition for which the dispute is firstly required to be referred for the decision of the final authority under the terms of the works contract upon accrual of the dispute and thereafter, one year from the date of communication of the decision of the final authority, the reference petition is to be filed before the Tribunal. He would also submit that in the instant case, the question of limitation was considered by the Tribunal on 27.10.2005 and the petition was admitted for hearing after having satisfied that the reference petition is within limitation. He would also submit that the learned Arbitration Tribunal has failed to consider the fact that in the works contract there is no concept of cause of action, here the question would be the cause of arbitration. He would also submit that cause of arbitration accrued from the date when the claimant first

acquired either a right of action or a right to require that an arbitration should take place upon the dispute concerned. He would lastly submit that in the present case, the dispute was firstly referred to the Superintending Engineer and thereafter, the Chief Engineer and thereafter, within the period prescribed under Section 7-B (1) (b) of the Act, the reference petition was filed and the Tribunal is absolutely unjustified in rejecting the reference petition as barred by limitation.

4. Mr. Vinod Deshmukh, learned Dy.Govt. Advocate appearing on behalf of the State of Chhattisgarh/respondents, would support the impugned award.

5. I have heard learned counsel for the parties, given thoughtful consideration to the facts of the present case, perused the award impugned and also gone through the records with utmost circumspection.

6. In order to understand the dispute between the parties, it would be advantageous to refer to the provisions of the Act of 1983. The Act of 1983 was enacted by the competent Legislature which came into force on 7th of October, 1983. Section 7 of the Act of 1983 deals with Reference to Tribunal. After few years, the Act of 1983 experienced some difficulties in its implementation by which the Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990 was passed with effect from 24-4-1990 by which some provisions including Section 7-B were inserted. The Statement of objects and

reasons of the Sanshodhan Adhiniyam, 1990 would show that Section 7-B was inserted for efficient functioning of the Tribunal and thus, it was proposed to prescribe limitation which has not been so far prescribed for admission of reference petition. Accordingly, with effect from 24-4-1990, Section 7-B was introduced in the Act of 1983 which states as under: -

> "**7-B. Limitation**.—(1)The Tribunal shall not admit a reference petition unless-
>
> (a) the dispute is first referred for the decision of the final authority under the terms of the works contract, and
>
> (b) the petition to the Tribunal is made within one year from the date of communication of the decision of the final authority :
>
> Provided that if the final authority fails to decide the dispute within a period of six months from the date of reference to it, the petition to the tribunal shall be made within one year of the expiry of the said period of six months.
>
> (2) Notwithstanding anything contained in sub-section (1), where no proceeding has been commenced at all before any Court preceding the date of commencement of this Act or after such commencement but before the commencement of the Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990, a reference petition shall be entertained within one year of the date of commencement of Madhya Pradesh Madhyastham Adhikaran (Sanshodhan) Adhiniyam, 1990 irrespective of the fact whether a decision has or has not been made by the final authority under the agreement."

7. A critical study of Section 7-B(1) of the Act of 1983 would show that the Tribunal shall not admit a reference petition unless the dispute is first referred for the decision of the final authority under the terms of the works contract. In sub-section (1) of

Section 7-B, the word “admit” has been used. In ordinary legal parlance, the word “admit” means accepted for consideration or final hearing. Thus, the dispute is firstly required to be referred to the final authority under the terms of the contract for resolution of dispute and upon resolution of dispute within a period of one year from the date of communication of the decision of the final authority, the reference petition is to be filed before the Tribunal and in case, the final authority fails to decide the dispute within a period of six months from the date of reference to it, the petition to the Tribunal shall be made within one year of the expiry of the said period of six months. It is extremely important to note that this period of limitation has been prescribed for admission of reference petition and therefore this limitation is only confined to admission of reference petition and has nothing to do with the merits of the claim of the contractor / claimant / petitioner herein.

8. Section 7-B of the Act of 1983 came up for consideration before the Division Bench of this Court in Civil Revision No.165/2008 (M/s. Uttam Construction Company – Versus – State of Chhattisgarh and another) and the Division Bench vide order dated 7-1-2013 while considering Section 7-B of the Act of 1983 speaking through Justice Abhay Manohar Sapre (as then His Lordship was), observed as under: -

> “(7) Mere perusal of the afore-quoted section would go to show that the claimant is first required to approach the final authority under the terms of

> the works contract after getting a decision on their claim from the final authority. Sub-section (b) provides for one year limitation which is required to be counted from the date of communication of the decision taken by the final authority on the claim made by the claimant. Proviso to Section 7-B provides that if the final authority is unable to take decision within a period of 6 months from the date of submission of reference to it, then, a claim petition can be filed by the claimant within one year of the expiry of the said period of 6 months."

9. This consideration of true scope and object of Section 7-B of the Act of 1983 and the object of enacting the said provision would bring me to the question as to when the right of arbitration accrues in the context of the arbitration clause.

10. In the matter of **State of Orissa v. Damodar Das**[1], the Supreme Court while considering Section 3 of the Limitation Act, 1963, held as under: -

> "Russell on Arbitration by Anthony Walton (19th Edition) at pp. 4-5 states that the period of limitation for commencing an arbitration runs from the date on which the "cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. The period of limitation for the commencement of the 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.
>
> Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred until an award is

1 (1996) 2 SCC 216 : 1996 AIR SCW 351 : AIR 1996 SC 942

> made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause."

11. Likewise, in the matter of **Panchu Gopal Bose v. Board of Trustees for Port of Calcutta**[2], the Supreme Court regarding commencement of the period of limitation for cause of arbitration has held as under (para 11 of AIR): -

> "The period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned.
>
> 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."

12. Aforesaid two decisions were considered by Their Lordships of the Supreme Court in the matter of **Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor**[3] by holding as under in paragraph 29: -

> "29. Applying the aforesaid ratio in the present case, right to refer the dispute to the arbitrator arose in 1979 when Contractor gave a notice demanding the amount and there was no response from the appellant and the amount was not paid. The cause of action for recovery of the said amount arose from the date of the notice. Contractor cannot wait indefinitely and is required to take action within the period of limitation. In the present case, there was supplementary agreement between the parties.

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2 (1993) 4 SCC 338 : 1994 AIR SCW 1335 : AIR 1994 SC 1615

3 AIR 1999 SC 3275

> Supplementary agreement nowhere provides that so-called right of the contractor to recover damages was in any manner saved. On the contrary, it specifically mentions that contractor was yet to execute a considerable portion of the work more particularly described in the schedule to the agreement. And that the contractor has agreed to complete the said balance work on the terms and conditions enumerated in the agreement. Now, in this set of circumstances, contractor cannot wait and approach the authority or the Court for referring the dispute to the arbitrator beyond the period of limitation. Section 37 of the Arbitration Act specifically provides that provisions of the Indian Limitation Act shall apply to the arbitrations as they apply to proceedings in the Court."

13. Thus, there is a distinction between "cause of action" and "cause of arbitration".

14. Likewise, in a recently delivered judgment in the matter of **Rashtriya Ispat Nigam Ltd. v. M/s. Prathyusha Resources and Infra Private Ltd. and another**[4], the Supreme Court has said that cause of action for arbitration arises when real dispute arises i.e. when one party asserts and other party denies any right, and observed as under: -

> "..... Either ways the cause of action in favour of the respondent / claimant accrued, if any, is an imperfect right."

15. In order to have a cause of arbitration there must be a dispute and it is well settled that unless there is a difference there cannot be any dispute. The High Court of Madhya Pradesh in the matter of **Dilip Construction Company, Baroda v. Hindustan Steel Ltd., Ranchi**[5] as held as under: -

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4 AIR 2016 SC 861

5 1973 JLJ 696 : AIR 1973 MP 261

> "The existence of a dispute is an essential condition for the jurisdiction of an arbitrator. If there is no dispute, there can be no legal right to demand arbitration at all. Failure to pay does not necessarily constitute a difference or dispute. A dispute implies an assertion of right by one party and repudiation thereof by another. The jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute."

16. A Special Bench of the Madhya Pradesh High Court in the matter of **Sanjay Dubey v. State of M.P. and another**[6] while dealing with the scope of Section 7-B of the Act of 1983 (Limitation for reference) has held that where the works contract contains an arbitration clause, the jurisdiction of the Tribunal can be invoked only after approaching the Authority as provided under the terms of the works contract, and observed in paragraph 13 (i) as under: -

> "(i) Where the works contract contains a clause like Clause 29, the jurisdiction of the Tribunal can be invoked only after approaching the Authority as provided under the terms of the works contract."

17. The Arbitration Tribunal has held in paragraphs 8 and 9 as under:-

> "8. The petitioner by his letter dated 24/8/93 addressed to the S.E. (Ex.P-24) has submitted his quantified claim. From letter dated 6/1/90 (Ex.P-18) of the E.E. addressed to the S.D.O., it appears that the concerned Measurement Book was not traceable in the office of S.D.O. The S.D.O. was further asked to furnish measurement book and details of debitable cost. Copy of this letter was

6 2012(4) M.P.L.J. 212

also endorsed to the S.E. and the petitioner, however, it has to be noticed that the petitioner was informed about the amount of recoveries to be made against him by letter dated 11/7/89 (Ex.D-8) of the E.E. and therefore, in our opinion, this letter will form the cause of action with the petitioner to raise his quantified claim. It is immaterial that by further correspondence, the petitioner and also the department kept the matter alive in absence of the details as to how this recovery was arose against the petitioner.

9. Although, Clause 29 of the agreement does not provide any limitation for presenting the claim before the S.E. and it also does not provide as to within which period the S.E. has to give his decision. However, it has been provided that an appeal lies to the C.E. against the decision of the S.E., within a period of 30 days from such decision. If the cause of action is taken to be 11/7/89, the reference to the S.E. for invoking Clause 29 of the agreement by letter dated 1/8/89 is incomplete in the sense that it does not mention any quantified claim on behalf of the petitioner. The petitioner under he pretext of non-supply of the details of the various documents on the basis of which recovery is going to be affected has tried to keep the matter alive by submitting so many letters to the department and ultimately filed his quantified claim before the S.E. only on 24/8/93 (EX.P-24) after lapse of about four years from the accrual of the cause of action."

18. It was held by the Arbitration Tribunal that the petitioner was

informed about the amount of recovery to be made against him by letter dated 11.7.1989 (Ex.D-8) issued by respondent No.2 and therefore, that will constitute the cause of action for the petitioner to raise his quantified claim and further held that the petitioner raised his claim under clause 29 of the agreement for which no limitation was provided and the Superintending Engineer by its decision dated 1.9.2004 has failed to assign any reason in rejecting the claim of the petitioner as time barred, but ultimately held that reference petition was filed before the Tribunal on 17.10.2005 after lapse of more than 16 years from accrual of the cause of action and that was hopelessly barred by limitation.

19. It is pertinent to mention here that on 11.7.1989 (Ex.D-8) the respondents prepared the final bill showing adjustments and the petitioner objected to the said final bill and requested for initiation of arbitration proceedings under clause 29 of the agreement on 1.8.1989 vide Ex.P/16. The petitioner again submitted his application under clause 29 of the agreement vide Ex.P-24 and finally the Superintending Engineer rejected the said application preferred by the petitioner on 1.9.2004 and thereafter, as per clause 29 of the agreement, the petitioner preferred an appeal under clause 29 of the agreement before the Chief Engineer on 30.9.2004 vide Ex.P/25 and thereafter reference petition was filed before the Arbitration Tribunal on 17.10.2005 as provided in proviso to Section 7-B (1) of the Act

of 1983, which was admitted for hearing on 25.11.2005 after finding it is prima-facie case and within period of limitation.

20. The fact remains that the dispute arose between the parties when it was dismissed by the Superintending Engineer on 1.9.2004 vide Ex.P-6, which was the dispute raised under clause 29 of the agreement and against which, appeal was preferred vide Ex.P-25 and thereafter reference petition was filed on 17.10.2005. In the considered opinion of this Court, learned Arbitration Tribunal is absolutely unjustified in holding that reference petition is hopelessly time barred. There is a distinction between “cause of action” and “cause of arbitration”. Dismissal of application by the Superintending Engineer on 1.9.2004, against which the petitioner preferred an appeal and thereafter in accordance with Section 7-B(1) of the Act of 1983, reference petition was filed, which was apparently within the limitation.

21. As a fall out of the aforesaid discussion, the civil revision is allowed and the impugned award passed by the learned Arbitration Tribunal is hereby set aside in toto. The finding recorded by the Arbitration Tribunal on the question of reference petition being barred by limitation is perverse and contrary to record. The reference petition is restored to its original number for hearing and disposal in accordance with law on merits. The learned Arbitration Tribunal is directed to decide the reference petition within 4 months from the date of receipt

of a copy of this order in view of the legislative mandate contained in Section 16(2) of the Act of 1983 and further in view of fact that the reference petition was filed on 17.10.2005. Parties shall bear their own cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge

B/-