

Before Jaishree Thakur, J.

HOUSING BOARD HARYANA AND ANOTHER—Appellants

versus

M/S COMFITS MARKETING AND OTHERS—Respondents

FAO No.4329 of 2004

August 13, 2019

Arbitration and Conciliation Act, 1996—S.34—Contractual clause providing period of limitation for filing arbitration petition valid—Contract allotted by appellant to Respondent No.1 on 30.03.1995—Assigned work not completed till date fixed— Arbitrator appointed on 20.04.1999 i.e beyond the period of six months as per Clause 26(9) of contract—Arbitral award passed in favor of appellants—Respondent No.1 filed objections before ADJ—Award set aside on ground that arbitrator was appointed beyond period of limitation—Appeal preferred—Contended that plea of limitation was earlier not raised before arbitrator—Held, if arbitration petition is not filed within period specified in contract then claim is deemed to be waived—Contractual clause providing period of limitation supercedes Article 137 of Limitation Act—Even if plea of limitation is not raised in arbitration petition, Court is bound to consider it while perusing objections —Appeal dismissed.

Held that, as also, the decisions rendered by the Supreme Court in the cases of *P. Manohar Reddy & Bros. vs. Maharashtra Krishna Valley Development Corporation and others* and *Wild Life Institute of India vs. Vijay Kumar Garg (supra)* make it clear that a contractual clause providing for limitation so as to enable a party to lodge his claim with the other side is valid and the provisions of Section 28 of the Contract Act and period of limitation as prescribed under Article 137 of the Limitation Act would not be applicable to such a contractual clause. Further, if the claim is not made by the aggrieved party for arbitration within the period as specified in the contract then in such an eventuality the claim of the aggrieved party in this regard will be deemed to have been waived and absolutely barred and the party against whom claim would have been raised, shall be discharged and released of all liabilities under the contract in respect of those claims.

(Para 10)

Further held that, next question which this court is to answer is

that if a party fails to raise the issue of limitation in respect of any of the claim in the arbitration petition or in the written statement, whether the same can be raised in a petition filed under Section 34 of the Act? In this regard, in the case of *Binod Bihari Singh vs. Union of India*, (1993) 1 SCC 572, the Supreme Court has held that the bar of limitation may be considered even if such plea has not been specifically raised. Limitation Act is a statute of repose and bar of a cause of action in a court of law, which is otherwise lawful and valid, because of undesirable lapse of time as contained in the Limitation Act, has been made on a well accepted principle of jurisprudence and public policy. Similarly, in the case of *Sealand Shipping & Export Pvt. Ltd. vs. Kinship Services (India) Pvt. Ltd.*, 2011(5) Bom. C.R. 572, the Supreme Court has held that even if the plea of limitation is not specifically raised in the arbitration petition, the court is bound to consider such plea while considering a petition under Section 34 of the Act and there cannot be any waiver on the issue of limitation. The decisions rendered in the case of *Binod Bihari Singh vs. Union of India* (*supra*) was subsequently followed by the Supreme Court in the case of *Oil and Natural Gas Corporation Ltd. vs. Essar Oil Limited* (*supra*). So, it is clear that if the plea of limitation is not raised by a party in the arbitration petition or in the written statement, even then plea of limitation can be considered by the court while deciding a petition under Section 34 of the Act.

(Para 11)

Further held that, as per letter dated 20.02.1998 of the Executing Engineer, respondent No.1 had to commence the work by 05.03.1998 and as per another letter dated 02.03.1998 of the Executing Engineer, the work was to be completed within a period of 15 days i.e. by 20.03.1998. The Arbitrator was appointed by the Chief Administrator, Housing Board Haryana, Panchkula vide letter dated 20.04.1999. As per Clause 26(9) a party would be entitled to bring a claim for arbitration within six months from the date; (i) of abandonment of work, or (ii) of *its noncommencement within 6 months from the date of abandonment, or written orders to commence the work as applicable*. Under these circumstances, on calculation of a period of six months from 20.03.1998 i.e. the date upto which the work was to be completed by respondent No.1 under the written orders of the Executive Engineer (or of abandonment of work or of its non-commencement within 6 months from the date of abandonment, be that as it may), the matter could be referred to the Arbitrator by the Chief

Administrator, Housing Board Haryana, Panchkula by 20.09.1998 as per Clause 26(9) of the contract entered into between the parties. However as noticed, the Arbitrator was appointed by the Chief Administrator, Housing Board Haryana, Panchkula vide letter dated 20.04.1999 i.e. beyond the period of six months. This clause operates to discharge the liability of respondent No.1 after the expiry of six months, so the claim of the appellants was deemed to have been waived and absolutely barred and respondent No.1 had been discharged and released from all liabilities under the contract entered into between the parties.

(Para 14)

Further held that, this Court finds no illegality or perversity in the impugned order 11.02.2004 so passed by the Addl. District Judge, Panchkula. Accordingly, the appeal in hand is hereby dismissed.

(Para 15)

Alok Jain, Advocate
for the appellants.

Ayush Kumar Shrivastava, Advocate
for Abhay Gupta, Advocate
for respondent No.1.

JAISHREE THAKUR, J.

(1) The instant appeal has been filed seeking to challenge the order dated 11.02.2004 passed by the Addl. District Judge, Panchkula whereby, he has allowed the application filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for setting aside the arbitral award dated 04.12.2000, which was passed in favour of the appellants.

(2) A few brief facts that are to be noted is that a contract dated 30.03.1995 was allotted by the appellants in favour of respondent No.1 for providing and fixing drapery rods and vertical blinds in the head office building of the appellants at Panchkula. The work as allocated, was not completed within the specified time, which led to the appointment of an Arbitrator, who gave his award dated 04.12.2000 in favour of the appellants herein. As per the award, an amount of Rs.1,93,005/- lying with respondent No.1 was to be refunded to the appellants along with 12% simple interest and litigation expenses assessed at Rs.10,000/-. Aggrieved against the said award, respondent

No.1 challenged the same by way of filing objections under Section 34 of the Act before the Addl. District Judge, Panchkula, who set aside the award by an order dated 11.02.2004, which order has been assailed in this appeal.

(3) Mr. Alok Jain, learned counsel appearing on behalf of the appellants contends that the award as passed, had taken into consideration the fact that respondent No.1 had not completed the work order placed upon it, while also noticing that 55% advance payment had already been released in favour of respondent No.1. It was noticed that work only worth Rs. 1,12,355/- had been executed, and therefore, the Arbitrator had rightly held that the balance amount of the advance payment was to be refunded along with 12% interest. It is also argued that the Addl. District Judge, Panchkula had erred in setting aside the award itself on the ground that appointment of the Arbitrator was beyond the period of limitation. It is further submitted that respondent No.1 itself was keen to complete the work, as would be noticed in the award and thereby, it could be said that the plea of the limitation stood waived. It was further argued that respondent No.1 herein filed a suit for specific performance, which would itself substantiate the fact that it was keen to complete the work as allotted to it, and therefore, once the work allotted had not been completed in terms of the tender, the appellants herein would be entitled to refund the balance of the advance payment. It is also argued that respondent No.1 herein had not raised the plea of limitation before the Arbitrator, and therefore, is estopped from its own conduct from raising this plea, since the plea of limitation is a mixed question of law and fact. In support of his argument, he relied upon judgment rendered in the case of *Banarsi Das* versus *Kanshi Ram*¹. It is also contended that the contract that had been allotted in favour of respondent No.1 was in connivance with the officers of the Housing Board, since the same has been awarded without inviting open bids and once it was found that there were several agencies available to execute the work at a lower price, an effort was made to renegotiate the terms as per Clause 14 of the contract, which stipulated that the amount of work can be increased and decreased due to any item omitted or substituted.

(4) Per contra, Mr. Ayush Kumar Srivastva, learned counsel appearing on behalf of respondent No.1 herein urges that there is no infirmity in the order of the Addl. District Judge allowing the objections, insofar as the plea of limitation is concerned. It is argued

¹ 1963 AIR (SC) 1165

that even if the plea of limitation was not raised, the court has *suo motu* power to set aside the award on the said ground. In this regard, counsel places reliance upon judgment rendered in *Oil and Natural Gas Corporation Ltd. versus Essar Oil Limited*². It is argued that the reason for not completing the work within time was on account of the fact that the site was not made available. Moreover, after the terms and conditions had been settled, the appellants herein made every possible attempt to get respondent No.1 to reduce the rates already settled between them, which caused a further delay. It is further argued that the Arbitrator has misconducted himself in giving a finding that the contract itself had been illegally awarded to respondent No.1 since it was not within his purview to give an opinion on the validity of the contract.

(5) I have heard counsel for the parties and with their assistance gone through the pleadings of the case and the record available.

(6) It is not in dispute that work was allocated to respondent No.1 herein for the purpose of fixing drapery rods and vertical blinds in the head office building of the appellants at Panchkula vide letter dated 30.03.1995. As per the letter dated 30.03.1995 allocating work, the time provided for completion of the work was a period of two months from the date of issue of letter i.e. by 30.05.1995. As per the documents, which are available on the record, it appears that respondent no.1 had addressed letters to the Executive Engineer, Housing Board, Haryana asking the Board to intimate them the readiness of the rooms where the blinds were to be installed. Two of the letters, as available on the record, are dated 19.12.1996 and 06.01.1997 and in response to the letter dated 06.01.1997, the Executive Engineer vide his letter dated 17.01.1997 wrote back stating that “*The undersigned has not allowed you to proceed further till you reduce the rates to the reasonable market rate as communicated to you vide this office letter No.3636 dated 3.10.96. This disposes off your letter dated 6.1.97 also.*” By the letter dated 29.01.1997, the Executive Engineer also raised a dispute regarding the drapery rods, which had been provided in the office of the Chairman and the Chief Administrator's room by stating that those were sample rods, as such, could not be said that the work of vertical blinds had been completed against the said two rooms. Respondent No.1 again replied requesting for confirmation of the rooms, which were to be completed by stating that they were ready to complete the work contract, but could

² 2016 SCC Online Bom 28

not do so on account of delay in handing over the rooms. As per letter dated 20.02.1998 (Annexure R-2) the Executing Engineer wrote a letter to respondent No.1, directing it to **commence work by 05.03.1998**, failing which action as per contract agreement would be taken against respondent No.1, which was followed by **another letter dated 02.03.1998** directing that **work to be completed within a period of 15 days (i.e. by 20.03.1998)**. On account of a dispute having arisen, an Arbitrator was appointed by the Chief Administrator, Housing Board Haryana, Panchkula vide letter dated **20.04.1999**.

(7) It appears from the record that Clause 26 was invoked on 20.04.1999 by the Chief Administrator, Housing Board Haryana, Panchkula, subsequent to which an Arbitrator was appointed. As per Clause 26 of the contract agreement, an Arbitrator was to be appointed, who would settle all disputes and Clause 26(9) provided for a period to bring a claim for arbitration. As per Clause 26(9) a party would be entitled to bring a claim for arbitration within six months from the date of abandonment of the work. Before deciding all issues as raised by counsel for the appellants, the question whether the arbitration proceedings would have been sustainable being beyond the period of limitation, ought to be decided first. Hence, this court proposes to decide the question of limitation at the very outset. Clause 26(9) of the contract is reproduced as under;-

“Neither party shall be entitled to bring a claim for arbitration if the appointment of such arbitrator has not been applied within 6 months;-

(a) of the date of completion of the work as certified by Executive Incharge, or

(b) of the date of abandonment of the work, or

(c) of its non-commencement within 6 months from the date of abandonment or written orders to commence the work as applicable, or

(d) of the completion of the work through any alternative agency or means after withdrawal of the work from the contractor in whole or in part/or its recession, or

(e) of receiving an intimation from the Executive Engineer, Incharge of the work that final payment due to or recovery from the contractor had been determined which he may acknowledge and/or receive. Whichever of (a) to (e) above

is the latest. If the matter is not referred to arbitration within the period prescribed above, all the rights and claims of any party under the contract shall be deemed to have been forfeited and absolutely barred by time even for civil litigation notwithstanding.”

The above clause pertains to the period within which the matter could be referred to the Arbitrator for adjudication of any dispute that arose between the parties.

(8) In the case of *P. Manohar Reddy & Bros. versus Maharashtra Krishna Valley Development Corporation and others*³, the Supreme Court, while dealing with the similar issue as involved in the present case, has observed as under;-

“The contractual clause provides for a limitation for the purpose of raising a claim having regard to the provisions of Section 28 of the Contract Act. It is no doubt that the period of limitation as prescribed under Article 137 of the Limitation Act would be applicable, but it is well settled that a clause providing for limitation so as to enable a party to lodge his claim with the other side is not invalid.”

(9) In the case of *Wild Life Institute of India versus Vijay Kumar Garg*⁴, in the similar facts and circumstances as involved in the instant case, the Supreme Court has held as under;-

“6. It is also necessary to refer to the arbitration clause under the contract which clearly provides that if the contractor does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from the appellants that the bill is ready for payment, the claim of the contractor will be deemed to have been waived and absolutely barred and the appellants shall be discharged and released of all liabilities under the contract in respect of those claims. The liability, therefore, of the appellants ceases if no claim of the contractor is received within 90 days of receipt by the contractor of an intimation that the bill is ready for payment. This clause operates to discharge the liability of the appellants on expiry of 90 days as set out therein and is not merely a clause

³ (2009) 2 SCC 494

⁴ (1997) 10 SCC 528

providing a period of limitation. In the present case, the contractor has not made any claim within 90 days of even receipt of the amount under the final bill. The dispute has been raised for the first time by the contractor 10 months after the receipt of the amount under the final bill.”

(10) As also, the decisions rendered by the Supreme Court in the cases of *P. Manohar Reddy & Bros. versus Maharashtra Krishna Valley Development Corporation and others* and *Wild Life Institute of India versus Vijay Kumar Garg* (supra) make it clear that a contractual clause providing for limitation so as to enable a party to lodge his claim with the other side is valid and the provisions of Section 28 of the Contract Act and period of limitation as prescribed under Article 137 of the Limitation Act would not be applicable to such a contractual clause. Further, if the claim is not made by the aggrieved party for arbitration within the period as specified in the contract then in such an eventuality the claim of the aggrieved party in this regard will be deemed to have been waived and absolutely barred and the party against whom claim would have been raised, shall be discharged and released of all liabilities under the contract in respect of those claims.

(11) The next question which this court is to answer is that if a party fails to raise the issue of limitation in respect of any of the claim in the arbitration petition or in the written statement, whether the same can be raised in a petition filed under Section 34 of the Act? In this regard, in the case of *Binod Bihari Singh versus Union of India*⁵, the Supreme Court has held that the bar of limitation may be considered even if such plea has not been specifically raised. Limitation Act is a statute of repose and bar of a cause of action in a court of law, which is otherwise lawful and valid, because of undesirable lapse of time as contained in the Limitation Act, has been made on a well accepted principle of jurisprudence and public policy. Similarly, in the case of *Sealand Shipping & Export Pvt. Ltd. versus Kin-ship Services (India) Pvt. Ltd.*,⁶, the Supreme Court has held that even if the plea of limitation is not specifically raised in the arbitration petition, the court is bound to consider such plea while considering a petition under Section 34 of the Act and there cannot be any waiver on the issue of limitation. The decisions rendered in the case of *Binod Bihari Singh versus Union of India* (supra) was subsequently followed by the

⁵ (1993) 1 SCC 572

⁶ 2011(5) Bom. C.R. 572

Supreme Court in the case of *Oil and Natural Gas Corporation Ltd. versus Essar Oil Limited* (supra). So, it is clear that if the plea of limitation is not raised by a party in the arbitration petition or in the written statement, even then plea of limitation can be considered by the court while deciding a petition under Section 34 of the Act.

(12) Learned counsel for the appellants has urged that the plea of limitation involves a mix question of law and fact and should not be allowed to be raised in argument in the absence of proper pleadings. In support of his argument, he relied upon judgment rendered in the case of *Banarsi Das* versus *Kanshi Ram*⁷. This court has gone through the said judgment rendered by the Larger Bench of the Supreme Court wherein the issue involved was regarding dissolution of a partnership firm under the Partnership Act, 1932. In that case, the High Court allowed the plea of limitation to be raised before it particularly by defendants, who had not even filed a written statement in the case. In these circumstances, the Supreme Court observed that this was not a fit case for permitting an entirely new point to be raised by a non-contesting party to the suit. However, the issue involved in the case in hand is concerning the Arbitration and Conciliation Act, 1996 to the effect of validity of contractual clause in a contract for the purpose of raising a claim before the Arbitrator. So, the case law relied upon by learned counsel for the appellants in the case of *Banarsi Das* versus *Kanshi Ram* (supra) has no application to the facts and circumstances of the present case.

(13) The court of Addl. District Judge, Panchkula by the impugned order dated 11.02.2004, while allowing the petition filed by respondent No.1 under Section 34 of the Act, has observed that in the present case reference for arbitration has been made beyond the period of limitation agreed upon between the parties to the contract.

(14) In the present case, as per letter dated 20.02.1998 of the Executing Engineer, respondent No.1 had to commence the work by 05.03.1998 and as per another letter dated 02.03.1998 of the Executing Engineer, the work was to be completed within a period of 15 days i.e. by 20.03.1998. The Arbitrator was appointed by the Chief Administrator, Housing Board Haryana, Panchkula vide letter dated 20.04.1999. As per Clause 26(9) a party would be entitled to bring a claim for arbitration within six months from the date; **(i) of abandonment of work, or (ii) of its non- commencement within 6**

⁷ 1963 AIR (SC) 1165

months from the date of abandonment, or written orders to commence the work as applicable. Under these circumstances, on calculation of a period of six months from 20.03.1998 i.e. the date upto which the work was to be completed by respondent No.1 under the written orders of the Executive Engineer (or of abandonment of work or of its non-commencement within 6 months from the date of abandonment, be that as it may), the matter could be referred to the Arbitrator by the Chief Administrator, Housing Board Haryana, Panchkula by 20.09.1998 as per Clause 26(9) of the contract entered into between the parties. However as noticed, the Arbitrator was appointed by the Chief Administrator, Housing Board Haryana, Panchkula vide letter dated 20.04.1999 i.e. beyond the period of six months. This clause operates to discharge the liability of respondent No.1 after the expiry of six months, so the claim of the appellants was deemed to have been waived and absolutely barred and respondent No.1 had been discharged and released from all liabilities under the contract entered into between the parties.

(15) In view of the above, this court finds no illegality or perversity in the impugned order 11.02.2004 so passed by the Addl. District Judge, Panchkula. Accordingly, the appeal in hand is hereby dismissed.

Dr. Sumati Jund