

O.P.No.298 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Dated : 26.07.2022

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.298 of 2019

M/s.Chennai Water Desalination Ltd., (CWDL)

Rep. by its Manager

No.30A, 6th Cross Road

Thiru Vi Ka Industrial Estate

Guindy

Chennai – 600 032

... Petitioner

vs.

Chennai Metropolitan Water Supply and Sewerage Board (CMWSSB)

Rep. by its Managing Director

No.1, Pumping Station Road

Chintadripet

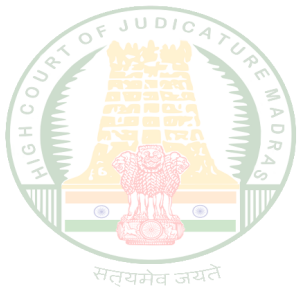
Chennai – 600 002

... Respondent

Petitioner filed under Sections 34(2)(b)(ii) read with Explanations (ii) and (iii) of the Arbitration and Conciliation Act, 1996 (as amended) to partially set aside the award dated 09.10.2017 passed by the Arbitral Tribunal as far as it relates to the counter claim of the petitioner herein.

For Petitioner : Ms.Hema Srinivasan
along with Ms.N.Umayaparvathi

For Respondent : Mr.P.Kumaresan
Additional Advocate General
for Mr.Gautam S. Raman
Standing Counsel for CMWSSB



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ORDER

Captioned 'Original Petition' ['OP' for the sake of convenience and clarity] was presented in this Court on 08.01.2018 under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity, assailing an arbitral award dated 09.10.2017 made by a three member Arbitral Tribunal.

2. This 09.10.2017 arbitral award being a unanimous award made by a three member 'Arbitral Tribunal' ['AT' for the sake of brevity] shall hereinafter be referred to as 'impugned award' for the sake of brevity, convenience and clarity.

3. There have been multiple listings of captioned main OP before this Court and proceedings made by me in the listing on 15.03.2021 captures the crux and gravamen of the captioned main OP. This 15.03.2021 proceedings reads as follows:

'Mr.R.Murari, learned senior advocate instructed by Ms.Hema Srinivasan, counsel on record for sole petitioner and Mr.S.R.Rajagopal, learned Additional Advocate General instructed by Mr.G.Janakiraman, Standing Counsel for Chennai Metropolitan Water Supply and Sewerage Board (CMWSSB) are before me.

2. The impugned award is dated 09.10.2017 and the same has been made by an 'Arbitral Tribunal' ('AT' for the sake of



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brevity) constituted by three Hon'ble Arbitrators. To be noted, it is an unanimous award.

3. The contractor, who was respondent before AT, is the petitioner in captioned OP and CMWSSB, the employer which was claimant before AT, is the respondent in captioned OP.

4. The fulcrum of the lis or in other words, the epicentre of the lis is an agreement dated 13.09.2005, which is described as 'Bulk Water Purchase Agreement' ('BWPA' for brevity).

5. The entire matter turns on limitation.

6. In a nutshell inter alia vide Paragraph 54 of the impugned award AT has held CMWSSB's claim to be time barred. The lis was therefore not examined on merits.

7. Likewise, vide Paragraphs 56 and 57, AT has held the counter claim of the contractor to be time barred. For convenience, it is recorded that in Paragraph 57 Hon'ble AT has extracted a paragraph from case law of Hon'ble Supreme Court and has mentioned that the same is an extract from **Praveen Enterprises** case law being law laid down by Hon'ble Supreme Court in **State of Goa Vs. Praveen Enterprises** reported in (2012) 12 SCC 581, but the extract is actually from **Voltas Limited Vs. Rolta India Limited** case law reported in (2014) 4 SCC 516. To be noted, what has been extracted in Paragraph 57 of the impugned award is not from **Praveen Enterprises**, but is part of paragraph 28 of **Rolta Vs. Voltas**.

8. There is no disputation or disagreement before this Court that CMWSSB, which was the claimant before AT, has not assailed the impugned award.

9. Likewise, case file placed before me reveals that captioned



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*OP which is at the instance of the contractor, who was respondent before AT, is a limited challenge, limited to the AT dismissing the counter claim of the contractor as time barred. Learned senior counsel submits that this is based on **J.G.Engineers** principle, being principle laid down by Hon'ble Supreme Court in **J.G.Engineers Private Limited Vs. Union of India** and another reported in (2011) 5 SCC 758. Relevant paragraph in **J.G.Engineers** case law is paragraph 25.*

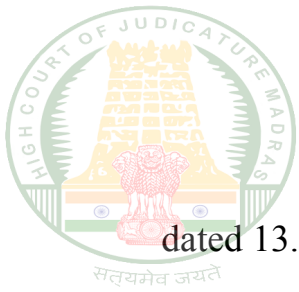
10. In the aforesaid backdrop, learned senior counsel submitted that return of the bank guarantee is a sequittur to the claim of the employer CMWSSB being held to be time barred, but learned Additional Advocate General submits that this position is incorrect and he would argue that captioned OP is liable to be dismissed notwithstanding the aforementioned paragraph 54 of impugned award.

11. The above has been recorded only for the limited purpose of recap in the ensuing listing.

List on 29.03.2021.'

4. Aforementioned 15.03.2021 proceedings shall be read as an integral part and parcel of this order. This means that the abbreviations, short forms and short references used in aforementioned 15.03.2021 proceedings will continue to be used in the instant order also for the sake of convenience and clarity.

5. Before proceeding further, this Court deems it appropriate to mention that Section 17 (captioned 'GOVERNING LAWS AND DISPUTES') of BWPA



dated 13.09.2005 is the arbitration clause and the same reads as follows:

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' Section 17: GOVERNING LAWS AND DISPUTES

17.1 Governing Law and Jurisdiction

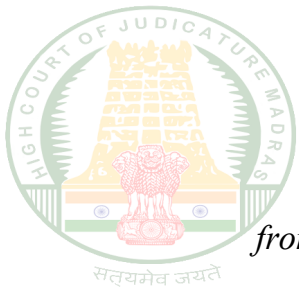
This Agreement shall be construed and interpreted in accordance with and governed by the laws in the State of Tamil Nadu and Laws of India and the Courts in Tamil Nadu shall have jurisdiction over all matters arising out of or relating to this Agreement.

17.2. Dispute and Resolution

17.2.1 Save where expressly stated to the contrary in this Agreement, any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this Agreement including non completion of the Facility, between the Parties and so notified in writing by either Party to the other (the "Dispute") In the first instance shall be attempted to be resolved amicably in accordance with the conciliation procedure set forth below in this Section 17.2.

17.2.2. Each party:

- i. Shall select and appoint one or two high-level representative(s) not concerned with the day to day performance of their appointer's obligations under this Agreement to sit on a panel (the "Panel" as soon as reasonably practicable before financial Close;*
- ii. Shall notify the other of the name and relevant qualifications of the Panel member(s) it has selected within thirty (30) days of their selection; and*
- iii. May appoint substitute or replacement Panel members*



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from time to time and shall notify the other of the name and relevant qualifications of the substitute or replacement Panel members so appointed within thirty (30) days of their appointment.

17.2.3. The Panel shall conduct the mediation in English, in Chennai, as it thinks fit, guided by the principles of equity and justice.

17.2.4. The Parties to the Dispute shall exchange, within fourteen (14) days of the Dispute being referred to the Panel, mediation briefs in English with principal supporting documentation summarising their respective cases and deliver copies of the briefs to the Panel.

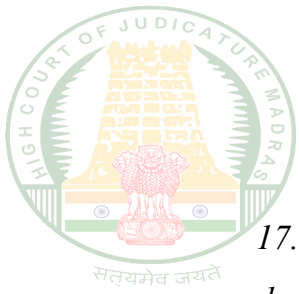
17.2.5. The Panel may at any time during the mediation process request a Party to the Dispute to submit to it such additional information as it deems necessary.

17.2.6. The Panel shall fix a date for the mediation hearing at the earliest convenient date and in any event within thirty (30) days of the Dispute being referred to the Panel. Each meeting before the Panel would be attended by representatives of the Parties to the Dispute with full settlement authority.

17.2.7. At the mediation hearing, each of the parties to the Dispute (who may be represented) will first give a brief presentation of its position to the Panel following which the Panel will then proceed to mediate the Dispute in accordance with the provisions of Section 17.2.3.

17.2.8. The Panel will (unless a settlement has already been achieved between the parties to the mediation) produce a non-binding recommendation.

17.2.9. If a settlement is achieved, the Parties to the Dispute will draw up a appropriate settlement agreement (in relation to which the Panel may be called upon to assist).



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17.2.10. No agreement as to the terms of any settlement reached during any mediation hearing shall be legally binding unless and until it is reduced to writing and signed by the duly authorized representatives of the Parties to the Dispute.

17.2.11. Any Party to the Dispute may at any time serve notice on the other(s) that it is withdrawing from the mediation process, in which event the Panel will cease hearing, and will cease to have any authority or responsibility in relation to the Dispute.

17.2.12. The Panel's deliberation and recommendation will be confidential and without prejudice to any subsequent judicial or arbitration proceedings and unless the Parties to the Dispute otherwise agree, the members of the Panel shall not act or appear in any judicial or arbitration proceedings, whether as an arbitrator, representative of a party or as a witness.

17.2.13. The Parties to any Dispute shall not, in any judicial proceedings:

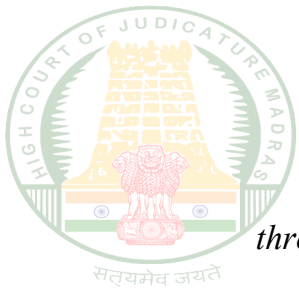
i. introduce any concessions or admissions made by any other Party to the Dispute or regarding any possible settlement, or the fact that another Party to the Dispute had incited a willingness to adopt a proposal put forward by the Panel; or

ii. Refer to any settlement proposals as having been made or recommended by the Panel.

17.2.14. Save and to the extent that a settlement provides otherwise, the costs of the Panel and the costs of the mediation process will be borne equally by the Parties to the Dispute and each of the Parties to the Dispute will bear its own costs.

17.2.15 In the event that

i. any such Dispute is not settled by the Parties to the Dispute



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through the mediation process;

ii. a Party to the dispute does not accept the Panel's recommendation (in whole, or in party) or

iii. A Party to the Dispute gives notice of withdrawal pursuant to Section 17.2.11

then any Party to the dispute may refer to the dispute (or the relevant part thereof) to arbitration in accordance with Section 17.3.

17.3 Arbitration

i. The Dispute shall be submitted to arbitration at the request of either Party upon written notice to that effect to the other Party (a "Notice of Reference") and be finally determined in accordance with the provisions of the UNCITRAL Rules of International Arbitration ("Rules") subject to the Arbitration and Conciliation Act, 1996 and any statutory modification thereto from time to time.

ii. The place of arbitration shall be Chennai in the state of Tamil Nadu, India and the Arbitration will be governed by the provisions of Indian Laws and the Arbitration and Conciliation Act, 1996;

iii. The decision of the arbitrator(s) shall be final and binding on the Parties.

iv. The arbitrator(s) shall reasonably decide the proportion in which arbitration fees and costs are to be shared by the Parties.

v. The arbitrator(s) may, with the consent of the Parties, extend the time taken to make and publish the award.

Notwithstanding the existence of any disputes referred to arbitration, the Parties shall continue to perform their respective obligations under this Agreement and the Parties shall not withhold, for any reason whatsoever including pendency of arbitration



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proceeding, payment of any amount which has become due under this Agreement.'

6. The aforementioned Section 17 of BWPA (BWPA dated 13.09.2005), which is the primary contract serves as arbitration agreement between the parties is a matter over which there is no dispute before this Court. In other words, aforementioned Section 17 of BWPA is the arbitration agreement i.e., 'arbitration agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act between the parties is the common say of learned counsel on both sides. To be noted, Ms.Hema Srinivasan along with Ms.N.Umayaparvathi for the petitioner [Chennai Water Desalination Ltd.], which shall hereinafter be referred to as 'Contractor' for the sake of convenience, clarity and Mr.P.Kumaresan, learned Additional Advocate General for Mr.Gautam S.Raman, learned Standing Counsel for CMWSSB are before this Court and therefore, this is the common say of these two learned counsel on both sides.

7. Though the case file is mammoth and very many issues have been raised before AT in the impugned award, the entire matter turns on an extremely narrow and short compass in the captioned main OP as would be evident from the aforementioned 15.03.2021 proceedings. To elaborate a little more on this, CMWSSB, which was claimant before AT, made a claim of a little over Rs.106 Crores (Rs.106,50,38,342/- to be precise) made up of three

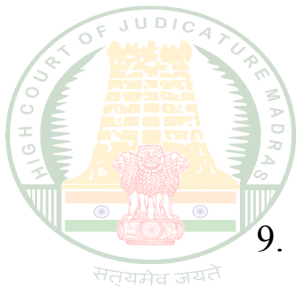


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components, namely damages for delay in work, Liquidated Damages and

damages for delay on account of financial closure (Rs.5,00,00,000/-, Rs.37,50,00,000/- and Rs.64,00,38,342/-). The entire claim of CMWSSB was negatived and rejected by AT in and by the impugned award primarily on the ground that it is barred by limitation. Learned Additional Advocate General submits that the impugned award has been given legal quietus by CMWSSB. In other words, CMWSSB accepts the impugned award and it is submitted that the impugned award has not been assailed by CMWSSB.

8. On the contrary, Contractor, who was respondent before AT, made counter claim in a sum of Rs.5 Crores being release of Bank Guarantee which was given by the Contractor qua Liquidated Damages, which is governed by Sections 5 and 7.4 of BWPA captioned 'SECURITY' and 'Liquidated Damages for Delay in Commissioning' respectively. The impugned award has rejected the counter claim of the contractor also on the ground that the counter claim is also barred by limitation. Contractor has assailed that portion of the impugned award which rejects the counter claim by saying that the counter claim of contractor is not barred by limitation. This is the reason why this Court (as delineated supra) deems it appropriate to say that the captioned main OP turns on a very narrow compass.



9. The short point that needs to be tested in the captioned main OP is whether the counter claim of the Contractor is time barred. To test this one question, a short contemporary chronicle is required. Several list of dates were placed before this Court in the course of multiple listings and list of dates (ironically) captioned 'UPDATED LIST OF DATES' dated 18.07.2022 has been placed before this Court (filed on 18.07.2022). This updation of dates was done based on the questions that fell from this Bench in the course of the arguments. The contemporary chronicle as can be culled out from the updated list of dates is as follows:

<i>Sl.N o.</i>	<i>Date</i>	<i>Event</i>
1	13.09.2005	The Contractor and CMWSSB entered into a Bulk Water Purchase Agreement [BWPA] for design, engineering financing, procurement, construction, operation, maintenance and transfer on a Design, Build, Own, Operate and Transfer [DBOOT] basis. The period of the Agreement is for 25 years from COD (@ Clause 3.2.1) and during that period the CMWSSB was to purchase water from the Contractor on the basis of monthly water capacity charges and water variable charges. Phase 1: 15 MLD (Million litres per day) Phase 2: 100 MLD
2	12.12.2005	90 days from signing of the BWPA-Date on which Financial Closure was to be achieved by the Contractor.
3	25.01.2007	Financial Closure of the project was achieved by the Contractor within the extended time granted by the CMWSSB .



Sl.N o.	Date	Event
4	16.05.2007	Effective Date of the project.
5	16.05.2008 15.08.2008	Scheduled dates of completion of Phase I and Phase II [12 and 15 months from Effective Date]
6	20.08.2009	Several letters were exchanged between the Contractor and CMWSSB on extension of time for completion due to force majeure conditions.
7	26.06.2009	CMWSSB sent a letter claiming that it was levying Liquidated Damages [LD] and that it was entitled to deduct the bank guarantee towards LD.
8	27.07.2010	Hon'ble High Court of Madras allowed OA 684 of 2009 filed by the Contractor and passed an order directing the following i. The Contractor herein to renew the bank guarantee and keep it alive till the arbitration is complete. ii. Subject to the bank guarantee being kept alive, the CMWSSB was restrained from invoking the bank guarantee till completion of arbitration proceedings
9	09.07.2010	Test Achievement Certificate was issued. However the balance development security of Rs.3 Crores was not released.
10.	24.07.2010	Commercial Operations Date was achieved.
11	19.04.2010	In terms of the arbitration clause, the Dispute Resolution Board ["DRB"] gave its recommendations stating that the Contractor was entitled to extension of time and that the CMWSSB was not entitled to levy LD.
12	05.08.2010	CMWSSB sent a letter declaring that the recommendations of the DRB were not acceptable to it and claimed Rs.37.50 crores as LD
13	27.04.2011 Received on 18.05.2011	Contractor sent a letter nominating Mr.R.Nadimuthu as its nominee arbitrator and requested the CMWSSB to appoint its nominee
14	24.07.2014	CMWSSB sent a letter reiterating their claim for LD and calling upon CWDL to initiate arbitration This letter was received on 28.07.2014
15	25.11.2014	CMWSSB sent a letter requesting Hon'ble Justice Mr.K.Chandru for his consent to act as the arbitrator



Sl.No.	Date	Event
16	17.12.2014	Notice of arbitration was issued by the CMWSSB This notice was received by the Contractor on 19.12.2014. Acknowledgement is at page 12. This is treated as notice under Section 21 by the Arbitral Tribunal @ page 227 (VI)
17	13.02.2016	CMWSSB filed its statement of claim before the Arbitral Tribunal Prayers sought are at page 122 of Volume II
18	12.04.2016	Contractor filed its statement of defence along with counter claim before the Arbitral Tribunal Counter claim starts at page 177 (Volume II) Prayer is at page 178
19	09.10.2017	The Arbitral Tribunal passed the impugned Arbitral Award dismissing the claims as well as counter claim as barred by limitation Issues framed are at Page 214 of Volume I Relevant portions of the Arbitral Tribunal's findings on issue 1 are from para 44 to page 222 of Volume I Findings on Issue 6 [whether the counter claim is barred by limitation is at page 231 of Volume I

10. Two learned counsel on either side very fairly submit that there is no disputation or disagreement about the aforementioned contemporary chronicle i.e., list of dates. This makes the disposal of captioned OP very simple. Learned counsel for Contractor, who is protagonist of the captioned OP, adverting to the aforementioned arbitration clause i.e., Section 17 of BWPA submitted that the arbitration agreement between the parties is in the nature of a



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step ladder. To be noted, when it is mentioned that the arbitration agreement is

in the nature of a step ladder, it should not be construed as tiered or multi-tiered

arbitration. It is not multi-tiered in terms of hierarchy of ATs. It is only lateral

and it is in terms of steps which the parties have to take. This Court reminds

itself of the oft-quoted ***Nabha Power*** case law rendered by Hon'ble Supreme

Court in ***Nabha Power Limited (NPL) v. Punjab State Power Corporation***

Limited (PSPCL) reported in ***(2018) 11 SCC 508*** penned by Hon'ble

Mr. Justice Sanjay Kishan Kaul wherein after a survey of the obtaining position

in various parts of the world the manner in which commercial contracts have to

be interpreted has been laid down. To be noted, the ratio in ***Nabha Power*** in a

nutshell is lot of thought process goes into making of covenants in commercial

contracts and therefore they have to be interpreted strictly in turn with what the

contracting parties contemplated/intended. Therefore, this arbitration agreement

also being part of a commercial contract, the same has to be interpreted by

giving utmost sanctity to what the parties have contemplated. In this view of

the matter, in the light of Clause 17.2.15 (ii) of arbitration clause the contention

of learned counsel for Contractor that 05.08.2010 is the reckoning date for

limitation is indisputable as that is the date on which CMWSSB sent a

communication saying that the recommendations of 'Dispute Resolution Board'

['DRB' for the sake of brevity] are not acceptable and that CMWSSB is entitled



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to claim Liquidated Damages. To be noted, this 'DRB' is also referred to as

WEB COPY This Court is informed that 'DRB' is 'Dispute Resolution Board' and 'DRP' is 'Dispute Resolution Panel'. The two terms are used interchangeably as the impugned award says it is 'DRP'. Therefore, it has become necessary to set out this in the interest of all and for the sake of clarity and specificity. If 05.08.2010 is taken as the reckoning date, this Court is informed without any disputation that the Article under 'the Limitation Act, 1963' (hereinafter 'Limitation Act' for the sake of brevity) is the applicable article. If one goes by Article 137 of Limitation Act, the period is three years from qua when the right to apply accrues. The question as to whether it would be a case of breach and whether it would fall under Article 55 is left open in the case on hand as it does not fall for consideration and it may not be of much significance. Be that as it may, if the right to apply had accrued on 05.08.2010, the contractor had time till 05.08.2013 to make the counter claim.

11. This takes this Court to the question as to when this limitation was arrested. This is the bone of contention between the parties. Learned Additional Advocate General submitted that even if 05.08.2010 being the date on which CMWSSB sent a communication saying that recommendations of DRP are not acceptable is taken as the reckoning date, the counter claim was made by the Contractor before AT only on 12.04.2016 which is well beyond

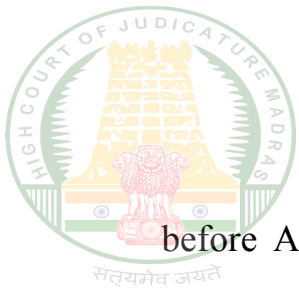


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three years and therefore, it is barred by limitation. Learned Additional

Advocate General submitted that 05.08.2010 may not be the reckoning date, 09.07.2010 being the date of Test Achievement Certificate was issued should be taken as reckoning date but this Court is unable to countenance this argument in the light of Clause 17.2.15 (ii) of arbitration clause and interpretation of the same in the light of **Nabha Power** principle. This Court would now be deciding the date on which the limitation was arrested. For deciding the date on which the limitation was arrested, considering the bone of contention in the case on hand, lead case is **Voltas Limited Vs. Rolta India Limited** case law reported in (2014) 4 SCC 516 in which **Praveen Enterprises** principle being ratio laid down by Hon'ble Supreme Court in **State of Goa Vs. Praveen Enterprises** reported in (2012) 12 SCC 581 was reiterated.

12. The simple principle in **Voltas** case law is, in the case of counter claim if the respondent before an AT has invoked the arbitration clause and if the invocation is within the meaning of Section 21 of A and C Act, that would be the reckoning date to decide the limitation and if a respondent before an AT has not resorted to invocation of arbitration agreement, then the date on which the counter claim is filed before AT would be the relevant date. In the case on hand, from the undisputable contemporary chronicle that has been set out supra (in a tabulation) it will be clear that the Contractor (Contractor was respondent



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before AT) invoked the arbitration clause in and by letter dated 27.04.2011,

which was received by CMWSSB on 18.05.2011. In this regard, it is necessary

to refer to Section 21 of A and C Act and the same reads as follows:

'21. Commencement of arbitral proceedings._ Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. '

13. A careful perusal of Section 21 of A and C Act makes it clear that the date of commencement of arbitration proceedings (for the purpose of limitation) shall be the date on which 27.04.2011 notice was received by the noticee. As regards the case on hand, notice has been received by the noticee on 18.05.2011 and that is the date on which arbitration proceedings commenced within the meaning of Section 21 of A and C Act. This means that if ***Voltas*** principle is applied in the light of Section 21 of A and C Act, the limitation qua counter claim got arrested on 18.05.2011 which is well within one year irrespective of whether the starting point is 05.08.2010 or 09.07.2010. This by itself gives a closure to the bone of contention in favour of the Contractor.

14. A careful perusal of the impugned award brings to light that aforementioned 27.04.2011 communication as well as 05.08.2010



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communication from CMWSSB wherein CMWSSB did not accept the recommendations of DRB were before the AT as Exs.C205 and C206 respectively. The relevant paragraph is paragraph No.18 of the impugned award and the same reads as follows:

'18. The Respondent in their counter statement dated 12.4.2016 denied their liability to pay any damages and delay payment charges. They also took a preliminary objection about the maintainability of the claim in terms of limitation. It is therefore necessary to set out below paras 6 to 9 of the counter statement relating to plea of bar of limitation.

'6. After the work was commenced in all earnest by the Respondent, the work was again affected by reason of several factors that were beyond the control of the Respondent and the correspondence relating to force majeure events have been set out later in this Statement of Defense. The Claimant had also in recognition of these Force Majeure periodically deferred time for the Required COD. The Claimant being completed its works with all earnest, conducted the Performance Tests on 24-29 June 2010. The Independent Consultant by letter dated 9 July 2010 (Ex.C-198) also confirmed that the Performance Tests had been carried out successfully and commercial operations for the Plan started from 25.07.2010.

7. The Claimant however insisted that Liquidated Damages were payable by the Respondent for the alleged delay in commissioning. The Respondent refuted the levy of Liquidated damages and had by its letter dated 14 July 2009 (Ex.C-111=Ex.R-10) referred the matter before the Dispute Resolution Board (the "Board") in terms of clause 17.2 of the BWPA. The Claimant had filed its response and Rejoinder was filed by



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the Respondent before the Board. The Dispute Resolution Board had on 19.04.2010 (Ex.C-201) provided its Recommendations and stated therein that the extension of time granted until end of January 2010 without the levy of liquidated damages is justified and that there was no provision in the contract for the forfeiture or encashment of Bank Guarantee by the Claimant. The Claimant by letter dated 05.08.2010 (Ex.C-205) declared that the Recommendations of the Dispute Resolution Board was not acceptable to the claimant and sought for liquidated damages for failure to commission and claimed Rs.37.50 Crore towards Liquidated Damages. The Claimant did not however take any further steps to proceed to Arbitration though it is for the Claimant to refer its claim to Arbitration.

8. The Respondent by letter dated 27.04.2011 (Ex.C-206) nominated Mr.R.Nadimuthu, Retired Chief Engineer as their nominee and requested the Claimant to appoint an arbitrator and sent a further reminder on 06.06.2011 which was not responded to by the Claimant. The Claimant after a lapse of more than 3 years, by letter dated 24.07.2014 claimed that Liquidated Damages for Rs.74,74,18,912/- was payable by the Respondent which is completely without any basis. It was only by its letter dated 25.11.2014 (Ex.C-209), that the Claimant made a reference of its claims and nominated Justice Mr.Chandru as its nominee. It is submitted that the Claimant ought to have made a reference to arbitration within a period of three years from the date of the DRP order dated 19.04.2010 and had failed to refer its claim to Arbitration within the period of limitation. Therefore all the Claims made by the Claimant including its claim for interest on liquidated damages are barred by limitation and the entire claim of the Claimant ought to be dismissed in limine. It is submitted that the Claimant cannot rely upon the Respondent's nomination of an Arbitration to save limitation since it is for



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the claimant to refer its claim to Arbitration within the period of limitation which is failed to do. In any case the Claimant cannot take advantage of the Respondent's proactive nomination of an arbitrator while the Claimant has delayed reference of its claims to arbitration. Since claim No.2 i.e., Liquidated damages itself is barred by limitation, Claim No.3 which is on the alleged delay in payment of liquidated damages is also barred by limitation.

9. Therefore the entire claims made by the Claimant ought to be dismissed in limine as none of the claims are saved by limitation."

15. Therefore, though 05.08.2010 letter of CMWSSB not accepting the recommendations of DRB was before AT as Ex.C205 and though notice dated 27.04.2011 from the Contractor invoking the arbitration clause was before AT as Ex.C206, the AT has held the counter claim of contractor to be time barred apparently referring to the date of filing of counter claim. This is clear from the manner in which Issue No.6 has been answered by AT. To be noted, Issue No.6 before AT reads as follows:

' 6. Whether the respondent is entitled for the release of the bank guarantee of Rs.5 Crores and whether the claimant is entitled to encash the same towards claim No.1?'

16. This issue No.6 has been answered in Paragraphs 56 to 58 of the impugned award and the same reads as follows:

'Issue No.6:

Issue No.6. Whether the respondent is entitled for the release of



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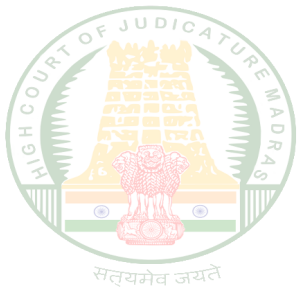
the bank guarantee of Rs.5 Crores and whether the claimant is entitled to encash the same towards claim No.1?'

56. *The respondent has filed their counter claim which is also without merits since after nominating their arbitrator and on finding that there was no agreement they did not pursue the matter by filing an application under Section 11 of the Arbitration Act within time. The Supreme Court while dealing with the claim for damages by way of counter claim dealt with the question of limitation and answered as follows vide its decision in Sankar Dastidar Vs.Shrimati Banjula Dastidar & Anr. reported in 2006 (13) SCC 470:-*

'A suit for damages, in our opinion, stands on a different footing vis-`- vis a continuous wrong in respect of enjoyment of one's right in a property. When a right of way is claimed whether public or private over a certain land over which the tort-feasor has no right of possession, the breaches would be continuing one. It is, however, indisputable that unless the wrong is a continuing one, period of limitation does not stop running. Once the period begins to run, it does not stop except where the provisions of [Section 22](#) would apply. '

57. *Further, the Supreme Court while dealing with the limitation for making a counter claim also made a reference to Praveen Enterprises case (2012 (12) SCC 581) and had observe as follows:*

*"First, in **Praveen Enterprises** (supra) the Court has carved out an exception and, while carving out an exception, has clearly stated that the limitation for "such counter claim" should be computed as on the "date of service of notice" of "such claim on the claimant" and not on the date of final counter claim. We are absolutely conscious that a judgment is not to be read as a statute but to understand the correct ratio stated in the case it is necessary*



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*to appreciate the repetitive use of the words. That apart, if the counter claim filed after the prescribed period of limitation before the arbitrator is saved in entirety solely on the ground that a party had vaguely stated that it would be claiming liquidated damages, it would not attract the conceptual exception carved out in **Praveen Enterprises** (supra). In fact, it would be contrary to the law laid down not only in the said case, but also to the basic principle that a time barred claim cannot be asserted after the prescribed period of limitation.'*

In the light of the above facts and the legal precedents, the counter claim made by the Respondent is also time barred. Hence Issue No.6 is answered against the Respondent. '

17. The above finding is obviously incorrect owing to the narrative, discussion and dispositive reasoning set out thus far and to put it in codified statutory parlance, the impugned award is hit by the vice of being in conflict with public policy of India i.e., in contravention of fundamental policy of India besides patent illegality. To put it differently in terms of specific provisions, it is hit by the vice of Section 34(2)(b)(ii) read with Clause (ii) of Explanation 1 thereat and Section 34(2A) of A and C Act. This Court is conscious of the proviso to Section 34(2A) (patent illegality) wherein two aspects of the matter are forbidden. One is re-appreciation of evidence and the other is setting aside an award on the mere ground of erroneous application of law. The case on hand is clearly outside the purview of this proviso as there is no re-appreciation



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of evidence and it is not a 'mere' erroneous application of law as it is incorrect

qua limitation. If at all and if that be so, Exs.C205 and C206 have been marked

by consent and there is no disputation before the AT and there is no disputation

that these two exhibits are before this Court also. More importantly, there is no

disputation about the contemporary chronicle which has been set out supra.

Even otherwise *de hors* Section 34(2A) impugned award is clearly hit by the

vice of being in conflict with public policy. The reason is, limitation is clearly

founded on public policy. Limitation being a facet of public policy, an error in

limitation clearly leaves an award hit by Section 34(2)(b)(ii) read with Clause

(ii) of Explanation 1 thereat. In this regard, two case laws will suffice. One is

oft-quoted *Associate Builders* case law [*Associate Builders Vs. Delhi*

Development Authority reported in (2015) 3 SCC 49] which was rendered by

Hon'ble Supreme Court on 25.11.2014 and *Ssangyong Engineering* case law

[*Ssangyong Engineering and Construction Company Limited Vs. National*

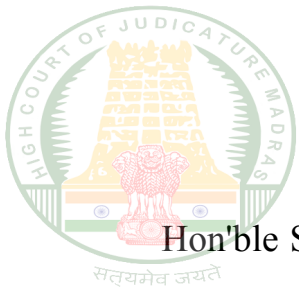
Highways Authority of India reported in (2019) 15 SCC 131], which was

rendered by Hon'ble Supreme Court on 08.05.2019. As regards *Associate*

Builders case law, this Court refers to the SCC report and as regards

Ssangyong Engineering case law this Court refers to SCC OnLine report. To

be noted, critical point is while *Associate Builders* case law was rendered by



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Hon'ble Supreme Court prior to 23.10.2015 i.e., prior to amendments to A and

C Act, ***Ssangyong Engineering*** case law was rendered post 23.10.2015 amendment wherein and whereby patent illegality is now available as a ground of attack qua an arbitral award vide section 34(2A) in ***Ssangyong Engineering*** case law. Adverting to ***Associate Builders*** case law, Hon'ble Supreme Court made it clear that patent illegality which was made a ground of attack by way of judicial pronouncements vide ***Saw Pipes*** principle [***Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.***, reported in (2003) 5 SCC 705] has now been codified and that is still available as a ground. This is vide paragraph 31, which reads as follows:

'31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would



be ? award could be set aside if it is contrary to:

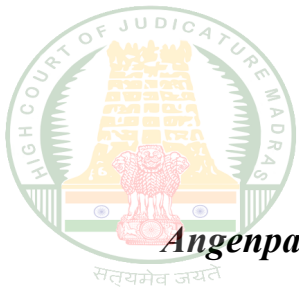
- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

This is of significance as patent illegality slot for challenge to an arbitral award prior to 23.10.2015 is based on Saw Pipes principle and not sub-section (2A) of section 34 of A and C Act. It has already been delineated supra elsewhere in this order that captioned OP will be governed by pre 23.10.2015 regime of the A and C Act.'

18. In any event, as there can be no disputation or disagreement that limitation is founded on public policy, Section 34(2)(b)(ii) read with Clause (ii) of Explanation 1 argument qua limitation also finds favour with this Court.

19. This takes this Court to one other aspect of the matter with regard to limitation in arbitration matters. In arbitration matters, there is a concept of cause of action and cause of arbitration. This has been explained in **Panchu Gopal Bose** case law [**Panchu Gopal Bose Vs. Board of Trustees For Port of Calcutta** reported in (1993) 4 SCC 338]. **Panchu Gopal Bose** case law was referred to by me in **Ion Exchange** case [**Ion Exchange India Ltd., Vs.**



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Angenpalayam Common Effluent Treatment Plant Ltd., reported in
WEB **MANU/TN/9915/2019**]. Be that as it may, Hon'ble Supreme Court in the

recently rendered *Nortel* case law [*Bharat Sanchar Nigam Limited and another Vs. Nortel Networks India Private Limited* reported in (2021) 5 SCC 738] has made it clear that the period of limitation for filing a petition seeking appointment of an arbitrator/s cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. This aspect of the matter is of immense significance. To be noted, this Court has already referred to *Nabha Power* principle supra. This is clearly a commercial contract and covenants provide for the reckoning date. The reckoning date is clearly the date on which CMWSSB refused to accept the recommendations of DRB i.e., 05.08.2010 (Ex.C205 which was marked by consent before AT contains clause Clause 17.2.15 (ii) alluded to supra)

20. This takes this Section 34 Court to the question of severability of the impugned award. The impugned award is in two parts. One part is rejection of the claim of CMWSSB i.e., claim under three heads (which have been alluded to supra) on the ground of limitation and the other part is rejection of the counter claim of the contractor on the ground of limitation. The latter has been discussed thus far and the dispositive reasoning of this Section 34 Court has been set out. As regards severability, the lead case would be *J.G.Engineering*



case law [***J.G.Engineering Private Limited Vs. Union of India and Another***

WEB COPY reported in (2011) 5 SCC 758] wherein relevant portion is Paragraph 25 which

reads as follows:

' 25.It is now well- settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent..... '

21. In the light of ***J.G.Engineering*** case law, it is clear that the rejection of the claim of CMWSSB by the impugned award which is severable will remain undisturbed and in other words, clinching finding regarding the claim of CMWSSB being time barred as captured in Paragraph 54 of the impugned award will *inter alia* remain undisturbed. The impugned award is set aside insofar as it rejects the counter claim of the contractor.

22. Before concluding, this Court deems it appropriate to set out that the question as to whether the contractor should have made a counter claim itself is a million dollar question. The reason is, Bank Guarantee, as alluded to supra, was given pursuant to Liquidated Damages, more particularly Sections 5 and 7 of BWPA which has been alluded to supra. If the Liquidated Damages claim of CMWSSB fails, it follows as a sequitur and consequence that Contractor is entitled to get back the bank guarantee amount. In this view of the matter, the



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argument of Additional Advocate General that CMWSSB will be entitled to

retain at least one part of the Liquidated Damages claim pales into insignificance. The reason is, the rejection of Liquidated Damages means rejection of Liquidated Damages claim of CMWSSB in its entirety and therefore, it cannot be gainsaid that 5 Crores from and out of total claim of Liquidated Damages at least can be retained if there is no judicial intervention qua impugned award at the instance of the Contractor.

23. The prayer in the captioned main OP reads as follows:

'PRAYER

For the facts and reasons set out above, and on the grounds set out above, it is humbly prayed that this Hon'ble Court:

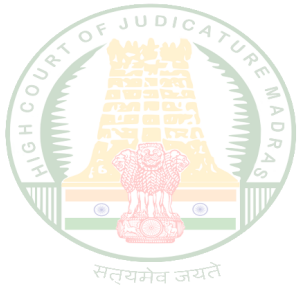
(a) May be pleased to partially set aside the Award dated 09.10.2017 passed by the Arbitral Tribunal so far as it relates to the counter claim of the Petitioner herein:

(b) And pass such other or further orders as may be deemed fit in the interest of justice and thus render justice.'

Captioned Arb.OP is therefore allowed. There shall be no order as to costs.

26.07.2022
($\frac{1}{2}$)

Index : Yes/No
Speaking Order/Non-speaking
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M.SUNDAR.J.,

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