

(2010) 02 DEL CK 0049

In the Delhi High Court

Case No : Arbitration Petition 3 Obj. of 2004

National Hydroelectric Power Corp. Ltd.

APPELLANT

Vs

Karam Chand Thapar and Bros (CS) Ltd. and Another

RESPONDENT

Date of Decision : 11-02-2010

Acts Referred:

Citation : (2010) 02 DEL CK 0049

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Kailash Vasdev and Ajit Pudussery, for the Appellant; Pinaki Mishra D. Moitra and Madhumita Kothari for R-1, for the Respondent

Final Decision : Allowed

Judgement

Manmohan, J.—Present objection petition has been filed u/s 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") challenging the Award dated 9th September, 2000 as well as the interim orders dated 23rd April, 1999, 24th November, 1999 and 6th May, 2000 passed by Mr. Thakar Dass, Sole Arbitrator.

2. Briefly stated the relevant facts of this case are that petitioner-objector Corporation entered into an Agreement dated 7th March, 1990 with respondent-claimant for construction of Tail Race Tunnel No. II (TRT II) Outlet Package for Salal Hydroelectric Project situated in Udhampur in the State of Jammu and Kashmir. The dam was designed as a "run of the river" scheme with no storage dam due to the provisions of the Indus Valley Treaty, according to which there was need to maintain a constant discharge downstream. This meant that the inflow into the dam of water was always to be equal to the outflow and water level had to be maintained at a reservoir level of 467.36 meters. As per design, once the water level exceeded 487.68 meters, the water was to overflow the dam.

3. On 9th/10th September, 1992 there was an unprecedented flood in the

Chenab Basin where TRT-II project was under construction. According to petitioner-objector due to flood, water level rose upto 493 meters with even eleven of the dam gates fully open. It is pertinent to mention that in Section I of Technical Specifications of the Contract it was mentioned that the maximum annual rainfall in the region is 185 cm. and the observed maximum flood was 12000 cumecs. The project was designed to handle a flood of 22047 cumecs. However, on 9/10 September, 1992 in a period of 24 hours there was a total rainfall of 302 mm. As a consequence of flood, there was loss of human lives and properties.

4. The present arbitral Award as well as the interim orders passed therein arise out of claims made by the respondent-claimant for compensation following the losses suffered by it during the flood.

5. The Arbitrator vide the impugned Award dated 9th September, 2000 awarded Rs. 1,94,32,792/- along with interest @21% per annum.

6. Mr. Kailash Vasdev, learned senior counsel for petitioner-objector not only impugned on merits the Award as well as interim orders passed by the Arbitrator during the arbitral proceedings but also urged that the respondent-claimant's claims were not maintainable in view of the finality attached to the Engineer-in-Charge's decision and further that the said claims were barred by limitation.

7. Mr. Vasdev drew my attention to Clause 32 and 34 of General Conditions of Contract (in short "GCC") and Clause 6 of Special Conditions of Contract (in short "Spl. CC"). The relevant portion of the said Clauses are reproduced hereinbelow:

i) GCC

Clause 32: Force Majeure:

32.1. The term "Force Majeure" shall herein mean riots (other than among the contractor's employees), Civil Commotion (to the extent not insurable), war (whether declared or not), invasion, act of foreign enemies, hostilities, civil war, rebellion, revolution, insurrection, military or usurped power, damage from aircraft, nuclear fission, acts of God, such as earthquake (above 7 magnitude on Richter Scale), lightning, unprecedented floods, fires not caused by contractor's negligence and other such causes over which the contractor has no control and are accepted as such by the Engineer-in-Charge, whose decision shall be final and binding. In the event of either party being rendered unable by Force Majeure to perform any obligation required to be performed by them under the contract, the relative obligation of the party effected by such Force Majeure shall be treated as suspended for the period during which such Force Majeure cause lasts, provided the party alleging that it has been rendered unable as aforesaid, thereby shall notify within 10 days of the alleged beginning and ending thereof giving full particulars and satisfactory evidence in support of such cause.

32.2. On occurrence of Force Majeure the liability of either party shall be dealt with in accordance with the provisions of Sub-clause 34.2....

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Clause 34 : Contractor's Liability and Insurance:

34.1 From commencement to completion of the work(s) as a whole, the Contractor shall take full responsibility for the care thereof and for taking precautions to prevent loss or damage. He shall be liable for any damage or loss that may happen to the works or any part thereof and to the Corporation's Plant, Equipment and Material (hired or issued to the Contractor) shall be in good order and condition and in conformity in every respect with the requirements of the Contract and instructions of the Engineer-in-Charge.

34.2 i) Neither party to the contract shall be liable to the other in respect of any loss or damage which may occur or arise out of "Force Majeure" to the works or any part thereof or to any material or article at site, but not incorporated in the works or to any person or anything or material whatsoever of either party provided such a loss or damage could not have been foreseen or avoided by a prudent person and the either party shall bear losses and damages in respect of their respective men and materials. As such liability of either parties shall include claims/compensations of the third party also.

ii) Provided, however, in an eventuality as mentioned in Sub-clause 34.2 (i) above, the following provisions shall also have effect:

(a) The Contractor shall, as may be directed in writing by the Engineer-in-Charge proceed with the erection and completion of the works under and in accordance with the provisions and conditions of the contract; and

(b) The Contractor shall, as may be directed in writing by the Engineer-in-Charge, re-execute the works lost or damaged, remove from the site any debris and so much of the works as shall have been damaged and carry the Corporation's T&P, Plant and Equipment, Material etc. to the Corporation's store. The cost of such re-execution of the works, removal of damaged works and carrying of Corporation's store shall be ascertained in the same manner as for deviations and this shall be added to the contract sum.

Provided always that the Contractor shall, at his own cost, repair and make good so much of the loss or damage as has been occasioned by any failure on his part to perform his obligations under the contract or not taking precautions to prevent loss or damage or minimise the amount of such loss or damage. Final assessment of loss or damage shall be decided by the Engineer-in-Charge and his decision shall be final and binding....

ii) Spl.CC

6. Flood Conditions

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6.2. Protection from flood shall be provided by the Contractor, by suitable and

timely arrangements, to the work already measured and/or the work in progress, labour, plant, equipment and materials against loss or damage during working and flood seasons. To cater the eventuality of flooding of the site of the work, the Contractor shall make at his own cost all necessary arrangements to move all plant, equipment and materials, including those supplied or issued by the Corporation and labour, to a safe place. Work shall be resumed immediately after floods have receded and the Contractor has sufficiently dewatered the site of the work. The contractor shall be paid cost of dewatering done inside the tunnel only at the unit price stipulated in this Contract for the quantity measured and approved by the Engineer-in-Charge. However, no payment for removal of silt and slush brought by floods will be made to the Contractor.

6.3. Except as provide for by Clause 34 of the general Conditions of Contract, the Contractor shall be liable for any loss or damage to labour, plant, equipment and materials or works whether measured or in progress that may occur due to flood and no compensation whatsoever shall be payable to the Contractor for such loss or damage.

8. Mr. Vasdev referred to petitioner-objector?s letter dated 9th October, 1996 by virtue of which respondent-claimant?s claim for compensation on account of flood was rejected by the Manager (Civil). The relevant portion of the said letter reads as under:

In response to para-2 of your letter No. : DEL/002/34(D)/1/1097 dated 4.9.1995, We would like to clarify that as mentioned in your letter No. SAL/001/01/1301/92 dated 12.9.92 and in the subsequent correspondence you are mentioning the floods as un-precedented so we fail to understand that how a un-precedented flood can be foreseen.

Your request for considering the flood under FORCE MAJEURE has been acceded to, and cost of re-execution of the works has since been paid to you in terms of Clause 34.2(ii)(b).

Since the dispute raised by you are regarding Clause 32 & 34 of the General Conditions of the Contract Agreement which are covered under Clause 53 i.e. Finality Clause: of the General Conditions of the Contract, wherein the decision of the Engineer-in-Charge shall be final and binding on the contractor. Therefore, your request for making the reference to the Arbitrator under Clause-55 of the General Conditions of the Contract cannot be acceded to in terms of Clause 55.1 of the General Conditions of Contract (mended).

9. According to Mr. Vasdev, once the Manager (Civil) had decided the dispute under Clauses 32, 34 and 55.1 of GCC, respondent-claimant was prohibited from raising the said claims before the Arbitrator. In a nutshell, Mr. Vasdev submitted that in view of Clauses 32, 34 and 55.1 of GCC read with Clause 6 of Spl. CC, the said claims were not arbitrable.

10. Mr. Vasdev submitted that such unprecedented flood could neither have been

anticipated nor was the petitioner contractually bound to give a flood warning. Consequently, according to him, the Arbitrator's conclusion that loss and damage caused by flood on 9th/10th September, 1992 could have been foreseen or avoided, was contrary to facts.

11. Mr. Vasdev further submitted that the interest awarded by the Arbitrator was disproportionate and contrary to law. In this connection, he referred to a judgment of the Supreme Court in Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another, .

12. Mr. Vasdev lastly submitted that respondent-claimant's claims were barred by limitation as the cause of action, if any, had accrued in respondent-claimant's favour on 9th/10th September, 1992 - the date of the flood - while the arbitration clause had been invoked by respondent-claimant on 1st May, 1996. Mr. Vasdev submitted that in view of Section 3 of Limitation Act, 1963 read with Article 55 of the Schedule annexed with the said Act, respondent-claimant's claims were barred by limitation. He also submitted that Arbitrator's order dated 6th May, 2000 holding respondent-claimant's claims within limitation was contrary to law inasmuch as the Arbitrator held that "accrual of cause of action for ordinary matters is quite different from those of arbitration matters, for the cause for arbitration there must be an assertion of claim and denial of the same to create a dispute". In this connection, Mr. Vasdev referred to a judgment of Supreme Court in J.C. Budhraj Vs. Chairman, Orissa Mining Corporation Ltd. and Another, wherein it has been observed as under:

25. The learned Counsel for the appellant submitted that the limitation would begun to run from the date on which a difference arose between the parties, and in this case the difference arose only when OMC refused to comply with the notice dated 4-6-1980 seeking reference to arbitration. We are afraid, the contention is without merit. The appellant is obviously confusing the limitation for a petition u/s 8(2) of the Arbitration Act, 1940 with the limitation for the claim itself. The limitation for a suit is calculated as on the date of filing of the suit. In the case of arbitration, limitation for the claim is to be calculated on the date on which the arbitration is deemed to have commenced.

26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4-6-1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition u/s 8(2) of the Act. Insofar as a petition u/s 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition u/s 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for

making a claim. The decisions of this Court in Major (Retd.) Inder Singh Rekhi v. DDA, Panchu Gopal Bose v. Board of Trustees for Port of Calcutta and Utkal Commercial Corporation v. Central Coal Fields Ltd. also make this position clear.

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29. The arbitrator committed an error apparent on the face of the record and a legal misconduct in holding that the entire claim was within time. His assumption that if the application filed by the contractor in 1980 u/s 8(2) of the Arbitration Act for appointment of an arbitrator was in time, all claims made in the claim statement filed before the arbitrator appointed in such proceeding u/s 8(2) are also in time, is patently erroneous and is an error apparent on the face of the record. The reasoning of the arbitrator that on account of the formation of the committee by OMC to scrutinise the pending claims in pursuance of OMC's letter dated 28-10-1978, and the payment of Rs 3,50,000 on 4-3-1980 in pursuance of the committee giving its final report on 7-12-1979, every claim of the contractor including new claims which were made for the first time in the claim statement filed in 1986 (as contrasted with "pending claims" considered by OMC), are not barred by limitation, is also an error apparent on the face of the award. u/s 18 an acknowledgment in writing extends the limitation....

13. On the other hand, Mr. Pinaki Mishra, learned senior counsel for respondent-claimant submitted that this Court in Section 34 proceedings cannot re-appreciate the evidence. He submitted that finding of facts could not be and should not be interfered with in Section 34 proceedings.

14. Mr. Mishra further submitted that respondent-claimant's claims were arbitrable. He stated that Clauses 32 and 34 of GCC and Clause 6 of Spl. CC have to be read with Clause 53 of GCC. The said Clause 53 reads as under:

Clause 53 : Finality Clause

It shall be accepted as an inseparable part of the contract that in matters regarding materials, workmanship, removal of improper work, interpretation of the contract drawings and contract specifications, mode of procedure and the carrying out of the work as stipulated in the Clause Nos. 7, 8, 10, 13, 17, 18, 21, 23, 24, 29, 32, 34, 37, 38, 40, 41 & 44, the decision of the Engineer-in-Charge, which shall be given in writing, shall be final and binding on the contractor.

15. According to Mr. Mishra, Clause 53 of GCC was of very limited import and did not deal with the issue of compensation and damages.

16. As far as the issue of rate of interest was concerned, Mr. Mishra left it to this Court to decide.

17. With regard to the issue of limitation, Mr. Mishra submitted that there was a significant departure in the Act, 1996 from Arbitration Act, 1940 (in short "Act, 1940"). He stated that Sections 2(a), 8, 20, 21, 23, 24 and 37 of Act, 1940 used the term "differences" between the parties, whereas Act, 1996 talked of

"disputes" between the parties. In this context, he referred to the Preamble as well as Sections 2(b), 7, 21, 30, 32 and 43 of Act, 1996. He submitted that in view of the expression "disputes" used in the Act, 1996, the judgment rendered by the Supreme Court in Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, would apply. In this said judgment, the Supreme Court has held as under:

4. Therefore, in order to be entitled to order of reference u/s 20, it is necessary that there should be an arbitration agreement and secondly, difference must arise to which this agreement applied. In this case, there is no dispute that there was an arbitration agreement. There has been an assertion of claim by the appellant and silence as well as refusal in respect of the same by respondent. Therefore, a dispute has arisen regarding non-payment of the alleged dues of the appellant. The question is for the present case when did such dispute arise. The High Court proceeded on the basis that the work was completed in 1980 and therefore, the appellant became entitled to the payment from that date and the cause of action under Article 137 arose from that date. But in order to be entitled to ask for a reference u/s 20 of the Act there must not only be an entitlement to money but there must be a difference or dispute must arise. 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 February 28, 1983 and there was non-payment, the cause of action arose from that date, that is to say, February 28, 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. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator u/s 8 or a reference u/s 20 of the Act. See Law of Arbitration by R.S. Bachawat, first edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case.

18. Mr. Mishra pointed out that a Division Bench of Andhra Pradesh High Court in Prathyusha Associates Vs. Rashtriya Ispat Nigam Limited, Visakhapatnam Steel Plant and Another, while deciding the issue of limitation under the Act, 1996 has observed as under:

99. The claim and denial, both put together, would constitute a dispute. Mere making a claim and if there is no effective and conclusive repudiation, the controversy would not take the shape of a dispute. Precisely, it is that date on which the differences between both the parties culminated into a "dispute" would

and should be the starting point of cause of action for the purpose of computation of limitation.

19. In the alternative, Mr. Mishra submitted that the letter dated 4th September, 1995 was an invocation of the arbitration clause. The portion of the said letter relied upon by Mishra reads as under:

Dear Sir,

As you are aware, on account of unprecedented flood on 10.09.92 we had suffered huge losses besides execution of work for debris and slush removal at the approach, as well as, inside the tunnel. As regards, removal of debris and slush etc. is concerned, our claim was amicably resolved and payment was made to us, but in respect of losses no decision has yet been taken due to which no payment has been made to us on this account.

We had sent a letter No. SAL/001/01/1355/95, dt. 18.09.1992 (copy enclosed for ready reference as Annexure -A). The list attached with this letter gave the details of various machines, Department material, store items and our material which has been submerged or washed away due to the floods. There were meetings also between the authorized representative of the contracting parties. The cause of the flood revealed that we would not have suffered the loss which in fact could have been foreseen and avoided by M/s.N.H.P.C. Limited, if it had acted prudently which was totally outside the Contractor's control.

We had sent a letter No. SAL/001/01/1669/92, dt. 02.11.1992, in this regard. In this letter we had also pointed-out that the financial implication of the damage and losses shall be intimated in due course (though vide our Annexure-A, we had already given the various details) with the expectation that on principle M/s. N.H.P.C. Limited would agree to pay the losses in all fairness. However, the matter still remains unresolved. Annexure-B enclosed herewith provides the details of losses of our claims and in case any further clarification is required we are prepared to clarify and satisfy you.

20. In view of the aforesaid, Mr. Mishra submitted that respondent-claimant's claims were within limitation as the said claims had never been repudiated or denied and the respondent-claimant had raised its claims within a period of three years from the date of cause of action. Mr. Mishra pointed out that the judgments relied upon by the petitioner-objector were irrelevant as they were under the Act, 1940. He further stated that in the said cases, final bills had been raised and invocation of arbitration was hopelessly barred by limitation.

21. Having heard the parties, I am of the view that the scope of the interference by this Court with an arbitral award u/s 34(2) of Act, 1996 is extremely limited. The Supreme Court in Delhi Development Authority Vs. R.S. Sharma and Co., New Delhi, after referring to a catena of judgments has held that an arbitral award is open to interference by a court u/s 34(2) of the Act, 1996 if it is contrary to either the substantive provisions of law or the contractual provisions

and/or is opposed to public policy.

22. In fact, the Supreme Court in *McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others*, has succinctly summed up the scope of interference by this Court by stating "the 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc...."

23. It is further settled law that if the arbitrator's decision on certain claims is a possible view, though perhaps not the only correct view, the award cannot be examined by the Court. Where reasons have been given by the arbitrator, Court cannot examine the reasonableness of the reasons. This is based on the premise that if the parties have selected their own forum, the said forum must be conceded the power of appraisal of evidence. Consequently, as the arbitrator is the sole judge of the quality as well as the quantity of evidence, it will not be for this Court to take upon itself the task of being a judge on the evidence before the arbitrator.

24. On a perusal of the impugned Award, I find that the Arbitrator had given cogent reasons for arriving at the conclusion that the losses/damages caused by the flood on 9th/10th September, 2000 could have been avoided or foreseen. The relevant portion of the impugned Award is reproduced hereinbelow:

As is clear from the report of Mr. J.A. Shahmiri there was a rainfall of 302 mm between 8.30 a.m. on 09.09.92 and 9.30 a.m. on 10.09.92 recorded at Dhyangarh which is upstream of the dam. Thus a heavy flood could be anticipated at the dam site. However, no flood warning was given to claimants either for the anticipated flood or at the time of raising of gates. The respondents stated that they were not contractually bound to give flood warning nor CWC had prescribed any such guidelines. The claimants stated that issuing of flood warning has been a practice. This has since been converted into a part of Dam Safety Act, 1996, which makes it mandatory to identify areas, populations, structures or installations likely to be adversely affected due to flood waters let out from the reservoir and issue emergency flood warning in the case of all dams which impound or divert water and which are more than 15 m high and that there is such practice at Dakpathar Barrage, on Yamuna as well as at Mayapur Head Works on the river Ganga near Haridwar.

It is held that in case, by any action of theirs, there was possibility of damage downstream it was necessary for the respondents to issue warning to their own staff, those working for them downstream and even to the third parties.

From the above, it is clear that the gates were raised at the same time in panic to save the dam, which caused sudden rise in flood level downstream near the work area of claimants. It is held that no prudent person could have acted in such a negligent manner as NHPC did without even giving any prior intimation or signal to that effect.

25. In view of the aforesaid finding of fact by the Arbitrator which has been reached after recording extensive evidence followed by cross-examination, I am of the opinion that this Court should not interfere with the same in Section 34 proceedings as that would amount to re-appreciating evidence and sitting as a Court of appeal over the finding reached by the Arbitrator.

26. I am further in agreement with Mr. Mishra's submission that the width and amplitude of Clause 53 of GCC is extremely limited inasmuch as it confines the Engineer-in-Charge's decision to matters regarding materials, workmanship, removal of improper work, interpretation of the contract drawings and contract specifications, mode of procedure and the carrying out of the work. In my opinion, Engineer-in-Charge could not have decided the issue whether flooding could have been avoided or foreseen by a prudent person. Thus, in my view, the respondent-claimant's claims were certainly arbitrable.

27. However, in my view, the Arbitrator has committed an error of law in holding that accrual of cause of action for ordinary matters is different from those of arbitration matters. It is settled law that the provisions of Limitation Act apply to arbitrations and the period of limitation for commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. In fact, "action" and "cause of action" have been construed as "arbitration" and "causes of arbitration". The cause of arbitration has been held to accrue when the claimant becomes entitled to raise the question, that is, when the claimant acquires right to require arbitration. Accordingly, it has been held that the claim for arbitration must be raised as soon as the "cause of arbitration arises" as the "cause of action" in a civil action. The Supreme Court in *South East Asia Shipping Co. Ltd. Vs. Nav Bharat Enterprises Pvt. Ltd. and Others*, has held that cause of action is a bundle of facts which gives cause to enforce a legal injury for redress in a court of law. In fact by virtue of Section 21 of Act, 1996, the arbitral proceedings are deemed to commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

28. The only difference in civil and arbitration matters is that by consent of parties, the court of law is substituted for an arbitrator. The Supreme Court in *Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta*, has held as under:

8. ...It would, therefore, be clear that the provisions of the Limitation Act would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party in respect of any such matter at the time when it should have accrued but for the contract....

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11. In *West Riding of Yorkshire County Council v. Huddersfield Corporation* (1957) 1 All ER 669, the Queens Bench Division, Lord Goddard, C.J. (as he then was) held that the Limitation Act applies to arbitrations as it applies to actions in

the High Court and the making, after a claim has become statute-barred, of a submission of it to arbitration, does not prevent the statute of limitation being pleaded. Russell on Arbitration, 19th Edition, reiterates the above proposition. At page 4 it was further stated that the parties to an arbitration agreement may provide therein, if they wish, that an arbitration must be commenced within a shorter period than that allowed by statute; but the court then has power to enlarge the time so agreed. 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.

12. 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 civil 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.

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14. The Law of Arbitration by Justice Bachawat in Chapter XXXVII 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, as 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.

15. Arbitration implies to charter out timous commencement of arbitration availing the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aid the promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. The question, therefore, as posed earlier is whether the court would be justified to permit a contracting party to rescind the contract or the court can revoke the authority to refer the disputes or differences to arbitration. Justice Bachawat in his Law of Arbitration, at p. 552 stated that "in an appropriate case leave should be given to revoke the authority of the arbitrator". It was also stated that an ordinary submission without special stipulation limiting or conditioning the functions of the arbitrator carried with it the implication that the arbitrator should give effect to all legal defences such as that of limitation. Accordingly the arbitrator was entitled and bound to apply the

law of limitation. Section 3 of the Limitation Act applied by way of analogy to arbitration proceedings, and like interpretation was given to Section 14 of the Limitation Act. The proceedings before the arbitration are like civil proceedings before the court within the meaning of Section 14 of the Limitation Act. By consent the parties have substituted the arbitrator for a court of law to arbitrate their disputes or difficulties. It is, therefore, open to the parties to plead in the proceedings before him of limitation as a defence.

(emphasis supplied)

29. In my opinion, Mr. Mishra's argument that on the issue of limitation there was a significant departure in the Act, 1996 from Act, 1940, is not correct. In my view, nothing turns on the use of expression "differences" in Act, 1940 and the expression "disputes" in the Act, 1996 as in both the Statutes, limitation has to be calculated in accordance with the Limitation Act, 1963 and not by virtue of Sections 2(b), 7, 21, 30, and 32 of Act, 1996. In fact, there is hardly any difference in the language used in Section 37 of Act, 1940 and Section 43 of Act, 1996 by virtue of which the Limitation Act, 1963 has been held applicable to arbitrations. The relevant portion of Section 37 of Act, 1940 and Section 43 of Act, 1996 is reproduced hereinbelow:

i) Section 37 of Act, 1940:

37. Limitations.- (1) All the provisions of the Indian Limitation Act, 1908, (9 of 1908.) shall apply to arbitrations as they apply to proceedings in Court.

ii) Section 43 of Act, 1996:

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

30. Keeping in view the aforesaid as well as judgment of the Supreme Court in J.C. Budhraj's case (supra), the concept of limitation for filing a claim is entirely different from a petition filed under Sections 8 and 20 of Act, 1940 seeking reference of disputes to arbitration. Accordingly, the judgment in Major (Retd.) Inder Singh Rekhi's case (supra) would have no application to the facts of the present case as the said case dealt with the issue of limitation vis-a-vis a reference petition.

31. As far as the Prathyusha Associates, Visakhapatnam's case (supra) is concerned, I am of the view that the said judgment is irrelevant as it was passed prior to the judgment of the Supreme Court in J.C. Budhraj's case (supra).

32. I am further of the opinion that the letter dated 4th September, 1995 is not an invocation of the arbitration clause inasmuch as in the said letter, the respondent-claimant had specifically stated that in case payment was not received within one month, the respondent shall be compelled to subsequently serve notice for arbitration and invoke the arbitration clause. The relevant portion of the said letter reads as under:

...In view of the above, we request that this matter should be decided within one month and the payment should be made to us failing which, on account of dispute, we shall be compelled to serve Notice for Arbitration and invoke the Arbitration Clause which definitely would involve time and expense for both the parties and it is with this bonafide desire that we are taking this opportunity for an amicable settlement....

(emphasis supplied)

33. Consequently, I am of the view that the claims filed by respondent-claimant were barred by limitation as cause of action for filing the said claims arose on 9th/10th September, 2000 - the date of the flood - while the arbitration clause was invoked by respondent-claimant on 1st May, 1996. It is also not the respondent-claimant's case that the limitation for filing the claim stood extended for any reason. Accordingly, the impugned Award is contrary to law and the same is set aside.

34. In view of the aforesaid, present petition is allowed and impugned Award dated 9th September, 2000 is set aside but with no order as to costs.