$~4

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

% *Date of Decision: 13.09.2022*

\+ **FAO(OS) (COMM) 11/2019 & CM APPL. 2246/2019**

K R ANAND ..... Petitioner

Through: Mr. Harish Malhotra, Sr. Adv. with Mr. Rajender Agarwal & Mr. Anoop Kumar, Advs.

Versus

NAVAYUGA ENGINEERING CO LTD ..... Respondents

Through: Mr. Pranay Agrawala, Adv.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration & Conciliation Act, 1996 (hereafter '**the A&C Act'**) impugning an order dated 27.11.2018 (hereafter '**the impugned order'**) passed by the learned Single Judge rejecting the appellant's petition [being OMP(COMM) No.27/2018 captioned ***Shri K.R. Anand v. Navayuga Engineering Co. Ltd***.]. The appellant had filed the said petition under Section 34 of the A&C Act seeking to set aside an arbitral award dated 16.11.2017 (hereafter '**the impugned award'**).

2. The impugned award was rendered in the context of disputes that have arisen between the parties in connection with the Sub Contract Agreement dated 10.12.2004.

Factual Context:

3. In the year 2004-05, the respondent was awarded a contract bearing no. 10/EE-I/PF P/2004-05 relating to construction of a bridge across river Yamuna near Geeta Colony, Delhi by the Public Works Department, Delhi (hereafter the **'PWD'**).

4. Thereafter, on 10.12.2004, the respondent sub-contracted a part of the works, as contained in Section II of the Bill of Quantities, to the appellant in terms of the Sub Contract Agreement (hereafter '**the Agreement'**). The contract between the parties was on a back-to-back basis, as is evident from Clause 13 of the Agreement. The stipulated date for commencement of the works was 30.01.2005 and the entire works were to be completed within a period of thirty-six months, that is, on or before 29.01.2008.

5. The appellant claims that it was to be paid in accordance with the rates paid by the PWD plus escalation in terms of Clause 9 of the Agreement.

6. Admittedly, the works were completed by the appellant on 22.12.2008. The appellant claims that the delay in execution of the works was due to breaches committed by the PWD and thus, it was entitled to an additional payment on account of the increase in rates of material, labour and other items etc.

7. Certain disputes had also arisen between the respondent and PWD in relation to the contract executed between them. Accordingly, by a communication dated 04.06.2008, the respondent invoked the agreement to refer those disputes to arbitration. The appellant states

that since it was not a party to the contract subsisting between the respondent and PWD, it could neither join the arbitral proceedings nor seek any relief in this proceeding. The appellant claims that there was an understanding between the parties, whereby the respondent had also agreed to pursue the claims in respect of the works executed by the appellant.

8. The appellant raised bills on the respondent for the works executed. Admittedly, the respondent paid the said bills. The appellant had also issued certificates evidencing the receipt of the amount of the bills.

9. The arbitral proceedings initiated by the respondent against the PWD culminated in an arbitral award dated 26.12.2011, in favour of the respondent. Thereafter, PWD, by way of an application under Section 34 of the A&C Act [being OMP No 420/2012], challenged the said arbitral award before this Court. By an order dated 31.03.2014, the said application was allowed by a Single Bench of this Court and the said award was set aside in respect of certain claims.

10. Thereafter, the respondent filed an appeal against the order dated 31.03.2014 under Section 37 of the A&C Act [being FAO OS No 264/2014]. On 15.03.2016, a Coordinate Bench of this Court allowed the said appeal and partially modified the judgment passed by the learned Single Judge, thereby reinstating the award in respect of certain claims preferred by the respondent against PWD. Thereafter, both the respondent and PWD challenged the said order by filing their respective Special Leave Petitions before the Supreme Court.

11. The appellant claims that the arbitral award secured by the respondent also includes claims in respect of escalation pertaining to the work executed by the appellant.

12. On 27.04.2016, the appellant states that it issued a notice calling upon the respondent to pay a sum of ₹10,44,35,551.37/- along with interest at the rate of 9% per annum, in terms of the arbitral award dated 26.12.2011, however, it did not receive any response regarding the same.

13. Thereafter, the appellant, by way of a petition under Section 9 of the A&C Act, sought an interim injunction, *inter alia*¸ restraining the respondent from appropriating the amount recoverable from the PWD on account of the arbitral award dated 26.12.2011. The appellant also apprehended that the respondent would enter into a settlement with PWD and give up the claim for escalation in respect of the work executed by the appellant.

14. By an order dated 21.12.2016, this Court restrained the respondent from entering into any settlement with the PWD for a period of four weeks from the date of the said order and, at the request of the parties, appointed the learned Sole Arbitrator (the Arbitral Tribunal) to adjudicate the disputes between the parties.

Arbitration:

15. Before the Arbitral Tribunal, the appellant raised certain claims including a claim for additional amount relating to escalation in the rates at which the works were executed under the Agreement.

16. The respondent raised two preliminary objections to the claims raised by the appellant. First, that the claims are barred by limitation; and second, that the Agreement stood discharged by accord and satisfaction as the appellant had accepted payments in full and final settlement of its bills.

17. The respondent filed an application under Section 16 of the A&C Act contending that the appellant did not have cause of action as the arbitral award against the PWD had not attained finality.

18. By the impugned award, the Arbitral Tribunal accepted the respondent's contention and rejected the claims preferred by the appellant on the ground of limitation as well on the ground that the appellant had accepted the payments in full and final settlement of the amount due for the work done. The relevant extract of the impugned award is set out below: -

> "21. The aforesaid facts clearly show as the Claimant has issued a certificate that it has received lull and final payment towards settlement of final bill, labour contract, staging and shuttering and for earth work of excavation in the year 2010 itself. Having done so, it is not open for the Claimant in the year 2015- 2016 turn around and claim that it is entitled to increase labour and material charges. Even if it is assumed that Claimant was entitled to raise a dispute regarding payment of enhanced rates or escalation because it has erroneously issued the certificate (which is not its case), it ought to have done within 3 years from the date when the last payment was received or when the certificate of final settlement was issued. Even this period would end in 2013. This clearly indicates that the Claimant was not entitled to any amount due or payable. Even for the sake of argument if it is assumed that the said

certificate was issued by the Claimant to the Respondent under erroneous impression, still at best, the cause of action is deemed to have been accrued to the Claimant in the 3'^ear 2010 and the suit for recovery of the amount which according to the Claimant was due and payable ought to have been initiated either in a civil court by way of Arbitral Tribunal within a period of three years from the date of such an accrual. This has not been done and therefore, ex-facie the claim of the Claimant is not sustainable in the eyes of law and even if it is contended and evidence taken, arguments heard, it has ultimately failed because of the aforesaid reason. The contention of the Ld. Senior Counsel for the Claimant that the arbitration was invoked by the Respondent with the PWD before the final payment to the Claimant, therefore the question of limitation will not apply to it is untenable in law. The question is not when the Respondent invoked the arbitration but the question is whether the claim of the Claimant was within limitation from the date of accrual of cause of action. Similarly, the contention of the Ld. Senior Counsel that whatever escalated amount is received by the Respondent cannot be appropriated by it alone. It was to be given to the Claimant in respect of the work executed by it. This is absolutely correct proposition on ground of morality but not in law. Law of limitation only bars remedy but does extinguish the right of the respondent wants to pay any money to the Claimant of its own freewill as and when it gets, it may do so but the Claimant cannot force the Respondent to pay the same by restoring processes to law which includes present arbitration proceedings.

22. In addition to this, the respondent is also estopped now to change his stand after having chosen to issue the certificate to the respondent towards the satisfaction of full and final settlement of claim. This cannot be permitted to be done. The Claimant has frequently referred to the word 'assurance' was given by the respondent, it would give the increased or enhanced rate

proportionally once it succeeds in the arbitration proceedings with the PWD. Assurance cannot put the law of limitation in abeyance. What is barred by law of limitation to be recovered in civil court cannot be received in an arbitration proceedings. Only the forum changes but the law remains the same. This is despite the fact I have not referred to cause of action having accrued to the Claimant in the year 2008, when the work was completed. Even if it is given a liberal meaning to assume that cause of action arose in the year 2010, even then it is barred by limitation because proceedings for arbitration having been started in the year 2015 or 2016. The purpose of the arbitration proceedings is to have expeditious resolution of disputes and not to subject one of the parties to undue harrasment.

23. In view of the aforesaid reasons, I feel that this arbitral tribunal does not have the jurisdiction to entertain a claim which is barred by time and is hit by section 43 of the Arbitration and Conciliation Act, 1996. Accordingly, I feel the arbitration deserves to be terminated. If this is not done, it would only subject the Respondents to harassment which can not be permitted to be done because such a prolonged action can become jumping board for extracting settlement at a later date. The application under Section 16 for adjournment of proceedings sine die is rejected. On the contrary, the objection of the Respondent that the claim is barred by limitation is accepted. There cannot be any enlargement of time for limitation. Accordingly, the arbitration proceedings for recovery of any amount is barred. Therefore, the arbitration proceedings are terminated. Ordered accordingly."

The Impugned Order:

19. The appellant challenged the impugned award by filing an application under Section 34 of the A&C Act [being OMP(COMM) No.27/2018 captioned ***Shri K.R. Anand v. Navayuga Engineering Co.***

Ltd.]. The appellant contended that the decision of the Arbitral Tribunal to reject the claims preferred by the appellant on the ground of limitation, was erroneous and thus, the impugned award is liable to be set aside.

20. The learned Single Judge examined the contentions advanced on behalf of the appellant and found the same to be unmerited. The learned Single Judge found that the Statement of Claims filed by the appellant neither mentioned the final bills raised by it on 15.03.2010 nor the certificates of full and final payment received by it from the respondent. The learned Single Judge further found that no correspondence or claim for amount of escalation had been raised by the appellant between the period 2010 to 27.04.2016.

21. The learned Single Judge referred to Clauses 9, 13 and 14 of the Agreement and found that in terms of the said clauses, the appellant was required to raise the bills for the works done by it and the same were to be verified and consolidated with the bills raised by the respondent to the PWD; and admittedly, the appellant had not raised any such bills for the amount that was claimed by it before the Arbitral Tribunal.

22. The learned Single Judge also held that even if the respondent had raised certain claims before PWD for the items executed by the petitioner, however, the same would not entitle the appellant to extend the period of limitation.

23. Aggrieved by the impugned order, the appellant filed the present appeal.

Submissions:

24. Mr Harish Malhotra, learned senior counsel appearing for the appellant, has assailed the impugned order and the impugned award on the following grounds:

24.1. First, he submitted that the Arbitral Tribunal had erred in concluding that the claims raised by the appellant were barred by limitation. He referred to Clause 9 of the Agreement and submitted that in terms of the said clause, the parties had agreed that escalation would be shared in proportion of the quantities executed by the appellant and the total quantity. The appellant's cause for sharing the escalation amount would arise only on the respondent receiving the same. Thus, the period of limitation would commence only after the respondent had received the escalation payment for the entire work. He also referred to Clause 13 of the Agreement and submitted that in terms of the said clause, the appellant was to submit the bills to the respondent and the respondent was required to submit the same to the employer.

24.2. Second, he submitted that the appellant had specifically reserved its right in respect of the escalation bills by making a notation on the original final bills, which had not been produced.

24.3. Third, he submitted that the appellant has not foreclosed its right to claim escalation by submitting certificates acknowledging receipt of the amounts pertaining to the bills raised. He also referred to the decisions of the Supreme Court in ***Bharat Coking Coal Ltd v. M/s Annapurna Construction: (2003) 8 SCC 154*** and ***Durga Charan Rautray v. State of Orissa and Anr.: AIR 2012 SC 442***, in support of his contention.

24.4. Fourth, he submitted that the Arbitral Tribunal had grossly erred in disposing of the appellant's claim in an application filed under Section 16 of the A&C Act. He stated that the respondent had merely requested for an adjournment of the proceedings since the matter relating to the arbitral award secured against the PWD was pending before the Supreme Court.

24.5. Lastly, he earnestly submitted that an SLP had been preferred by the PWD against the decision of the Division Bench of this Court reinstating the arbitral award secured by the respondent in respect of certain claims. Consequently, the PWD had made certain payments to the respondent, which included payment in respect of escalation pertaining to the works executed by the appellant. He stated that the respondent could not be permitted to unjustly enrich itself at the cost of the appellant.

Reasons and Conclusion:

25. The controversy to be addressed is in a narrow compass. The first question to be examined is whether the decision of the Arbitral Tribunal to accept that the appellant's claims were barred by limitation is manifestly erroneous and renders the impugned award patently illegal on the face of the record.

26. There is no dispute that the works in question were completed on 22.12.2008. The appellant had raised running bills from time to time for execution of the works and had raised final bills in the year 2010. There is no dispute that the bills were raised in accordance with the terms of the Agreement. It is also not in dispute that the appellant had received

a final payment against the said bills on 17.03.2010 and had acknowledged the receipts.

27. The Arbitral Tribunal had set out the three certificates that were admittedly issued by the appellant acknowledging the receipts of payment. The three certificates as noted by the Arbitral Tribunal are set out below:

> "K.R. ANAND ENGINEERS & CONTRACTORS
> A 1/175, JANAKPURI, NEW DELHI 110058
>
> **TO WHOMSOEVER IT MAY CONCERN**
>
> We have received an amount of Rs.1,58,14,768/- (Rupees one crore fifty eight lakhs fourteen thousand seven hundred sixty eight only) from M/s Navayuga Engineering Company Limited through cheque no.549687 dated 17.03.2010 of ICICI Bank Ltd **against our full & final bill of the project**, namely Bridge Across River Yamuna near Geeta Colony, Delhi
>
> Sd/- for K R Anand"

> "K R ANAND ENGINEERS & CONTRACTORS
> A 1/175, JANAKPURI, NEW DELHI 110058
> **TO WHOMSOEVER IT MAY CONCERN**
>
> We have received an amount of Rs.9,13,954/- (Rupees nine lakhs thirteen thousands nine hundred fifty four only) from M/s Navayuga Engineering Company Limited through cheque no.549682 dated 17.03.2010 of ICICI Bank Ltd **against our full & final bill of the project**, namely Bridge Across River Yamuna near Geeta Colony (Road portion) Section II, Guide Bund Approach & Embankment (Labour contract for staging, shuttering & Reinforcement)
>
> Sd/- for K R Anand"

"K R ANAND ENGINEERS & CONTRACTORS
A 1/175, JANAKPURI, NEW DELHI 110058

TO WHOMSOEVER IT MAY CONCERN

We have received an amount of Rs.7,79,625/- (Rupees six lakhs seventy nine thousands six hundred twenty five only) from M/s Navayuga Engineering Company Limited through cheque no.549683 dated 17.03.2010 of ICICI Bank Ltd **against our full & final bill of the project**, namely Bridge Across River Yamuna near Geeta Colony, (Road portion) section II Guide Bund, Approach & Enbankment (work order for earthwork in excavation for roads)

Sd/- for K R Anand"

28. In view of the above, there can be no dispute that the appellant had received the payments, which were in full, in respect of the bills raised by it. According to the appellant, it had not raised bills for increase in the rates of labour, material etc. (escalation bills). It is the appellant's contention that notwithstanding the same, it was entitled to claim the same as its cause for doing so would arise after the PWD had accepted/paid the amount of escalation to the respondent.

29. The aforesaid contention is clearly erroneous. The works were completed in the year 2008 and there is no provision in the Agreement providing that the escalation bills could be raised subsequently or were not required to be raised at the material time.

30. Clauses 9 and 13 of the Agreement, as referred on behalf of the appellant, are set out below:

"9. That Escalation Clause shall be as per main contract provisions, but shall be shared in proportion of actual quantities executed by KRA vis-a-vis total quantity.

xxxx xxxx xxxx

13. That KRA shall raise bills at contract rates, as a sub-contractor in accordance with contract provisions, for their scope of work on NEC, who after due verification and quality check, will consolidate the same with NEC's bill and submit the same to the Employer."

31. As is apparent, Clause 13 of the Agreement makes it amply clear that the appellant was required to issue the bills for the works done on the respondent. The respondent was required to verify the quantities and include the works covered under the bills raised on PWD. There is no question of the appellant withholding any bill, whether on account of escalation or otherwise, pending any clearance from the PWD or the respondent.

32. Clause 9 of the Agreement clearly stipulates that the Escalation Clause was required to be as per the contract between the PWD and the respondent. Clause 9 of the Agreement did not, in any manner, indicate that the appellant was not required to make a claim for escalation with the respondent for the quantities executed by it.

33. The contention that the appellant could raise the bills only on the issue of escalation being resolved between the respondent and PWD and the period of limitation would commence thereafter, cannot be accepted. The appellant, having chosen to not raise any bills or pursue

its claims regarding escalation with the respondent was, clearly, now precluded from raising such claims after a period of over seven years of completing the works.

34. This Court finds no infirmity with the decision of the Arbitral Tribunal rejecting the appellant's claim as being barred by limitation.

35. It was contended that the appellant had made an endorsement on the final bills that the same were subject to escalation to be decided by the court or an arbitration between the respondent and the PWD. No such document or a copy thereof, was produced by the appellant. Notwithstanding the same, the Arbitral Tribunal had called for the original documents, which were produced. The Arbitral Tribunal had examined the same and found that the same did not contain any endorsement as claimed by the appellant. The order passed by the Arbitral Tribunal on 08.09.2017 is reproduced below:

> "Original documents produced. The Ld. Counsel for the claimant has seen the original documents. So far as the documents which are annexed at pages 9 to 13 of the application u/s 16 are concerned they are the photocopies of the final bill submitted by the claimant with the Respondent. Original bills do not bear any endorsement by the claimant that these are being submitted subject to any escalation to be decided by the court or arbitration between the Respondent and the PWD.
>
> Pages 14 to 16 are the photocopies of the certificates issued by the claimant to the Respondent. Contents of these photocopies are also admitted by the claimant. Originals are seen and returned by the Ld. Counsel for the Claimant as well as by the Tribunal.

> Arguments heard on the application under section 16. Parties are permitted to file their submissions within one week after exchanging the same between themselves.
>
> Order on the application reserved."

36. It is apparent from the above that no objection was taken on behalf of appellant to the effect that respondent had not produced the original bills or the relevant page thereof. However, in the written submission filed before the Arbitral Tribunal after 08.09.2017, the appellant contended that the respondent had only produced three sheets of the final bill but not the main page, which records the endorsement claimed to have been made by the appellant. It is clear that the Arbitral Tribunal did not entertain the said contention.

37. The respondent denies that the appellant had made any notation reserving its right to claim escalation. The appellant did not produce any material to establish the same before the Arbitral Tribunal. This Court finds no flaw in the decision of the Arbitral Tribunal to not accede to the same.

38. In any view of the matter, making of any such notation would not extend the period of limitation. The appellant had not made any claim regarding the amount of escalation. The fact that the appellant had not done so forecloses the remedies in that regard.

39. The Arbitral Tribunal also found that the appellant had accepted payments in full and final settlement of the final bills and also issued certificates to the effect that he had received full and final payments towards settlement of final bills. The Arbitral Tribunal, accordingly,

held that it was not open for the appellant to now raise additional claims in respect of the said works, which were completed in the year 2008.

40. In this regard, it is relevant to note that there was no dispute that the appellant had issued such certificates. In the written submissions filed by the appellant before the Arbitral Tribunal, it was contended that "*such certificates are always issued while receiving payments otherwise the payments are not released to the contractor and it relates to the items of work mentioned in the final bill*". The appellant also contended that since it was not clear as to how much amount would be awarded by the Arbitrator, the bill was prepared "*on the basis of the Agreement rates and not taking into considerations the claims*".

41. There is no document on record, which would even remotely indicate that the appellant had issued the certificates acknowledging the payments under any compulsion or for the reason that without furnishing such certificates, payments would have been withheld by the respondent. No such protest was made by the appellant after receipts of the payments were acknowledged under the certificates.

42. In the circumstances, the decision of the Arbitral Tribunal to accept that the right of the appellant to claim the said amount stood closed, is a plausible conclusion.

43. The decisions of the Supreme Court in ***Durga Charan Rautray v. State of Orissa & Anr.*** (*supra*) and ***Bharat Coking Coal Ltd. v. Annapurna Construction*** (*supra*) are of little assistance to the appellant.

44. In ***Durga Charan Rautray v. State of Orissa & Anr.*** (*supra*), the

respondents' contention that the appellant was not entitled to refer any claims to arbitration as he had accepted the final bill without raising any objection, was accepted by the High Court. The Supreme Court referred to the earlier decision in ***Bharat Coking Coal Ltd. v. Annapurna Construction*** (*supra*) and held that the appellant was not precluded from referring any disputes to arbitration on that ground. Consequently, the appeal was allowed. It is material to note that the respondents' objection that reference to arbitration was not sustainable was based on interpretation of clause 23 of the agreement that was entered into between the parties in that case.

45. In ***Bharat Coking Coal Ltd. v. Annapurna Construction*** (*supra*), the Supreme Court held as under:

> "9. **FINDINGS:**
>
> Only because the respondent has accepted the final bill, the same would not mean that it was not entitled to raise any claim. It is not the case of the appellant that while accepting the final bill, the respondent had unequivocally stated that he would not raise any further claim. In absence of such a declaration, the respondent cannot be held to be estopped or precluded from raising any claim."

46. There is no dispute that a person, who has accepted payments against the bill, is not precluded from making further claims unless it is established that he had accepted the payments in full and final settlement of the amounts due.

47. The question whether the appellant had accepted the payments in full and final settlement of the amounts due under the Agreement is

a question relating to interpretation of the certificates issued by the appellant as well as the inference that may be drawn from the appellant's conduct. The Arbitral Tribunal had considered both these aspects – the language of the certificates as well as the fact that the appellant had not even made a whisper regarding the claim for escalation after receipts of the amounts.

48. The Arbitral Tribunal is the final adjudicator of the disputes and its decision is final unless it falls foul of any of the grounds as set out in Section 34 of the A&C Act. In the present case, this Court is unable to accept that the Arbitral Tribunal's view is unreasonable or one that no reasonable person could have possibly taken.

49. This Court finds no ground to interfere with the impugned award or the impugned order.

50. The appeal is unmerited and, accordingly, dismissed. Pending application, if any, is also dismissed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

SEPTEMBER 13, 2022
RK/gsr