

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

TUESDAY, THE 15TH DAY OF MARCH 2022 / 24TH PHALGUNA,
1943

ARB.A NO. 33 OF 2020

AGAINST THE ORDER DATED 22.02.2020 IN AOP 1247/2015
OF THE ADDITIONAL DISTRICT COURT-V, ERNAKULAM

APPELLANT/RESPONDENT:

SOUTHERN RAILWAY
REPRESENTED BY CHIEF ENGINEER
(CONSTRUCTION), SOUTHERN RAILWAY,
ERNAKULAM, PIN CODE-682 016.
BY ADV P.SANJAY

RESPONDENT/PETITIONER:

M/S.CHERIAN VARKEY CONSTRUCTION CO. PVT LTD.
(ENGINEERS AND CONTRACTORS), ALPHA PLAZA,
5TH FLOOR, K.P. VALLON ROAD, KADAVANTHRA,
KOCHI-682 020, REPRESENTED BY THE MANAGING
DIRECTOR, CHERIAN VARKEY.
BY ADVS.
SMT.SANTHA VARGHESE (CAVEATOR)
SRI.RANJITH VARGHESE-R1

THIS ARBITRATION APPEALS HAVING COME UP FOR
ADMISSION ON 15.03.2022, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

C.R.

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

Arbitration Appeal No.33 of 2020

Dated this the 15th day of March, 2022

J U D G M E N T

P.B.Suresh Kumar, J.

This appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (the Act) is directed against the order dated 22.2.2020 in A.OP No.1247 of 2015 on the files of the Court of the Additional District Judge-V, Ernakulam. The appellant was the respondent in the said proceedings.

2. The appellant, hereinafter referred to as “the Railway” has awarded to the respondent, hereinafter referred to as “the Contractor”, a work in connection with the construction of an over bridge. The work was completed during the year 2008. Even though periodical payments have been made by the

Railway to the Contractor in the course of execution of the work, final measurements of the work were taken by the Railway only on 10.02.2012. The final bill of the work was drawn by the Railway only thereafter and the balance payment was released to the Contractor on 13.12.2012. In the meanwhile, on 12.01.2010, the Contractor had raised a claim on the Railway in connection with the work for a sum of Rs.1,19,77,350.43/-. Later, before the disbursement of the final payment, when the Contractor was asked to submit a No Claim Certificate in terms of the contract, the Contractor submitted a No Claim Certificate without prejudice to their right to pursue the claim made on 12.01.2010. Since the final payment was released to the Contractor without considering the claim submitted by them on 12.01.2010, the Contractor sought resolution of the dispute relating to the said claim by appointing an arbitral tribunal as provided for in the contract. The said request was made by the Contractor on 03.04.2014. In response to the said request, the competent authority of the

Railway constituted an arbitral tribunal comprising of three officers of the Railway for adjudicating the claim raised by the Contractor.

3. Before the arbitral tribunal, the Railway contended, among others, that the claim of the Contractor is barred by limitation. The basis of the contention was that in the absence of any provision in the contract fixing a time for payment for the work done, the claim, if any, for the price of the work done should have been raised by the Contractor within three years from the date of completion of the work and insofar as the work was completed during 2008, the request made on 03.04.2014 for reference of the dispute relating to the claim made by the contractor on 12.01.2010 for resolution of the dispute by recourse to arbitration is barred by limitation. The arbitral tribunal chose to decide the said contention as a preliminary issue and after hearing both sides, found that the claim made being one for the price of the work done, the cause of action to seek reference of a dispute relating to the same for

adjudication by recourse to arbitration has arisen on completion of the work and the request for reference made three years after completion of the work is barred by limitation. In the light of the said finding, the arbitral tribunal rejected the claim of the Contractor as one barred by limitation.

4. The Contractor challenged the decision of the arbitral tribunal in A.OP No.1247 of 2015 before the court below invoking Section 34 of the Act. The court below, on a consideration of the facts and circumstances of the case, set aside the arbitral award, holding that the date of the final bill, and not the date of completion of the work, is the crucial date in the case on hand for reckoning the period for seeking reference of the dispute for resolution by recourse to arbitration and since the request was made within three years from the date of the final bill namely 13.12.2012, the claim is well within the period of limitation. The Railway is aggrieved by the said decision of the court below.

5. Heard the learned counsel for the Railway as

also the learned counsel for the Contractor.

6. The learned counsel for the Railway did not contend that the finding rendered by the arbitral tribunal on a question of limitation cannot be said to be perverse or patently illegal, precluding the court from interfering with the same in exercise of the power under Section 34 of the Act. On the other hand, the learned counsel has made elaborate submissions to bring home the point that the claim for reference is barred by limitation. The essence of the submissions made by the learned counsel for the Railway was that insofar as there is no provision in the contract fixing a time for payment of the work done by the Contractor, cause of action for the claim arose on completion of the work, and insofar as the work was admittedly completed during the year 2008, the request for reference made on 03.04.2014, after a lapse of almost six years from the date of completion of the work is barred by limitation. The learned counsel has relied on the decision of the Apex Court in **M/s.Geo Miller & Co. Pvt. Ltd. v. Chairman, Rajasthan**

Vidyut Utpadan Nigam Ltd., (2020) 14 SCC 643, the decisions of the Allahabad High Court in **State of UP. v. Thakur Kundan Singh,** AIR 1984 All 161 and **Manish Engineering Enterprises v. Indian Farmers Fertilizer Co-op. Ltd.,** 2021 SCC OnLine All 876, decision of the Andhra Pradesh High Court in **Badarwada Bhima Subbaraju v. Village Panchayat of Gundugolanu,** AIR 1965 AP 186 and the decision of the Orissa High Court in **State of Orissa v. Adikanda Patra,** AIR 1999 Ori 113, in support of his contention.

7. Per contra, the learned counsel for the Contractor submitted that the final measurements of the work were taken by the Railway only on 10.03.2012 and it is thereafter that the final bill of the work was drawn on 13.12.2012 and the admitted balance payments due to the Contractor were disbursed. According to the learned counsel, the cause of action for seeking a reference of the dispute relating to the claim made by the Contractor has arisen only

when the final bill of the work was drawn without considering the said claim and the request for reference made within three years from 13.12.2012, the day on which the final bill of the work was drawn, is well within the period of limitation.

8. We have perused the materials on record and given a thoughtful consideration to the arguments advanced by the learned counsel for the parties on either side.

9. Sub-section (1) of Section 43 of the Act provides that the Limitation Act shall apply to arbitrations, as it applies to proceedings in court. Sub-section (2) of Section 43 provides that for the purpose of Section 43 and the Limitation Act, an arbitration shall be deemed to have commenced on the date referred to in Section 21. Section 21 provides that unless otherwise agreed to 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. It is by now settled that the period of limitation for applying for reference of a dispute for resolution

by recourse to arbitration, or seeking appointment of an arbitrator is governed by Article 137 of the Schedule to the Limitation Act. The period prescribed in terms of Article 137 is 3 years from the date on which the right to apply accrues.

10. When does the right to apply for reference of a dispute for resolution by recourse to arbitration accrues, is the next question. After reviewing the law on the point, in **Panchu Gopal Bose v. Board of Trustees for Port of Calcutta**, (1993) 4 SCC 338, the Apex Court has held that the period of limitation for commencement of arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. In **State of Orissa v. Damodar Das**, (1996) 2 SCC 216, after referring to *Russell on Arbitration* by Anthony Walton, the Apex Court has clarified that the cause of action for commencement of arbitration would run from the date when the claimant first acquired either a right of action or a right to require that arbitration takes place upon the dispute concerned. It was also clarified in the said case that there is no

right to apply for reference of a dispute to arbitration until there is a clear and unequivocal denial of the right asserted by the claimant. The aforesaid principles have been reiterated by the Apex Court in **M/s.Geo Miller** relied on by the learned counsel for the Railway.

11. When does the cause of action for seeking a reference of the dispute in respect of the claim made by the Contractor in the case on hand in terms of their letter addressed to the Railway on 12.1.2010 accrued, is the next question. According to the Railway, insofar as the claim is for the price of the work done by the Contractor for the Railway at their request and insofar as there is no time limit fixed for effecting payment, the cause of action should be held to have accrued in favour of the Contractor when the work was completed, whereas the stand of the Contractor is that the cause of action for applying for reference in respect of the claim raised by them against the Railway on 12.1.2010 accrued in their favour only when the Railway has drawn the final bill of

the work without considering the claim. If the date of completion of the work is reckoned as the date on which cause of action to apply for reference is accrued, the claim is barred in terms of Article 137, inasmuch as the application for reference was preferred beyond three years of the date of completion of the work. On the other hand, if the date of the final bill is reckoned as the date on which the cause of action to apply for reference accrued, the claim is within the period prescribed in Article 137.

12. The controversy aforesaid is one to be resolved on the facts of the case. Clause 46 of the agreement entered into between the parties providing for interim payments to the Contractor in respect of the work reads thus:

“46(1). **“On-Account” Payments:** The Contractor shall be entitled to be paid from time to time by way of "On Account" payments only for such works as in the opinion of the Engineer he has executed in terms of the contract. All payments due on the Engineer's or the Engineer's representative's certificates of measurements shall be subject to any deductions which may be made under these presents and shall further be subject to, unless otherwise required by Clause 16 of these conditions, a retention of ten

percent by way of security deposit, until the amount of security deposit by way of retained earnest money and such retentions shall amount to 10% of the total value of the contract; provided always that the Engineer may by any certificate make any correction or modification in any previous certificate which shall have been issued by him and that the Engineer may withhold any certificate if the works or any part thereof are not being carried out to his satisfaction.

(2). **Rounding off amounts:**--The total amount due on each certificate shall be rounded off the nearest rupee i.e., sums less than 50 paise shall be omitted and sums of 50 paise and more upto Re. 1/- will be reckoned as Re. 1/-.

(3). **"On-Account" Payments not prejudicial to final settlement:-** "On-Account" payments made to the Contractor shall be without prejudice to the final making up of the accounts (except where measurements are specifically noted in the Measurement Book as "Final Measurements" and as such have been signed by the Contractor) and shall in no respect be considered or used as evidence of any facts stated in or to be inferred from such accounts nor of any particular quantity of work having been executed nor of the manner of its execution being satisfactory.

(4). **Manner of payment:**--Unless otherwise specified, payments to the Contractor will be made by cheque but no cheque will be issued for an amount less than Rs. 100/-(One hundred only)."

Clause 51(1) of the agreement providing for final payment in respect of the work reads thus:

“Final Payment:- On the Engineer's Certificate of Completion in respect of the works an adjustment shall be made and the balance of account based on the Engineer or the Engineer's representative's certified measurements of the total quantity of work executed by the Contractor upto the date of completion and on the accepted schedule of rates and for extra works on rates determined under Clause 39 of these conditions shall be paid to the Contractor subject always to any deductions which may be made under these presents and further subject to the Contractor having delivered to the Engineer either a full account in detail of all claims he may have on the Railway in respect of the works or having delivered a "No Claim Certificate" and to the Engineer having after the receipt of such account given a certificate in writing that such claims are correct, that the whole of the works to be done under the provisions of the Contract have been completed, that they have been inspected by him since their completion and found to be in good and substantial order, that all properties, works and things removed, disturbed or injured in consequence of the works, have been properly replaced and made good and all expenses and demands incurred by or made upon the Railway for or in the respect of damage or loss by, from or in consequence of the works, have been satisfied agreeably and in conformity with the

contract.”

A reading of the extracted clauses in the agreement would show that the contemplation of the parties at the time of entering into the contract was that interim payments, styled in the agreement as “On-Account Payments” will be effected to the Contractor for the executed portions of the work during the progress of the work itself, after necessary deductions provided for in the agreement, based on the certificates of measurements issued by the Engineer of the work. Similarly, the contemplation of the parties was that the final payment will be effected only on the Engineer's Certificate of Completion of the work, after adjusting the interim payments made, based on the final measurement of the work taken by the Engineer. It is also evident from clause 51(1) of the agreement that before effecting final payment, the contractor is expected to deliver to the Engineer either a full account in detail of all claims he may have on the Railway in respect of the works or in the alternative, a No Claim Certificate and for the purpose of

effecting payment, the Engineer is to certify that the claims made by the Contractor are correct. In other words, the contemplation was that it is at the point of time when the final bill for the work is drawn, the sustainability or otherwise of the claims of the contractor would be considered by the Railway. The said fact is evident from clause 64(1)(iv) of the agreement also, which reads thus:

“If the Contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railway that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.”

As noted, the said clause clarifies that the Contractor has time to deliver his claims on the Railway up to the date of preparation of the bill. In essence, the contemplation of the parties at the time of entering into the contract was that a final decision on the claims of the Contractor would be taken by the Railway only at the time of drawing the final bill of the work.

13. The materials on record would show that even

though the work was executed in full by the Contractor before August, 2008, the final measurements of the work were taken by the Engineer only on 10.03.2012. It is thereafter that the Contractor was required by the Railway to furnish a No Claim Certificate. As noted, the Contractor has not furnished the No Claim Certificate sought by the Railway. Instead, they have furnished a No Claim Certificate on 26.09.2012 subject to the claim made by them on 12.01.2010. It is thereafter that the final bill of the work was drawn on 13.12.2012, without considering the claim. Since a dispute entails a positive element, a mere inaction to pay does not lead to the inference that a dispute exists and there is no right to apply for reference of a dispute to arbitration until there is a clear and unequivocal denial of the right asserted by one party by the other [See **Rashtriya Ispat Nigam Ltd. v. Prathyusha Resources & Infra (P) Ltd.**, (2016) 12 SCC 405]. In the case on hand, a clear and unequivocal denial of the claim raised by the Contractor could be inferred only when final bill of the work was

drawn by the Railway ignoring the same despite a No Claim Certificate furnished in the aforesaid manner. In other words, a cause of action for seeking reference of the dispute by recourse to arbitration in respect of the claim made by the Contractor against the Railway on 12.01.2010 arose only when the final bill of the work was drawn on 13.12.2012. In short, the request of the Contractor for reference of the dispute to arbitration on 03.04.2014 is well within the period of limitation.

14. **Thakur Kundan Singh, Manish Engineering Enterprises, Badarwada Bhima Subbaraju and Adikanda Patra** are cases arising from regular suits discussing the scope of Article 18 of the Schedule to the Limitation Act and the said judgments, according to us, do not have any application to the facts of the present case. Coming to the decision of the Apex Court in **M/s.Geo Miller**, of course, it was observed therein that when the applicant has asserted their claim and the respondent failed to respond to such claim, the failure of the respondent is liable to be treated as a denial of the claim of the applicant,

giving rise to such dispute and therefore a cause of action for reference to arbitration. It was a case where a Contractor who was awarded a work relating to construction of a water treatment plant has raised final bill in respect of the work on 08.02.1983 and sought a reference of the dispute relating to the payment of claim after about 20 years, during the year 2002. The argument raised in reply to the contention that the claim is stale was that the cause of action arose not in the year 1983, but in the year 1989 when the opposite party repudiated the claim. The observation aforesaid made in the above factual background cannot have any application to the facts of the present case.

In the light of the aforesaid discussions, we do not find any merit in the appeal and the same is, accordingly, dismissed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

Sd/-

C.S.SUDHA, JUDGE.