Kidde India vs.ntpc

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SooperKanoon Citation : sooperkanoon.com/1221956

Court : Delhi

Decided On : Mar-12-2019

Appellant : Kidde India

Respondent : Ntpc

Advocate for Def. : Mr. Puneet Taneja, Ms. Shaheen, Ms. Laxmi Kumari

Advocate for Pet/Ap. : Mr. Chandan Kumar

Judgement :

$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on :

8. h January, 2019 Date of decision :

12. h March, 2019 + CS (OS) 549/2009, I.As.5570/2009, 8274/2017 & 8275/2017 KIDDE INDIA ..... Plaintiff Through: Mr. Chandan Kumar, Advocate. (M:9810312011) versus NTPC ..... Defendant Through: Mr. Puneet Taneja, Ms. Shaheen and Ms. Laxmi Kumari, Advocates. (M:9810208494) CORAM: JUSTICE PRATHIBA M. SINGH JUDGMENT Prathiba M. Singh, J.

1. The present petition, under the provisions of the Indian Arbitration Act, 1940 (hereinafter, Arbitration Act) has been commenced after receipt of award dated 9th December, 2008 filed by the Arbitral Tribunal in this Court, for passing of a decree in terms of the award. Objections were filed by the Respondent, NTPC (hereinafter, NTPC) vide I.A. No.5570/2009 under Sections 30 and 33 of the

Arbitration Act. The same are being disposed of by way of the present order.

2. One M/s Vijay Machinery Store (hereinafter, Contractor) was awarded a contract for installation of fire protection systems, against prescribed specifications for the Ramagundum, Super Thermal Power Project, Stage I vide letter 01/CC/32-133/AC dated 24th March, 1982. The said contract contained an arbitration clause which reads as under: CS (OS) 549/2009 Page 1 of 32 16.0 It is specifically agreed by and between the parties that all the differences or disputes arising out of this Contract or touching the subject matter of this Contract, shall be decided by process of settlement and arbitration as specified in Clause 25.0 and 26.0 of Section GCC, Conditions of Contract, Volume-I and provisions of the Indian Arbitration Act, 1940 shall apply and Delhi courts alone shall have exclusive jurisdiction over the same. 3. The works were executed by the contractor, and the systems were taken over by NTPC on 4th August, 1986. On 14th October, 1987, vide a telex message sent to the Contractor, it was informed that all the pending bills of the Contractor were already cleared by NTPC. However, on 23rd November, 1987, the Contractor raised claims towards extra works, which it claimed to have undertaken. The claims raised by the Contractor were denied by NTPC on 21st June, 1988. NTPC gave detailed reasons as to why each of the claims of the Contractor was not maintainable. On 6th March, 1989, the contractor raised a total claim of Rs.74,80,122.97/- along with 18% p.a. to be computed from 1st June,1983 to 28th February, 1989. In this letter, the contractor relied upon several letters/messages exchanged between the parties. Vide this letter, the contractor informed NTPC that if the claims are not settled, it would be invoking arbitration.

4. Since there was no response, the contractor invoked arbitration on 9th December, 1989. In this letter, which was exhibit C-253, the amount of Rs.74,80,122.87/- was again claimed and Shri M. M. Sharma was appointed as the nominee Arbitrator by the Contractor. NTPC was also called upon to appoint its nominee arbitrator.

5. There was complete silence after this letter. As per the conditions of CS (OS) 549/2009 Page 2 of 32 the General Conditions of Contract, if any particular party

does not appoint arbitration, the mechanism under clauses 25 and 26 were to come into operation. Clauses read as under: 25.0 SETTLEMENT OF DISPUTE251 Except as otherwise specifically provided in the Contract all disputes concerning questions of fact arising under the contract shall be decided by the Engineer subject to a written appeal by the Contractor to the Engineer, whose decision shall be final to the parties hereto. 25.2 Any disputes or differences including those considered as such by only one of the parties arising out of or in connection with the contract shall be to the extent possible settled amicably between the parties. 25.3 If amicable settlement cannot be reached then all disputed issues shall be settled by arbitration as provided in Clause 26 below 26.0 ARBITRATION261 If any dispute or difference of any kind whatsoever shall arise between the Owner and the Contractor, arising out of the Contract for the performance of the works whether during the progress of the works or after its completion or whether before or after the termination, abandonment or breach of the contract, it shall, in the first place, be referred to and settled by the engineer, who, within a period of thirty (30) days after being requested by either party to do so, shall give written notice of his decision to the Owner and the Contractor. 26.2 Save as hereinafter provided such decision in respect of every matter so referred shall be final and binding upon the parties until the completion of the works and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence, whether he or the Owner requires arbitration as hereinafter provided or not. CS (OS) 549/2009 Page 3 of 32 26.3 If after the Engineer has given written notice of his decision to the parties, no claim to arbitration has been communicated to him by either party within thirty (30) days from the receipt of such notice, the said decision shall become final and binding on the parties. 26.4 In the event of the Engineer failing to notify his decision as aforesaid within thirty (30) days after being requested as aforesaid, or in the event of either the owner or the contractor being dissatisfied with any such decision, or within thirty (30) days after the expiry of the first mentioned period of thirty (30) days, as the case may be, either party may require that the matters in dispute be referred to arbitration as hereinafter provided. 26.5 All disputes or differences in respect of which the decision, if any, of the Engineer has not become final or binding as aforesaid, shall be settled by arbitration in the manner hereinafter

provided. 26.6.1.1 The arbitration shall be conducted by three arbitrators, one each the Contractor and the owner and the third to be named by the President of the Institution of Engineers, India, if either of the parties fails to appoint its arbitrator within sixty (60) days after receipt of a notice from the other party the President of the Institution of Engineer, India, shall have the power at the request of either of the parties, to appoint the arbitrator. A certified copy of the said President making such an appointment shall be furnished to both the parties. in 26.6.1.2 The arbitration shall be conducted accordance with Indian Arbitration Act, 1940 or any statutory modification thereof. The venue of arbitration shall be New Delhi, India. 26.7 The decision of the majority of the arbitrators shall be final and binding upon the parties. The expense of the arbitration shall be paid as may be the arbitration clause, to be nominated by invoking the provisions of the CS (OS) 549/2009 Page 4 of 32 determined by the arbitrators. The arbitrators may, from time to time, with the consent of all the parties enlarge the time for making the award. In the event of any of the aforesaid arbitrators dying, neglecting, resigning or being unable to act for any reason, it will be lawful for the party concerned to nominate another arbitrator in place of the outgoing arbitrator. 26.8 The arbitrator shall have full powers to review and/ or revise any decision, opinion, directions, certificate or valuation of the Engineer in consonance with the Contract and neither party shall be limited in the proceedings before such arbitrator to the evidence or arguments put before the Engineer for the purpose of obtaining the said decision. 26.9 No decision given by the Engineer in accordance with the aforegoing provisions shall disqualify him as being called as a witness or giving evidence before the arbitrators on any manner whatsoever relevant to the dispute of difference referred to the arbitrators as aforesaid."

6. Letter dated 9th December, 1989, is claimed to have been sent by the Contractor, but it was averred that NTPC never received the said letter. After a passage of four and half years, the Contractor issued another notice dated 10th May, 1994 calling upon NTPC to appoint its nominee arbitrator. The said notice was a reiteration of the letter dated 9th December, 1989. Relevant portion of the said letter is set out below: Registered A.D. M/s National Thermal Power Corporation Ltd., 301, Hemkunt Tower, 98, Nehru Place, New Delhi- 110019 Dear Sir, Sub: Final notice of arbitration on behalf of my client, M/s Vijay Fire Protection

Systems Ltd. CS (OS) 549/2009 Page 5 of 32 Under instructions from and on behalf of my clients, M/s Vijay Fire Protection Systems Ltd., a company duly registered under the Companies Act and having its registered office at 66, Nirmal Building, N.S. Road No.6, Juhu Scheme, Bombay and its Branch office at 501-502 Pragati House, 47-48 Nehru Place, New Delhi, I have to address you as follows:-

"(1) That you awarded a contract to my client for fire protection system at your Ramagundam STPP stage. I vide your award letter No.01/CC/32-133/AC dated 24.03.1982. The contract documents containing arbitration clause, stipulating that in case of disputes between the parties, the same shall be referred to arbitration of three arbitrators, one each to be appointed by both parties, and the third to be appointed by the Institution of Engineers. That my clients, vide their letter dated 9th

(2) December 1989, sought to refer to arbitration my clients claims against you sum of Rs.74,80,122.87/- (seventy four lacs eighty thousand one hundred twenty two and paise eighty seven only) together with interest thereon @ 18% per annum compounded quarterly w.e.f. 1.6.1983 (not clear in copy) i.e. date of payment, and accordingly appointed Sh. M.N. Sharma, Executive Director (Retd.) of NTPC, resident of Block B-I, Flat no.1.71, Vasant Kunj, New Delhi as their arbitrator and called upon you to appoint your arbitrator within 15 days of the receipt of the said letter. A copy of my clients said letter dated 9th December, 1989, is enclosed herewith for your ready reference, it may be pointed out that the said letter has been duly served by delivery to your office against acknowledgment, and also by sending through post under UPC.

(3) appoint your arbitrator, inspite of several reminders.

(4) That in view of your failure to appoint your arbitrator within the stipulated time, the arbitrator That you have so far failed and neglected to i.e. for CS (OS) 549/2009 Page 6 of 32 appointed by my clients is entitled to enter upon and proceed with the reference as the sole arbitrator, in accordance with the provisions of the Arbitration Act, 1940. However, my client having waited so long, are inclined to give you one more opportunity to appoint your arbitrator. THEREFORE, PLEASE TAKE NOTICE that unless you appoint and nominate your arbitrator

within 15 days of the receipt of this notice, the arbitrator appointed and nominated by my clients would act as the sole arbitrator in accordance with the provisions of the Arbitration Act, 1940, and my client would be free to take such further legal action in the matter as my client may be advised. This is the final opportunity for you further opportunity would be given to you for this purpose. Thanking you, ENCL: Copy of letter dt. 9/ADVOCATE You are requested to acknowledge this notice. Yours faithfully, (G.S. AGARWALA) to appoint your arbitrator, as no

7. From the above letter, it is clear that the Contractor treated letter dated 9th December, 1989 as the first invocation of arbitration. The letter dated 10th May, 1994 was a reiteration of the first letter dated 9th December, 1989. Thereafter, NTPC vide letter dated 2nd June, 1994, responded to letter dated 10th May, 1994 as under: Dated:

2. 6.1994 Shri G.S. Aggarwal Advocate N-8C, Saket New Delhi - 110017. Sub: Notice dated 10.5.94 for Arbitration issued on behalf of M/s Vijay Fire Protection System Ltd. CS (OS) 549/2009 Page 7 of 32 Dear Sir, Please refer your Regd. AD notice dated 10.5.94 requesting us to appoint and nominate our Arbitrator in the matter of Contract bearing No.01/CC/32- 133/AC dated 24.3.82 awarded to M/s Vijay Fire Protection System Ltd. In this connection it is to inform you issue regarding appointment and nomination of Arbitrator on behalf of NTPC is under consideration and that require some time. However, we shall revert back to you soon as and when the matter is decided. Kindly acknowledge receipt of this letter Thanking you, that the Sd/- (O.P. Mittal) Sr. Manager (Law) 8. NTPC, however, did not take any steps to appoint its Arbitrator. Accordingly, the contractor approached the President of the Institute of Engineers, for appointment of NTPCs nominee and thereafter, for appointment of chairman. The President, Institute of Engineers, vide letter dated 2nd June, 1995 appointed Mr. D. P. Chachad as NTPCs nominee arbitrator and Brig D.B. Kathuria as presiding Arbitrator. Thereafter, CS(OS) 2065A/1996 was filed by NTPC, under Sections 5, 11, and 12 of the Arbitration Act, praying that the arbitration agreement between the parties be revoked/superseded on the ground that the conditions precedent for invoking arbitration under the General Conditions of Contract were not complied with. Objections were also raised to the appointment of Shri M.M. Sharma as an

Arbitrator by NTPC. The said suit was disposed of on 7th March, 2003 in the following terms:-

"Learned counsel for the petitioner states that since during the intervening period the arbitrator against CS (OS) 549/2009 Page 8 of 32 whose appointment petitioner had raised objections, has resigned, this petition may be dismissed having become infructuous with the liberty to the petitioner to raise the pleas against the appointment of any subsequent Arbitrator by respondent which are available to it including the contentions raised in this petition. On the other hand, respondent shall have the liberty to appoint another Arbitrator in terms of agreement if it chooses to do so. Such an appointment will be without prejudice to the rights and contentions raised in this petition. On this representation, petition is dismissed having become infructuous without prejudice to the rights and contentions of the parties. 9. The contractors nominee Arbitrator had resigned, during the pendency of the petition, which had led to the disposal of the above petition. Thereafter, the Contractor appointed Mr. Justice C.L. Chaudhary (Retd.). Meanwhile, Brig Kathuria, the presiding arbitrator passed away. Thereafter, the President, Institute of Engineers appointed Shri Madan Lal as the presiding arbitrator. NTPC again filed suit No.1448/2006 challenging the appointment of Shri D.B. Chachad as its nominee arbitrator. The said arbitrator also resigned from the Tribunal and thereafter, NTPC appointed Mr. Justice M.C. Aggarwal (Retd.) as its nominee arbitrator. Thus, the Final Tribunal consisted of Mr. Justice C.L. Chaudhary (Retd.), Mr. Justice M.C. Aggarwal (Retd.), and Shri Madan Lal, as presiding arbitrator.

10. The proceedings do not end here. The Contractor filed a petition under section 28 of the Arbitration Act for enlargement of time being OMP162005, which was disposed of on 18th April, 2006. A Ld. Single judge of this court held that the mandate of the Arbitral Tribunal was not objected to by NTPC in any of the previous proceedings held before the Tribunal and CS (OS) 549/2009 Page 9 of 32 accordingly, it was a fit case for arbitration. The Court, while extending the time for completion of arbitral proceedings, observed as under: 23 . Whether the time should be extended in the facts and circumstances or not is not disputed that the court can extend the time for making the award even after the award is made and

published and it will depend on the facts and circumstances of each case. If the parties are willing to extend the time and has not objected to it then the time should be extended.

24. In view of fact that the parties had been taking willing part in the proceedings before the arbitral Tribunal, as in none of the hearing, the objection was taken that the time to given the award had expired and had not objected to even the adjournment of more than four months on 3rd April, 2004, this will be a fit case for extension of time, despite the fact that the notice invoking the arbitration agreement was first given in 1989 and thereafter in 1994 in respect of a contract of 1982. The objection was raised by the respondent for the first time by letter dated 18th October, 2004 and immediately thereafter, the petitioner filed this petition seeking enlargement of time to make the award on 12th January, 2005 after receiving the rejoinder dated 21st December, 2004 to his reply dated 6th December, 2004. The time is also extended because till now only three hearing have been held on 29th July, 1995. 3rd April, 2004 and 1st September, 2004 because of pendency of judicial proceeding or considerable time taken in appointment of arbitrators.

25. Consequently the time to make the award is enlarged by four months of Arbitral Tribunal comprising of Justice C.J.

Chaudhary (Retd.) D-15. Sector 20, Noida-201301 U.P; Mr. D.B. Chachad, FIE, A-1/297, Safdarjung Enclave, New Delhi-110023 and Mr. Madan Lal, FIE, 18-A, Patliputra Colony, Patna (Bihar) in the dispute between the petitioner and the respondent pertaining to Ramagundam Super Thermal CS (OS) 549/2009 Page 10 of 32 Power Project.

26. Let the parties appear before the Arbitral Tribunal on 27th April, 2006 at 11 A.M. Copies of this order be sent to the Arbitral Tribunal forthwith . Copies of this order be also sent by the parties to the Arbitral Tribunal. Copies dasti to the parties. 11. The proceedings did not conclude there. NTPC had filed CS(OS) 1876/2006 under Section 33 of the Arbitration Act, seeking a prayer that the mandate of the Tribunals stands terminated. Order dated 11th December, 2006 came to be passed in the said suit, which reads as under: felt that the claimant

deserved I.A. No.137

This is an application by the petitioner assailing the order dated 2nd December, 2006 passed by Arbitral Tribunal in so far as it has imposed cost of Rs.70,000/- on the petitioner. The Tribunal in its order has made reference to two earlier orders passed by it on 2nd September, 2006 and 4th November, 2006 whereby the petitioner who is respondent before the Tribunal was granted time to file its statement of defence/counter claim but it failed to file the same. Therefore, the Tribunal to be compensated and accordingly imposed cost as noticed above. Shri Rajiv Shakdhar learned senior counsel appearing on behalf of petitioner has drawn my attention to the order passed by this Court on 17th November, 2006 whereby the petitioner was granted two weeks' time to file its reply/counter claim before the Tribunal. It is submitted that pursuant to this order reply/counter claim was filed within the stipulated time yet the Tribunal has imposed cost of Rs. 70,000/-. The Tribunal in its order dated 2nd December, 2006 has also observed that the time for making the award stood expired on 17th December, 2006 and even though the petitioner herein was asked by the Tribunal to agree to the enlargement of time to enable the CS (OS) 549/2009 Page 11 of 32 filed under Section 33 of Tribunal to continue with the arbitration it refused to do so. On this learned counsel for the petitioner submits that since the petitioner in the present petition which has been the Arbitration Act, 1940 has challenged the very jurisdiction of the Arbitral Tribunal to proceed with the arbitration, it could not have agreed to the enlargement of time and had it done so it would have amounted to negating its own claim before this Court. Having said this learned counsel for the petitioner has no objection to the enlargement of time by this court without prejudice to the case set up in the petition under Section 33 of the Arbitration Act, 1940. Having regard to what has been noticed above and in view of the order dated 17th November, 2006 whereby this Court granted two weeks time to the petitioner to file the Arbitral Tribunal, I am of the view that the Arbitral Tribunal was not justified in awarding cost of Rs.70,000/- on the petitioner. I, therefore, set aside the order dated 2nd December, 2006 passed by Arbitral Tribunal in so far as it imposes cost of Rs.70,000/-. However, in view of the statement of learned counsel for the petitioner that he has no objection to the enlargement of time so as to enable the Tribunal to conclude the proceedings except passing of the final award,

the time to do so is extended by four months from 16th December, 2006. This, however, will be without prejudice to the case set up by the petitioner in the present petition. The application stands disposed of. Dasti. its reply/counter claim before 12. Thus, as per the above order, the proceedings before the Tribunal were to continue, but the final order could not be passed. Thereafter the said suit was, finally disposed of with the following order: 56 % 18.08.2008 Present: Mr. Saket Sikri for the plaintiff CS (OS) 549/2009 Page 12 of 32 Mr. A.K. Nigam for the defendant. + C.S. (OS) No.1876/2006 Learned counsel for the plaintiff states that by order dated 11th December, 2006 this court had passed an order to the effect that though Arbitrator may proceed with the arbitration proceedings but shall not pass the award. Now it is stated by the learned counsel for the plaintiff that since arbitral proceedings are complete and that award is not being made because of the order passed by this court, and now he has no objection if the award is made by the Arbitrator and in case necessity arises he shall file objection to the same. The order dated 11th December, 2006 is modified to the extent that the Arbitrator is at liberty to pronounce the award. The plaintiff be shall at liberty to file objections if circumstances so warrant. In view of this order learned counsel for the plaintiff does not press this suit. The suit is disposed of accordingly. 13. Thus, by the above order dated 18th August, 2008, the said suit was disposed of. The Tribunal then passed the impugned award dated 9th December, 2008. The award is by a 2:1 majority. The minority award has been separately passed with reasons.

14. After passing of the award, a suit was filed by the contractor seeking to make the award rule of court being, CS(OS) 72/2009. The said suit was disposed of as infructuous, as the Arbitral Tribunal suo moto had filed the award which was registered as a separate suit being CS(OS) 549/2009. Thus, CS(OS)
was disposed of with the following observations: Counsel for the plaintiff states that this suit filed by the Plaintiff has become infructuous in view of the fact that the Arbitrator has filed the award suo moto and a separate number has been given to the petition filed by CS (OS) 549/2009 Page 13 of 32 the Arbitrator. He states that the suit be dismissed as withdrawn. The suit is hereby dismissed as withdraw. Counsel for the defendant states that this suit was otherwise barred by limitation and he had filed an objection to this effect. Irrespective of the objection filed by the defendant, the plaintiff who files suit has right to withdraw it. The plaintiff is

therefore allowed to withdraw the suit. This file be attached with the file of Suit No.5
for reference purpose only. 15. In the present suit, NTPC has filed an application being IA557009 under section 30 and 33 of the Arbitration Act praying for setting aside of the award dated 9.12.2008.

16. Mr. Punit Taneja, appearing for NTPC, raises the following two objections challenging the award: That the claims of the Contractor were barred by limitation Kidde India i.e., the

... Petitioner
is not a successor-in-interest of the original Contractor, M/s Vijay Machinery Store.

17. The second objection is being dealt with first as it is primarily a technical objection. The original contract was awarded to M/s Vijay Machinery Store. The said M/s Vijay Machinery Store changed its name to Vijay Fire Protection Private Ltd. on 9th May, 1981. Thereafter, on 22nd February, 1989, from Vijay Fire Protection Private Ltd, it changed its name to Vijay Fire Protection Systems Limited. The said company changed its name to Vijay Industries and Projects Limited on 19th January, 1999, which thereafter became Kidde India on 11th October, 2005. Certificate of incorporation, consequent on the change of name to Kidde India, is on record. Mr. Pradip R. Salot has been issued a Power of Attorney to file CS (OS) 549/2009 Page 14 of 32 petitions on behalf of the company.

18. Vide assignment deed dated 8th December, 2005, Vijay Industries and Project Limited had assigned their actionable claims to one Vijay Associates. Vijay Associates was claimed to be an association of persons. The claim from NTPC is listed as one of the receivable claims of Vijay Industries and Project Limited. These facts have been mentioned in the additional affidavit of Mr. Pradip R. Salot dated 20th October, 2007. The said company had also issued a Power of Attorney in favour of Pradip Salot.

19. IA587809 was initially filed seeking substitution of M/s Kidde India Limited, in place of Vijay Industries and Projects Limited. The said application was allowed on 25th January, 2017. However, an application was filed being IA82742017, seeking

recall of the said order by NTPC. It is NTPCs submission that Kidde India Limited, has no locus in the present case.

20. The two affidavits filed by Mr. Pradip Salot have explained the manner in which Kidde India Limited is in fact the successor-in-interest to the original contractor, namely, M/s Vijay Machinery Store, which was originally awarded the contract.

21. The submission that the entire receivable stood transferred in favour of Vijay Associates and only Vijay Associates could maintain the claim against NTPC is not correct as Schedule 3 to the assignment deed not only, lists the receivables of the company, but also provides that until and unless a specific Power of Attorney was given by the company to Vijay Associates to recover the said receivables, Vijay Associates could not maintain any claim against NTPC. This is clear from a reading of the deed of assignment dated 8th December, 2005 along with another agreement of the same date. The CS (OS) 549/2009 Page 15 of 32 deed of assignment and the relevant clause of the second agreement dated 8th December 2005 read as under: DEED OF ASSIGNMENT OF RECEIVABLES This Deed of Assignment of Receivables (Deed) made on the 8th Day of December, 2005 between: Vijay Industries & Projects Limited, a company incorporated under the Companies Act, 1956 and having its registered office at EL-205, TTC Industrial Area, Mahape, Navi Mumbai-400 710, (hereinafter referred to as the Company which expression shall unless repugnant to the meaning or context thereof be deemed to include its successors in business) AND Vijay Associates, an Association of persons comprising members of the Salot Family whose names are set out in Schedule 1, represented by Harish Ratila Salot, a Mumbai inhabitant residing at 3, Vakharia House, N.S. Road No.9 JVPD Mumbai-400 049 (collectively referred to as Vijay Associates), who acting on his own behalf and on behalf of each member of the Salot Family pursuant to a legally valid power of attorney which expression shall, unless repugnant to the meaning or context thereof be deemed to include their respective heirs, executors, administrators and assigns). The Company and Vijay Associates ae collectively referred to as Parties WHEREAS is engaged in A. The Company the business of manufacture of fire-fighting equipment and has entered into various agreements with its customers in relation to fire-fighting equipment. the supply and installation of B. Vijay Industries

propose the Company receivables and also claims pending as on 1st April, 2005 in courts or an arbitral tribunals/ panel of to purchase from CS (OS) 549/2009 Page 16 of 32 the Company under the aforesaid agreements, details of which are given in Schedule 2 (the Listed Receivables) and the Company has agreed to assign the Listed Receivables to Vijay Associates on the terms and conditions herein contained. NOW THIS DEED WITNESSETH irrevocably 1. In consideration of Vijay Associates paying a sum of Rs. (not readable) The receipt whereof is hereby acknowledged by the Company, the Company as the beneficial owner of the Listed Receivables hereby unconditionally and sells, assigns, transfers and releases to and unto Vijay associates jointly all the Listed Receivables together with the right and title in the underlying Security interest, if any, forever TO HOLD the same unto Vijay Associates absolutely to the end and intent that Vijay Associates shall hereafter be deemed to be the full and absolute legal and beneficial owner and legally entitled to receive and recover the Listed Receivables or any part thereof free from any or all encumbrances, including the right to file a suit or institute and pursue such proceedings, including arbitration and take such other action as may be required against the customers, debtors for the purpose of recovery of the Receivables in its own name and rights and as an assignee, and not as a representative or agent of the Company. Security Interest in this in this Clause means any security by way of mortgage, charge, hypothecation or any other encumbrance or third party obligation as security for payment of the Listed Receivables and includes the obligation of the customers/debtors to make payments of the Listed Receivables into the earmarked accounts of the Company upon the terms and subject to the conditions agreed between the Company and its customers debtors.

2. The Company agrees that in the event it receives amounts pertaining to the Listed Receivables or any CS (OS) 549/2009 Page 17 of 32 part thereof, subsequent to the execution of this Deed, it shall hand over and deposit such amounts into an exclusive account opened in the name of the Company with the State Bank of India Sakinaka Branch Mumbai- 400072. The Company shall give standing instructions to the State Bank of India to transfer all amounts deposited into this account in favour of an account of Vijay Associates, details of which shall be provided by Vijay Associates to the Company.

3. Vijay Associates unconditionally and irrevocably agrees that the Company shall not at all times after the execution of this Deed, be held responsible for any non-recovery of the Listed Receivables. IN WITNESS WHEREOF the parties hereto have caused their respective hands to be affixed hereunto the day and year first hereinabove written For Vijay Industries & Project Limited By: _____ Name: R.D. Mathur Designation: Managing Director For Vijay Associates By: _____ Name: Harish Salot(as attorney) Designation: _____ AGREEMENT IN RELATION TO THE DEED OF ASSIGNMENT 7. Upon the prior written consent of the Company, Vijay Associates shall be entitled to recover certain Listed Receivables as set forth in Schedule 3 from certain customers of the Company by pursuing recovery proceedings in the name of the Company. For this purpose, the Company will provide on a case by case basis for Listed Receivables set forth in Schedule 3 a necessary power of attorney for members of Vijay CS (OS) 549/2009 Page 18 of 32 Associates in the form set out in Schedule 4. Any monies received in relation to these Listed Receivables set forth in Schedule 3 will be credited to the account of Vijay Associates in the manner provided in Class 3 of the Deed. 22. Thus, as per the second agreement, a specific power of attorney was required for Vijay Associates to exercise its rights qua any of the receivables - the NTPC claims being one of them. Since, no Power of Attorney was issued by the company to Vijay Associates for pursuing the claim of NTPC, the deed of assignment did not take effect in respect of NTPCs claims/counter-claims.

23. Further, Kidde India is the primary claimant and is no different from the company Vijay Industries and Projects Limited or Vijay Fire Protection Systems Limited. The invocation of arbitration was on behalf of Vijay Fire Protection Systems Limited, whose name changed and became Kidde India.

24. All the documents, including the certificate of change of name, have been placed on record. There is no reason to disbelieve the said documents. It is held that Kidde India is entitled to maintain the claims and be substituted in place of original Contractor. Thus, order dated 25th January, 2017 does not deserve to be recalled. IA82742017 and 8275/2017, filed by NTPC, are dismissed. Claims being barred by Limitation 25. The main objection on limitation is that the Contractor after having invoked arbitration on 9th December, 1989 took no steps to get the

Arbitral tribunal constituted. The submission of Mr. Taneja is that the claims of the Contractor were barred by limitation, as the Contractor having invoked CS (OS) 549/2009 Page 19 of 32 Arbitration on 9th December, 1989, did not take steps to get the Arbitral Tribunal constituted till 10th May, 1994.

26. In the objections raised by NTPC, NTPC argues that when the claims were raised on 23rd November, 1987 and were denied by NTPC on 21st June, 1988, the cause of action had accrued. Thereafter, Arbitration was invoked on 9th December, 1989, and as per clause 26.6.1.1, the Contractor could have only waited for a period of 60 days for NTPC to have appointed its arbitrator, and on the expiry of 60 days, had to approach the President, Institute of Engineers to constitute the Tribunal. However, the Contractor did not take any action till 10th May, 1994. NTPC submits that the denial of receipt of notice dated 9th December, 1989 does not stop the cause of action which had accrued and does not give any benefit to the Contractor, which claimed to have invoked arbitration on 9th December, 1989. It is NTPCs stand that provisions of the Limitation Act, 1963 apply to arbitration proceedings. It is further argued that once the payment was made for the work done, on 14th October, 1987, the Contractor could not have waited for so long i.e., 7 years for invoking arbitration and pursuing its invocation of arbitration and getting the tribunal constituted.

27. The Contractors submission in reply, is that this ground was not raised in the statement of defence. Since the final bill was not prepared, even as on 8th May, 2007, when NTPCs witness was cross examined, the claims were not barred by limitation. The next submission was that since NTPC challenged the receipt of letter dated 9th December, 1989, the same would not constitute notice under the act. Since the letter dated 9th December, 1989 was not received, the invocation was only on 10th May,1994 to which NTPC had responded on 2nd June, 1994 that the issue regarding appointment of CS (OS) 549/2009 Page 20 of 32 arbitrator is under consideration. Since the final bill had not been prepared in the contract, the claims are not barred by limitation.

28. The plea of the contractor in response to the objection of NTPC on limitation is set out below: D, E, F, G. Contents of Ground D, E, F, G of the Objection are

denied. The alleged version set out in the instant objection was not even spelt out by the Defendants in its reply to the statement of claim. As is stated in their reply to statement of claim, Defendant stated that Applicant raised final bill on 11.6.1985 and thereafter on 6.3.1989. Going beyond that, as is recorded in the cross examination of defendants witness dated 8.5.2007 that even on that date Defendant had not prepared their final bill as against the final bill of the Application. Without prejudice, in any case, bill dated 6.3.1989 was within three years of 4.8.1986, where defendant took over the system from the Applicant. Still even otherwise, bills dated 11.6.1986 and 6.3.1989 were identical and dealt with, inter alia, admitted extra items consumed and price variation thereon. It is denied that any alleged cause of action started to run from 9.12.1989 or that arbitration was invoked on that date as alleged or at all. Clear findings of facts have been given in the Award by the Majority where Ld. Arbitrators record that Defendant stated before Honble High Court in OMP No.16 of 2005 that they had not received the communication dated 9.12.1989. That in their admission/ denial before the arbitral tribunal, they denied having received this letter. Unless Defendant first withdraws its pleading and document supported by affidavit, it is wrong to suggest that the findings of the Ld. Arbitrator are wrong or perverse. In terms of the referred to clause, time to appoint arbitral tribunal would run only when such letter has first been received by the other party and such party refused or CS (OS) 549/2009 Page 21 of 32 omitted to act. Here such party did not receive in the first place. It is denied that finding of facts is de horse the evidence on record. It is denied, therefore, that as on 10.5.1994, claims had become time barred as alleged or at all. It is denied that Major Inder Singh Rekhi judgment at all helps Defendant to put across the alleged point. This very judgment says that when other party did not finalise the bill, how can it say that cause of action had arisen. In this case, Defendants witness admits that even till date of his cross-examination in the arbitral proceedings, Defendant had not prepared their final bill based on their own measurement. Defendant is put to strict proof of all its alleged averments. Contents of Ground K of the Objection are denied. It is denied that Article 18 of Schedule to the Limitation Act applies either to the facts of the case or in the manner Defendant seeking it to. Defendant is put to strict proof thereof. Without prejudice, it was never a case of defendant before the arbitral tribunal, which it is

seeking to project now. Admitted facts of the case is that Defendant took over the system on 4.8.1986, final bill by Applicant was raised on 6.3.1989, this bill was never disputed. Defendant are on record to state that letter dated 9.12.1989 was not received by them, arbitration was to which Defendant responded by their letter dated 2.6.1994 stating that they were in the process of nominating their arbitrator, as on 8.5.2007 during cross examination Defendant witness admits that Defendant till date not prepared any final bill. Without prejudice, while discussing issue no.1 dealing with limitation Ld. Arbitrators have devoted as many as 14 pages. Save and except to make some vague proposition, Defendants have not been able to point out where such analysis of fact or law was wrong. invoked on 10.5.1994 CS (OS) 549/2009 Page 22 of 32 29. Mr. Chandan Kumar appears for the Contractor submits that limitation was not raised before the Arbitral Tribunal and in fact NTPC filed counter claims. Since NTPC had participated in the arbitral proceedings it is not entitled to raise the said objection at this stage. He relies on the judgment in Stic Travels (P) Ltd. v. Ethiopian Airlines 2011 (58) DRJ119(hereinafter, Stic Travels).

30. On the other hand, Mr. Taneja argues that the objection as to limitation cannot be waived in law and there is no estoppel qua the same. He submits, relying on the judgment of J.

C. Budhiraja v. Chairman Orissa Mining Corporation Ltd. (2008) 2 SCC444(hereinafter, J.C. Budhiraja) that limitation for invoking arbitration is different and is not to be confused with limitation for making the claims.

31. The objection that limitation was not raised before the Arbitral Tribunal, in the statement of Defence by NTPC is baseless as the first issue framed by the Tribunal dealt with limitation and is as under:-

"Issue No.1 Whether the Claimants Claims are barred by limitation as alleged by the Respondent?. 32. Thus, clearly NTPC had raised the objection as to limitation. So many proceedings had been filed before the Court during the constitution of the Tribunal. The filing of counter claims does not mean that the objection as to limitation had been given up by NTPC. Both in the majority and minority award, the issue of limitation has been discussed in detail. The majority award comes to the

conclusion that the claims are within limitation. The minority award, on the other hand, holds that the claims are barred.

33. The scheme of the constitution of the tribunal is contained in clauses 25 and 26 of GCC. As per the said clauses, arbitration was to be conducted CS (OS) 549/2009 Page 23 of 32 by a three member tribunal. One Arbitrator was to be nominated by each party and the President, Institute of Engineers was to nominate the chairman. Upon notice being given by either party invoking arbitration, if the other party failed to appoint its nominee arbitrator, within 60 days from receipt of notice, then the President, Institute of Engineers, would also nominate the party arbitrator.

34. Admittedly in the present case, after the entire payment was received by the Contractor, on 14th October, 1987, the Contractor raised claims for additional works on 23rd November, 1987. Till the said date, no claims were raised by the Contractor though work was completed on 4th August, 1986. When the claims were raised by the Contractor, NTPC denied the payability of these claims on 21st June, 1988. Thus, disputes had arisen as on 21st June, 1988. On 6th March, 1989, conciliation was sought and it was clearly specified by the Contractor that if the dispute was not resolved, it would invoke arbitration. Thus, on that date, the Contractor knew that if NTPC does not accept claims, then arbitration would have to be invoked. On 9th December, 1989, the Contractor issued notice for arbitration. However, it did not receive any reply from NTPC. The Contractor had two options at that stage: i. Either issue a reminder to NTPC or confirm receipt of invocation letter OR ii. To approach the President, Institute of Engineers for appointment of NTPCs nominee arbitrator. It did not do either. It continued to wait endlessly. The majority award holds that there was correspondence during this period, as per para 1.4.3 of the CS (OS) 549/2009 Page 24 of 32 award. However, no letters are mentioned. In the minority award the Ld. Arbitrator specifically notes as under: 24. In the voluminous statement of Claim (Folder CL1) the claimant has devoted nine pages in section 4 titled as justification for limitation of claimants claim. It catalogues the correspondence between the parties. After the notice dated 09.12.89 and before the subsequent notice dated 10.05.94 only three letters are mentioned which were addressed by the Claimant to the respondent urging it

for settlement of the claims. They are letters dated 12.03.91, 10.09.91 and 08.09.93 and find place at pages 570, 571 and 573 of claimants documents in Vol. CL4 The cause for arbitration had already accrued before 09.12.89 and the cause for making an application to the President. Institution of Engineers, India, accrued on the expiry of sixty days from 9.12.89 i.e. on 06.02.1990. The period of limitation for such an application is three years (Art. 137 of Limitation Act) and the claimant allowed it to expire. The one sided volley of letters was thus of no avail. As observed by the Honble supreme Court in Major Inder Singh Vs. DDA, 1988 (2) Arb. Law Reporter 270, a party cannot postpone the accrual of cause of action by writing reminders or sending reminders. And above all the period of limitation for approaching the President having begun to run on 06.02.90 nothing could stop it from running. 35. Thus, between 1989 to 1994, there were three letters in the arbitral record, wherein the Contractor sought settlement of its claims. However, there was no letter by NTPC. Can unilateral letters and reminders seeking settlement of claims lead to extension of limitation?.

36. The majority award holds that the fire system which was installed by the Contractor was provisionally taken over on 4th August, 1986 and that the first notice is within limitation. There is no doubt about that. The first CS (OS) 549/2009 Page 25 of 32 invocation is within limitation. However, the waiting from 1989 till 1994, when the second notice was issued is the period which the Contractor had to explain, which it is unable to do.

37. It is the settled position that mere unilateral letters cannot extend the period of limitation. In J.C. Budhiraja (supra), the Supreme Court held as under: 20. Section 18 of the Limitation Act, 1963 deals with effect of acknowledgement in writing. Sub-section (1) thereof provides that where, before the expiration of the prescribed period for a suit or application in respect of any right, an acknowledgment of liability in respect of such right has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. The explanation that an acknowledgement may be sufficient though it omits to specify the exact nature of the right or avers that the time for payment has not yet come or is accompanied by a refusal to pay, or is coupled with a claim to set off, or is addressed to a person

other than a person entitled to the right. Interpreting Section 19 of the Limitation Act, 1908 (corresponding to Section 18 of the Limitation Act, 1963) this Court in Shapoor Freedom Mazda v. Durga Prosad Chamaria (AIR 1961 SC1236, held: section provides to the 6. ... acknowledgement as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgment of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact CS (OS) 549/2009 Page 26 of 32 nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear, then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. Stated generally, courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an far-fetched process of reasoning. In construing words used in the statements made in writing on which a plea of acknowledgment rests oral evidence has been expressly surrounding circumstances can always be considered.

7. The effect of the words used in a particular document must inevitably depend upon the context in which the words are used and would always be conditioned by the tenor of the said document... involved or excluded but 21. It is now well settled that a writing to be an acknowledgment of liability must involve an admission CS (OS) 549/2009 Page 27 of 32 the accounts, it may not amount of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability. The admission need

not be in regard to any precise amount nor by expressed words. If a defendant writes to the plaintiff requesting him to send his claim for verification and payment, it amounts to an acknowledgment. But if the defendant merely says, without admitting liability, it would like to examine the claim or to acknowledgment. In other words, a writing, to be treated as an acknowledgment of liability should consciously admit his liability to pay or admit his intention to pay the debt. 25. The learned Counsel for the appellant submitted that the limitation would begin 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 under Section 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 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 the arbitration is deemed CS (OS) 549/2009 Page 28 of 32 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 under Section 8(2) of the Act. Insofar as a petition under Section 8(2), 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 under Section 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 (1988) 2 SCC338 Panchu Gopal Bose v. Board of Trustees for Port of Calcutta (1993) 4 SCC338and Utkal Commercial Corporation v. Central Coal Fields (1999) 2 SCC571also make this position clear. 38. Thus, a mere letter that the matter is under consideration or is being examined is not sufficient to extend limitation. This issue has recently been considered by

this Court in DDA v. Cengers Geotechnica Pvt. Ltd. [RFA1572017 decided on 14th December, 2018]..

39. The Contractor relies on letter dated 2nd June, 1994, wherein NTPC states that the second invocation dated 10th May, 1994 is under consideration. Can such a letter again extend limitation?. The answer is a clear No.Firstly, the second invocation was beyond the three-year period after issuance of first notice on 9th December, 1989. Further, a mere letter which uses words such as under consideration, does not result in extending the limitation period. There was no reason why the Contractor did not approach the President, Institute of Engineers, after issuing the first letter of invocation. The non-receipt of the first invocation letter by NTPC may have an effect on deciding whether the Arbitration clause was properly invoked or not, however, the non-receipt of the letter does not stop the CS (OS) 549/2009 Page 29 of 32 running of the limitation period, when the cause of action has already accrued.

40. The scheme under the contract being clear, i.e., the contractor had to approach the appointing authority, if it received, no response for 60 days from NTPC. There is no reason why the contractor failed to follow the same. The contractor was well aware of the scheme of the clause in the contract as, in the second round when it invoked arbitration and NTPC did not respond, it approached the appointing authority. No valid explanation exists for the contractor having not issued a reminder to NTPC or for not approaching the appointing authority immediately after the expiry of sixty days from issuance of the invocation letter. The contractor was clearly a reluctant claimant. After issuing a notice invoking arbitration, a party cannot choose to pursue the claims/appointment of the Arbitrators/Tribunal at its own convenience. It is bound by the mechanism stipulated under the contract, which has to be strictly followed.

41. Further, the limitation, as per the settled legal position in Naresh Kumar Gupta Vs. MCD199(2013) DLT279(DB) runs either from the preparation of the final bill or from the date when the claim is first asserted, if the final bill is not prepared. The observation of the Ld. Division Bench is as under: 11. The common thread which runs through all these judgments is that the limitation commences from the date of

intimation of the preparation of the final bill or the final bill being ready for payment. There is also a view that the starting point for commencement of limitation would arise when the final bill is passed and where the final bill has not been prepared, the cause of action would arise from the assertion of the CS (OS) 549/2009 Page 30 of 32 claim. Learned counsel also sought to canvass a proposition that even if a contractor does not prepare the final bill, it was open to the department to prepare the final bill. Thus, the limitation for filing of claims begins to run from the date of raising of the claim and denial thereof in 1987, and in any event from the date of first invocation of the arbitration in 1989.

42. Merely because several years have passed by, during which the arbitral proceedings remained pending, and several petitions were filed challenging the constitution of the tribunal, it cannot be presumed that NTPC had given up its objection as to limitation. The objection as to limitation was very much alive. It was one of the main issues framed in the arbitral proceedings and the same is being considered by the court for the first time in this application. The earlier petitions never considered or ruled on the issue of limitation. Thus, the question of limitation required examination on merits, especially, when there were divergent opinions in the Tribunal.

43. The legal position is well settled. The arbitral proceedings commence when the first notice is issued as held in Milkfood Ltd. v. GMC Ice Cream P. Ltd. (2004) 7 SCC288and Visakhapatnam Port Trust v. Continental Construction Company (2009) 4 SCC546 In this case, the said date is 9th December, 1989.

44. In Prasun Roy Vs. Calcutta AIR 1988 SC205the Court held that once the party has participated in the arbitral proceedings, the reference cannot be questioned. Even in Stic Travels (supra), a Ld. Single Judge held that principles of estoppel and waiver would apply to the constitution of the Tribunal once the party participates in the proceedings. The issue here is not CS (OS) 549/2009 Page 31 of 32 about questioning the reference or questioning the constitution of the Tribunal, but whether the claims of the contractor are within limitation. The two issues relating to the valid constitution of the tribunal and issue of limitation are distinct issues. They cannot be conflated. Limitation in filing claims is a substantive

issue which has been decided by the Tribunal and is liable to be examined by this Court in the objection filed by NTPC.

45. In view of the express provisions of the contract and the scheme of appointment of the Tribunal, the contractor miserably failed in approaching the President, Institute of Engineers, i.e., the appointing authority after issuance of the first notice of invocation of the arbitration clause. The dates are crystal clear. The claims of the Contractor for extra works done were denied by NTPC vide its letter dated 21st June, 1988. Conciliation was sought by the Contractor on 6th March, 1989, which evoked no response. Thereafter the arbitration clause was invoked on 9th December, 1989. After sixty days from the issuance of this notice, the Contractor ought to have approached the appointing authority, i.e., the President, Institute of Engineers. It failed to do so.

46. Accordingly, it is held that the claims of the Contractor were barred by limitation. The impugned award is, accordingly, set aside, and the suit is dismissed. All pending IAs are also disposed of. MARCH12 2019 MR JUDGE PRATHIBA M. SINGH CS (OS) 549/2009 Page 32 of 32