Executive Engineer and ors. Vs. Bharath Engineering Service Technocrats and Company

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Overruled by : Bharat Engineering Service Technocrats and Co. vs. Executive Engineer and Ors.

SooperKanoon Citation : sooperkanoon.com/387846

Court : Karnataka

Decided On : Sep-12-2003

Reported in : ILR2004KAR1817

Judge : Tirath S. Thakur and ;Mohan Shantanagoudar, JJ.

Acts : Arbitration Act, 1940 - Sections 8, 29 30, 33, 119B; Limitation Act - Schedule - Articles 113 and 119

Appeal No. : MFA No. 1466/1998 C/w M.F.A. No. 1467 and 1468/1998

Appellant : Executive Engineer and ors.

Respondent : Bharath Engineering Service Technocrats and Company

Advocate for Pet/Ap. : H. Manjunath, HCGP

Disposition : Appeal allowed

Judgement :
Mohan Shantana Goudar, J.

1. These appeals arise out of a common Order passed by the II Addl. Civil Judge at Mysore in A.C.s No. 3/91, 4/91 and 62/1991 whereby objections filed by the appellants to the Awards made by the Arbitrator have been rejected as time barred and the Awards made a rule of the Court. In the factual backdrop that we propose to set out hereunder, the appellant shall be referred to as the 'Department' and the respondents as 'Claimant' for the sake of convenience.

2. The Department invited tenders for different items of work in connection with construction of Kabini Right Bank Canal. The claimant emerged successful in regard to three items of work which were allotted to him for execution in terms of three separate agreements signed by the parties. These works were to be completed within the time stipulated in the respective Agreement, failing which the Department could rescind the contract and have the remainder of the work orworks executed through another agency, at the risk and cost of the claimant.

3. The claimant could not despite extensions granted to him for the purpose, complete the execution of the works allotted to him within the extended period granted to him for the purpose. The contracts executed between the parties were therefore rescinded by the Department after notice to the claimant and the balance of the work assigned to another agency for completion.

4. The broad details of the said works were on the date of termination as under:

I. Agreement dated 6.7.1981:

a) Estimated value of the works - Rs. 21,82,722.00/-

b) Works actually executed - Rs. 9,98,681.00/-

II. Agreement dated 10-07-1981.

a) Estimated value of the works - Ps. 15,42,900.00/

b) Works actually executed - Rs. 7,62,782.00/-

III. Agreement dated 29- 12-1981:

a) Estimated value of the works - Rs. 13,13,485.00/-

b) Works actually executed - Rs. 5,74,448.00/-

5. In the year 1990, the Department raised claims for payment of the extra cost incurred by it for the completion of the incomplete work left by the claimant. Aggrieved by the demand raised against him, the claimant filed three different petitions under Sections 8 and 20 of the Arbitration Act in connection with the three agreements mentioned above before the Civil Judge at Mysore which were registered as A.C.s No. 2, 3 and 4 of 1991. In the said petitions, the claimant sought a direction for filing the Arbitration Agreement in the Court and for reference of the disputes to the Chief Engineer for adjudication. The said petitions were opposed by the Department inter alia contending that there was no arbitration clause in the agreement executed between the parties, hence no reference to arbitration was permissible. The Civil Judge passed a common Order dated 27-7-1993 by which he held that Clause-30 of the Agreement was an arbitration agreement and accordingly referred the disputes raised by the claimant to the Chief Engineer for arbitration. No appeal against the said Order was preferred by the Department with the result that Sri Kaliprasad, the then Chief Engineer entered upon the reference but retired from service before he could complete the proceedings. The claimant thereupon filed an application (I.A. No. 5) before the Court for an Order permitting Sri Kaliprasad to continue as Arbitrator. The said I.A. was dismissed by the Court below by Order dated 4-4-1995. Another I.A. was thereafter filed before the Court seeking review of its earlier Order dated 4-4-1995. That application was allowed by the Court below by Order dated 30-11-1995 and Sri Kaliprasad continued as Arbitrator.

6. The Arbitrator eventually filed three separate Awards before the Court below on 31-5-1996. No specific notice regarding the filing of the Awards was issued by the Reference Court, It is however not in dispute that copies of the Awards were served upon the Government Pleader in the Court below on 3-8-1996 and the matter posted for filing of objections to the Awards to 10-10-1996. On 10-10-1996, Objections to the Awards were filed on behalf of the Department by the Government Pleader. It was inter alia contended that the reference itself was bad

in the absence of a valid arbitration agreement and that the claim made by the claimant was in any case barred by limitation. Other objections touching upon the validity of the Awards were also raised

7. While the Court below was seized of the above proceedings and objections, the Department preferred MFAs No. 3755, 3756 and 3757 of 1996 before this Court in which it challenged the Order passed by the Court below on 30-11-1995 allowing Sri Kaliprasad to continue as an Arbitrator. This Court however declined to interfere with the said Order holding that since the Arbitrator had already made and filed his Award in the Court, the Department shall be at liberty to take all the contentions raised in the appeals before the Court below including the correctness and the legality of the Order passed by the said Court on I.A.No. -VI.

8. It was after the passing of the aforementioned Order that the Department filed an application under Section 33 of the Arbitration Act for an Order determining the existence and effect of the Arbitration Agreement between the parties and for setting aside the awards made by the Arbitrator. In the said application the Department once again contended that there was no valid arbitration agreement to call for any arbitration proceedings and that the Awards made by the Arbitrator was without the sanction of law. An application under Section 5 of the Limitation Act was also filed seeking condonation of delay in filing of the application under Section 33 of the Arbitration Act. The Court below has by common Order dated 20-12-1997 dismissed the application for condonation of delay and made the Awards filed by the Arbitrator a rule of the Court. The present appeals call in question the validity of the said Order.

9. Appearing for the appellant, learned Government Advocate argued that the Order under challenge in these appeals was illegal and arbitrary. The appellant had according to the learned Counsel made out a case for condonation of delay in filing of the objections to the Awards and the application under Section 33 of the Arbitration Act. He urged that the objections to the Awards filed by the Department on 10-10-1996 were by themselves sufficient even in the absence of a formal application under Section 33 of the Arbitration Act. There was according to him no doubt a delay of 37 days in filing of the objections, but the said delay had been

satisfactorily explained by the Department and ought to have been condoned. The Court below was according to the learned Counsel in error in holding that the delay in making of the application had to be reckoned upto the date of the filing of the said application. In the absence of any specific form for making of an application seeking setting aside of the Awards made by the Arbitrator, the objections filed by a party could themselves be treated as an application especially when there was a prayer in such objections for setting aside of the Awards. The Order passed by the Court below was not therefore sustainable in law.

10. On behalf of the respondent-claimant, it was on the other hand contended by Mr. Gopal Hegde that the objections to the Awards ought to have been filed within 30 days and if not filed within that period, the same could not be looked into. In support he placed reliance upon the decisions of the Supreme Court in Madan Lal Dead By Lrs. v. Sunder lal and anr., : [1967]3SCR147 and 'Mohammed Esoof v. V.R. Subramanyam And Anr., AIR 1957 MYSORE 78 it was also contended that the objections were not accompanied by an application for condonation of delay which application was filed much later on 22-7-1997, hence could not be considered.

11. We have given our anxious consideration to the submissions made at the Bar. The material facts are not in dispute. It is not in dispute that the Awards were filed before the Court below on 31-5-1996. It is also not in dispute that no notice regarding the filing of the Awards was issued by the Court or served upon the parties at any stage. The record however bears testimony to the fact that a copy of each of the Awards made by the Arbitrator were served upon the Government Advocate on 3-8-1996 and the matter adjourned for filing of the objections to the Awards to 10-10-1996 on which date the objections were in fact filed by the Government Advocate. Two applications were thereafter made on 22-7-1997 by the Department one under Section 33 of the Arbitration Act and the other under Section 5 of the Limitation Act for condonation of delay. Those applications have been dismissed by the Court below as noticed earlier. Two questions therefore arise for consideration in regard to the correctness of the said Order of dismissal and the consequential orders making the Awards a rule of the Court. The first is whether there is any definite form in which the application for setting aside an

award made by the Arbitrator has to be made and in particular whether objections to the award could also be treated to be an application for setting aside the Awards. The second question is whether the delay in filing of the objections has been satisfactorily explained by the Department so as to call for an order of condonation.

12. In so far as the first question is concerned, the same stands answered by the decision of the Supreme Court in MADAN LAL v. SUNDERLAL AND ANR., : [1967]3SCR147 where objections to the Award were treated as an application for setting aside the same. To the same effect is the decision of the High Court of Andhra Pradesh in 'GANGA SUGAR CORPORATION LTD., AND ORS. v. SUKHBIR SINGH AND ANR, : AIR 1974 AP113 where the Court held that no particular form is prescribed for an application seeking setting aside of an Award under Section 30 of the Arbitration Act and that objections to an Award may be treated as such an application. We may also refer to the decision of this Court in MOHAMMED ESOOF v. V.R. SUBRAMANYAM AND ANR. (Supra) where this Court has held that the making of an application for setting aside of an award whether in the form of the objection statement or in the form of an application is a matter entirely within the volition of the party concerned. In the light of these pronouncements, we have no difficulty in holding that even in the absence of a formal application under Section 33 of the Arbitration Act, a party aggrieved of an award made by the Arbitrator could challenge the same and seek its setting aside by filing objections to the Award before the Court concerned.

13. That brings us to the second question whether there was any delay in filing of the objections and if so whether the same has been satisfactorily explained. Article 119 of the Limitation Act, 1963 prescribes a period of 30 days for making an application/ objection for setting aside an Award reckoned from the date of service of notice of the filing of the award. As mentioned earlier, no notice regarding filing of the Award in the Court was issued to the Department. The claimant's case appears to be that since the Award had been filed on 6-7-1996, the Government Advocate must be deemed to have accepted notice regarding filing of the Award on that date. We see no merit in that argument. It is common ground that although the Award was filed on 6-7-1996, neither any notice was issued by the Court

regarding the filing of the Award nor was a copy of the Award delivered or served upon the Government Advocate. The copy of the Award of the Arbitrator was furnished to the Government Advocate only on 3-8-1996. The best that can be said in favour of the claimant is that the service of the copy of the Award on the Government Advocate should be treated as service of a notice upon the Department regarding the filing of the award in the Court. If the period of limitation is calculated from the said date, there was a delay of only 37 days in filing of the objections by the Department on 10-10-1996. The Court below was clearly in error in holding that the delay in filing of the application for setting aside the Award was to the tune of 322 days. The delay has to be reckoned only up to the date of the filing of objections and not the subsequent application under Section 33 which was strictly speaking unnecessary as the objections could themselves be treated to be an application. The subsequent application giving further grounds for setting aside the awards could only be supplementing the grounds already taken in the objections filed by the Department.

14. Coming then to the question whether the delay of 37 days has been satisfactorily explained. It is seen that the affidavit accompanying the application for condonation of delay has been sworn by the concerned Executive Engineer who has explained the delay on the ground that the same was caused because of administrative reasons. The said explanation in our view should have been accepted by the Court below in the facts and circumstances of the case. It is true that the law of limitation does not make any special concession for State appeals and applications, yet the Court dealing with a prayer for condonation of delay cannot ignore the fact that the decision and the process leading to filing of an appeal or application on behalf of the Government or a Government Agency is rather impersonal and has to go through various stages and hands before it eventually fructifies into action. So long as there is no negligence on the part of those charged with the processing the papers, the request for condonation has to be considered adopting a realistic and liberal approach. We do not find any neglect or dereliction of duty on the part of those concerned with filing of the objections in the instant case so as to decline the condonation of delay. We accordingly allow the application and condone the delay in filing of the objections for setting aside the Award.

15. The only other aspect that needs to be examined is whether we ought to send back the matter to the Court below to examine the objections on their merits and pass a fresh order or we ought to look into the said objections ourselves to avoid any such remand. In the ordinary course, since the Order passed by the Court below is being set aside on a preliminary ground, the matter could be remitted back to the Trial Court to proceed with the objections on merits, but, having regard to the nature of the objections that have been raised against the Award and the fact that any remand is bound to further prolong the matter, we find it a fit case in which we ought to ourselves look into the merits of the objections. We say so especially for the reason that the objections urged against the Award in our view go to the root of the controversy and if accepted would call for an order setting aside the Award and remission of the matter back to the Arbitrator originally appointed or any other Arbitrator to be nominated in his place.

16. A three-fold submission was urged on behalf of the Department in support of its prayer for setting aside the Award. Firstly, it was contended that Clause-30 of the schedule to the Agreement did not constitute a valid arbitration agreement to justify a reference to arbitration. Clause-30 of the schedule to the Agreement reads as under.

'Except where otherwise specified in the contract and subject to powers delegated to him by Government under the code rules then in force, the decision of the Chief Engineer for the time being shall be final conclusive and binding on all the parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions herein before mention and as to the quality of the workmanship; or materials used on the work or as to any other question claim, right, matter, things whatsoever if any was arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or those conditions or failure to execute the same arising during the progress of the work or after the complaint on abandonment thereof'.

17. Learned Government Advocate argued that Clause-30 cannot be construed as an arbitration agreement, in as much as Clause-30 does not contemplate a reference of any dispute to arbitration. As can be seen from Clause-30, any

question relating to meaning of specifications, designs, drawings and instructions and as to the quality of workmanship are materials used in the work etc., has to be referred to the Chief Engineer for his decision and his decision on such points shall be final. Learned Government Advocate argued that the present reference did not relate to any dispute specified in Clause-30, hence no arbitration was permissible nor can the award made on the same be sustained.

18. The question whether Clause - 30 would constitute an arbitration agreement between the parties is no longer res integra having been answered in the negative by two earlier Division Bench decisions of this Court in MFAs No. 1552, 1553 and 1973/1993 disposed of on 13-12-1994 and MFA No. 2818/1997 disposed of on 14-7-2003.

In both these cases, the very same clause fell for consideration. The Court held that the clause do not constitute an arbitration agreement so as to justify a reference to arbitration While saying so, reliance was placed upon the decision of the Supreme Court in 'STATE OF U.P. v. TIPPERCHAND, : AIR 1980 SC1522 in which the Court was considering similar issue in the context of Clause-22 of the agreement before their Lordships repelling the contention that clause constitute an agreement, the Supreme Court observed:

' After perusing the contents of the said clause and hearing learned counsel for' the parties we find ourselves in complete agreement with the view taken by the High Court. Admittedly the clause does not contain any express arbitration agreement. Nor can such an agreement be spelled out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of the clause clearly appears to be to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time.'

19. Sri Gopal Hegde, learned Counsel for the claimant however argued that as both the parties had participated in the arbitration proceedings after engaging their respective advocates, the Department cannot now take a stand that there is no arbitration clause at all.

20. From the material on record, it is clear that after hearing both the parties on the application filed under Sections 8 and 20 of the Act, the Court had passed an order dt.27.7. 1993 referring the matter to the arbitrator for resolving the dispute. That order has not been challenged by the Engineering Department at any point of time. Thus the order of reference to the arbitrator dated 27.7.1993 has become final. Thereafter both the parties have participated in the arbitration proceedings, submitted their respective cases and filed documents in support of their cases. In other words, the Engineering Department has acquiesced and is consequently estopped from contending that there is no arbitration agreement between the parties or that Clause-30 does not constitute an arbitration agreement. A reference may in this connection be made to PRASUN ROY v. THE CALCUTTA METROPOLITAN DEVELOPMENT AUTHORITY, : [1987]3SCR569 wherein the Apex Court has observed that the Courts do not favour to conduct of an applicant who participates in the arbitration proceedings without protest and fully avails of the entire arbitration proceedings and when he sees that the award has gone against him comes forward to challenge the arbitration proceedings as without jurisdiction. Their Lordships quoted with approval the following passage from the Law of Arbitration by Russel.

' Although a party may by reason of some disability be legally incapable of submitting matters to arbitration that fact is not one that can be raised as a ground for disputing the award by other parties to a reference who were aware of the disability. If one of the parties is incapable the objection should be taken to the submission. A Party will not be permitted to lie by and join in the submission and then if it suits its purpose attack the award on that ground. The presumption in the absence of proof to the contrary will be that the party complaining was aware of the disability when the submission was made.

SUPERINTENDING ENGINEER, NATIONAL HIGHWAYS, SALEM AND ORS., : AIR 1988 SC2045 the Apex Court observed thus:

'If the parties to the reference either agree beforehand to the method of appointment or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they well be precluded from objecting to such

appointment as invalidating subsequent proceedings.'22. From the above pronouncements, it is clear that once the parties have participated in the arbitration proceedings without taking any objection, they cannot turn round to contend that there was no arbitration clause. Suffice it to say that both the parties having accepted that there was an arbitration agreement and proceeded on the said basis, the Department cannot be allowed to urge that the arbitration clause did not in law constitute a valid arbitration agreement.

23. It was next argued by learned Government Advocate that even if Clause-30 was interpreted as an arbitration clause and even when the Department may have acquiesced to the reference, it was only the Chief Engineer in office who could adjudicate upon the disputes between the parties. Sri Kaliprasad who had retired on 31-7-1994 could not, it was argued continue or be continued as an Arbitrator. The Order passed by the Court below on I.A. No. 6 allowing Sri Kaliprasad to continue was therefore illegal not only because the same was opposed to the provisions of Clause-30, but also because the said Court could not have made an Order on I.A. No. 6 or exercised the powers of review which were not vested in it. It was contended that this Court could examine the validity of the Order made on I.A.No. 6 in the light of the liberty that was granted to the Department by a Single Bench of this Court while disposing of MFAs No. 3755 to 3757 of 1996.

24. There is no manner of doubt that if Clause-30 of the agreement is construed as an arbitration clause, it is the Chief Engineer alone who could act as an Arbitrator. Upon the retirement of Sri Kaliprasad, he could not obviously continue as an Arbitrator as he ceased to hold the office of Chief Engineer. The Order passed by the Court below on I.A. No. 6 allowing Sri. Kaliprasad to continue as an Arbitrator was in that view untenable in law firstly because there was no justification for removal of the designated Arbitrator and secondly because the Court having rejected an earlier application filed for continuance of Sri Kaliprasad could not have reviewed the said Order in the absence of any powers under the Arbitration Act to do so. That however is only one aspect of the controversy. What is more important is that although Sri Kaliprasad had ceased to be the Chief Engineer, the Department continued to appear before him and continued to participate in the proceedings in pursuance of the Order made by the Court below

on I.A.No. 6 filed by the claimant. It was only after Sri Kaliprasad had made and published his Awards that the Department decided to question the correctness of the Order made on I.A. No. 6 whereby the - former had been allowed to continue as an Arbitrator. In other words, the Department participated in the proceedings before the Arbitrator, took a chance to get a favourable Judgment from him, but having seen that the same has gone against the Department turned around to challenge the validity of the Order under which the Arbitrator was allowed to continue. This conduct does not speak well of the Department. If Sri Kaliprasad was unacceptable as an Arbitrator on account of his retirement, there is no reason why the matter should not have been agitated at the appropriate stage and the Order passed by the Court below got vacated. Instead of doing so, the Department merrily went along with the proceedings and took a chance of securing a favourable Order from the Arbitrator. It acquiesced in the continuance of Sri Kaliprasad as an Arbitrator and thereby lost its right to question the Awards made by him subsequently. The filing of the appeals against the Order made by the Court continuing Sri. Kaliprasad as an Arbitrator at a stage when the Award bad already been made was an exercise in futility. So also was the liberty given to the Department in raising the question of the validity of Sri Kaliprasad's continuance before the Court in the course of the proceedings for challenging the validity of the Awards. The acquiescence of the Department in the proceedings before the Arbitrator was bound to emerge as a substantial impediment in its attempt to get rid of the Awards. That impediment in our view continues to exist and disentitles the Department from assailing the validity of the Order on the ground that Sri Kaliprasad could not have after retirement functioned as an Arbitrator.

25. That brings us to the third aspect of the challenge mounted by the Department. It was argued that the claim made by the Contractor was barred by limitation having been made more than seven years after the termination of the contract. It was submitted that no such claim would have been raised if the Department had not demanded extra cost on the completion of the balance work from the Contractor, Any such claim could not however give to the Contractor the right to agitate a claim which was barred by limitation with the passage of time. Alternatively, it was submitted that the Arbitrator had totally ignored its claim for payment of the extra cost involved in the execution of the balance work which was

in the facts and circumstances of the case bound to be treated as a part of the reference made to the Arbitrator.

26. The Awards made by the Arbitrator are reasoned awards. They set out the facts and the reasoning behind the acceptance or rejection of the claims made by the claimant. It is only because of the reasons recorded by the arbitrator that this Court can look into the correctness thereof. In the case of non speaking Awards, the legal position is fairly well settled by a catena of decisions of the Supreme Court to the effect that the Court cannot probe into the mental process of the Arbitrator or speculate about the reasons which must have impelled him to make an Award where no such reasons have been given. See 'HINDUSTAN STEEL WORKS CONSTRUCTION LTD., v. C. RAJASEKHAR RAO, : [1987]3SCR653 .

27. In 'BUNGAO STEEL FURNITURE PVT. LTD., v. UNION OF INDIA, : [1967]1SCR633 the Apex Court observed:

'It is only when the arbitrator proceeds to give his reasons or to lay down principles on which he has arrived at his decisions that the Court is competent to examine whether he has proceeded contrary to law and is entitled to interfere if such error in law is apparent on the face of the award itself.' 28. Since the Arbitrator has given reasons in support of his conclusion in the instant case, the Court has the advantage of examining whether the said reasons or any one of them is contrary to law and to interfere if it is found to be so.

29. The Department had even before the Arbitrator, raised a specific contention to the effect that the claims raised by the Contractor were barred by limitation. The Arbitrator has given reasons for repelling that contention. We shall presently turn to the reasons, but before we do so, it is necessary to briefly refer to the claims made in regard to which the question of limitation fell for consideration.

30. Claim No. 1 as reproduced by the Arbitrator in his Award in Paragraph-2.7 thereof was split into Six different subheadings. The claim has been made in the following words:

' CLAIM No. 1:

a) to hold that the rescission of contract by the respondent was illegal and wrongful

b) to direct the respondent to close the contract on as it is and where it is basis.

c) to award that no penalties whatsoever including the maximum penalty of 71/2% should be levied by the respondent on the claimant.

d) To award the release of EMD & FSD to claimant.

e) To award that no cost and risk of completing balance work by other agency should be imposed on the claimant by the respondent; and

f) To award the balance payment (final bill) for work done quantities which is yet to be paid to the claimant if any. '

31. Claim No. 2 related to price for the additional work done by the Contractor whereas Claim No. 3 related to overhead charges allegedly incurred by the Contractor for the period beyond the stipulated date of completion. Claim No. 4 related to loss of profit at the rate of 15% on the total quantum of work allotted. Claim No. 5 was for payment of interest at the rate of 20% p.a. on the amounts held payable. Claim No. 6 was for interest at the rate of 20% pendente lite whereas Claim No. 7 was for payment of interest from the date of the Award to the date of the decree or the date of payment whichever was earlier.

32. A careful reading of the above would show that in Claim No. 1, the claimant had sought a declaration to the effect that the rescission of the contract was illegal and wrongful with a direction to the respondent to close the contract on as is where is basis, to levy no penalties on him, and to release the EMD and FSD lying with the Department. The remaining claims related to the payment for work allegedly done by the Contractor and the extra expenditure allegedly incurred by him apart from the loss of profit suffered by the claimant, The Arbitrator has held the rescission of the contract to be illegal and wrongful. He has also directed the Department to close the contract on as is where is basis. He has then disallowed the penalties levied by the Department and directed refund of the EMD and FSD amount. He has further allowed the extra expenditure incurred by the Department

on the completion of the works and directed the balance payment of the work done by the claimant.

33. The question whether the reliefs claimed by the Contractor and granted by the Arbitrator were beyond the period of limitation prescribed for the purpose has therefore to be seen in the above background. Any exercise aimed at finding an answer to that question would require the Court or the Arbitrator dealing with the same to identify the specific Article of the Schedule to the Limitation Act under which the claim would fall and then determine whether the claim is within the period prescribed for the same reckoned from the date time starts running in terms of Column-3 of the Schedule. The Arbitrator has not however done so. He has not identified the specific Article in the Schedule to the Limitation Act under which the claims or one of them would fall. Consequently, he has failed to determine the precise period of limitation applicable to the claim. The result is that the reasons given by the Arbitrator in the Award present a somewhat generalised and jumbled version of the Arbitrator's opinion in regard to the question of limitation. The reasoning of the Arbitrator in A.C.4/91 proceeds as under:

' The learned counsel for the respondents argument that the period of limitation should be counted from the date when the claim was raised lacks merit. Almost all the claims were raised by the claimant during the course of execution of the work before the contract was rescinded and there were continuous cause of actions. In Page 8 of Ex.R.105, the learned counsel himself has stated different dates of cause of action like 02.09.1983, 4.10.1983 etc, considering the dates when the claimant has raised the claims during the course of execution of the work which in turn indicated the nature of the cause of actions. Moreover the raising of a claim by itself cannot constitute cause of action. A dispute arises when an assertion is made by one party and the denial is made by the opposite party and the arisal of dispute leads to cause of action. Again when the contract was rescinded subsequent to raising of the claims by the claimant an altogether different cause of action will accrue on account of the consequences of the said rescission. The consequences are nothing but the settlement of final accounts pertaining to the contract and intimation of cost and risk amount of completion of the balance work by other agency to the claimant. In this particular case, the final accounts

pertaining to the contract were never made known to the claimant after rescission of the contract and the cost and risk amount of completing the balance work by other agency was made known to the claimant on 07.11.1990 giving rise to the cause of action. Immediately thereafter, the claimant disputed the action of the respondent and referred the matter to the Chief Engineer on 19.11.1990 (Ex. C.12), when no response was forthcoming from the said Chief Engineer; the claimant filed A. C. No. 62 of 1991 in the Hon'ble Court of the II Addl. Civil Judge, Mysore along with other cases pertaining to neighbouring contracts (A.C 3 of 1991 & A.C 4 of 1991) praying for appointment of Arbitrator and order of reference. ' Almost identical reasoning is advanced in the other two Awards made by the Arbitrator.

34. The Arbitrator appears to hold that since certain claims had been raised by the Contractor before the termination of the contract, the same would give rise to a recurring cause of action. He has further held that termination of the contract subsequent to the raising of such claims was a cause of action entirely different and distinct and that so long as accounts were not settled in consequence of the termination, the period of limitation would not start running. We find it difficult to subscribe to those conclusions. Just because certain claims had been raised before the contract was terminated did not mean that the contractor could sleep over such claims for years or choose his own time to agitate the same in proper legal proceedings. In any event, the cause of action to seek appropriate redress or the right to sue for an appropriate relief accrued to the claimant no sooner the contract was terminated by the Department. The Contractor need not have waited after the said termination for any further development or communication before he could seek a declaratory relief to the effect that the rescission of the contract was illegal nor was any such wait necessary before he could seek a direction to the Department to close the contract on as is where is basis. The right to seek refund of EMD and FSD as also the declaration that the claimant was not liable to bear the extra cost for completion of the balance work could have been claimed by the Contractor immediately after the contracts were terminated. This is true even in regard to the Award of balance payment for work already done by the Contractor concerned. Suffice it to say that there is not a single claim out of those belatedly made by the Contractor which could not have been raised for adjudication by way

of arbitration or otherwise in a competent Civil Court immediately after the contracts were terminated. Stated differently, the right to sue had accrued to the claimant not only in regard to the alleged illegal termination of the contract, but also reliefs consequential upon the termination of the contract by the Department. That being so, it is difficult to see how the cause of action to claim any one of the reliefs which the Contractor eventually demanded could be either recurring or could be said to have arisen only after the Department had raised a demand for payment of the extra cost.

35. What the claimant was asking for is a declaration that the termination of the contract was illegal and that he was not liable to reimburse to the Department any extra costs incurred by it. That relief could be claimed and granted even when the Department had not quantified the amount representing the extra cost nor raised a demand for payment of the same. So also settlement of the accounts were not essential before the claimant could seek a declaration that the termination of the contract was illegal. The legal position regarding the period of limitation applicable to declaratory reliefs is well settled by decisions of the Supreme Court. In 'STATE OF PUNJAB AND ORS. v. GURDEV SINGH, ASHOK KUMAR, : (1992)ILLJ283SC the plaintiffs had sought a declaration to the effect that the order of termination of their services was void and inoperative and that be continued to be in service. The suit was contested inter alia on the ground that the same was barred by limitation. The Trial Court dismissed the suit as barred by limitation, but the first Appellate Court decreed the same holding that there was no limitation for challenging an illegal Order and since the Order of termination was bad in law, the suit was not barred by time. The High Court agreed with that view. On a further appeal to the Supreme Court by the State of Punjab, their Lordships reversed the view taken by the High Court. The Court observed that the statute of limitation was intended to provide a time limit for all conceivable suits and that to say that the suit is not covered by law of limitation runs a foul of the Limitation Act. The Court said:

'The Court has to find out when the 'right to sue' accrued to the plaintiff. If a suit is not covered by any of the specific articles prescribing a period of limitation, it must fall within the residuary article. The purpose of the residuary article is to provide for cases which could not be covered by any other provision in the Limitation Act. The

residuary article is applicable to every variety of suits not otherwise provided for. Article 113(corresponding to Article 120 of the Act of 1908) is a residuary article for cases not covered by any other provisions in the Act. It prescribes a period of three years when the right to sue accrues. Under Article 120 it was six years which has been reduced to three years under Article 113. According to the third column in Article 113, time commences to run when the right to sue accrues. The words 'right to sue' ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.' 36. Dealing with the argument that a void Order need not be questioned or set aside, the Court held that even in the case of a void Order, a party aggrieved of the invalidity of the order has to approach the Court for the relief of declaration that the same is inoperative and not binding upon him and that he must do so within the prescribed period of limitation beyond which the Court cannot give declarations prayed for.

37. A reference may also be made in this regard to a Constitution Bench decision of the Supreme Court in S.S. RATHORE v. STATE OF MADHYA PRADESH, : 1989(43)ELT790(SC) . One of the questions that fell for consideration in that case was about the date on which cause of action shall be taken to have arisen in a case where the original Order was challenged before a higher authority in a statutory remedy provided against the same. The Court held that since the remedy sought against the original order is statutory, the period of limitation would start running from the date the appellate authority disposed of the matter. What is important is that the Court did not make the accrual of cause of action dependent upon unsuccessful representations not provided for by law. Such representations were for purposes of limitation considered to be inconsequential.

38. We do not wish to multiply the authorities on the subject nor are we inclined to express any final opinion as regards the precise Article under which the case of the claimant falls for purposes of. imitation and whether the claims were really time barred as argued by the Department. All that we wish to emphasize is that the

approach adopted by the Arbitrator and the understanding of the legal position by him as regards limitation does appear to be erroneous. The Award consequently proceeds on an erroneous understanding of how the question of limitation has to be. examined and the dispute resolved. Since the said question goes to the very root of the matter, we do not consider it necessary to examine other objections that were argued on behalf of the appellant touching upon the merits of the Awards made by the Arbitrator, Whether or not the Award is perverse and otherwise invalid in the absence of any evidence to support the same, whether or not the Award is contrary to the terms of the agreement, whether or not the award is beyond the scope of the reference made to the Arbitrator are all questions which may have been examined if only this Court came to the conclusion that the view taken by the Arbitrator on the tenability of the claims from the point of view of limitation was correct. Since that is not found by us to be so. We need not express any opinion on the remaining issues, for the awards are liable to be set aside in toto, on account of an erroneous premise regarding limitation having vitiated the same.

39. The only other aspect that needs to be considered is whether the reference ought to be superceded or the matter remitted to the same Arbitrator or else a reference made to another Arbitrator to give quietus to the controversy. We do not think that this is a fit case in which we need to supercede the reference at this stage and force the parties to agitate their claims before a Civil Court. We also do not consider this to be a fit case in which we ought to remit the matter back to Sri Kaliprasad, the Arbitrator. The nature of the controversy, especially the interpretation of provisions of the Limitation Act and the provisions of the Contract in our view call for a reference to a person with a sound legal background and training and known for his unimpeachable integrity. A former Judge of this Court would preeminently fit into that description and ensure a satisfactory and expeditious disposal of the entire controversy.

40. In the result, we make the following Order:

The Appeals are allowed, the impugned order passed by the Court below shall stand sets aside and so also the Awards made by Sri Kaliprasad, the Arbitrator.

41. The disputes raised by the claimant as also the claim of the appellant for payment of extra cost incurred by it in connection with all the there contacts shall stand referred for adjudication to Justice Patri Basavana Goud, former Judge of this Court who is requested to enter upon the reference and expeditiously dispose of the matters in dispute preferably making reasoned Awards on the claims and the counter claims filed by the parties uninfluenced by the findings recorded by the earlier Arbitrator or the observations made in the body of this Judgment. The Arbitrator shall be free to permit the parties to adduce any further evidence in support of their respective cases and to record his finding in respect of each claim and counter claim afresh. The Arbitrator shall also be free to determine his own fees and direct the apportionment of the liability on that account between the parties. In the circumstances, there shall be no orders as to costs.