

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 07.02.2023

+ **FAO(OS)(COMM) 361/2019**

KIDDE INDIA LTD.

..... Appellant

versus

**NATIONAL THERMAL POWER CORPN.
LTD.**

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Chandan Kumar with Ms Kirti Atri,
Advocates.

For the Respondent : Mr Puneet Taneja, Ms Laxmi Kumari and
Mr Manmohan Singh Narula, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

1. The appellant (Kidde India Ltd.) has filed the present appeal impugning an order dated 12.03.2019 (hereafter '**the impugned order**') passed by the learned Single Judge in **CS(OS) 549/2009** captioned "***Kidde India v. NTPC***". The impugned order sets aside an arbitral award dated 09.12.2008 (hereafter '**the impugned award**') on the ground that the claims made by the appellant in the arbitral proceedings are barred by limitation.

2. The limited question that falls for consideration of this court is whether the impugned award is vitiated by patent illegality.

Factual Context

3. The predecessor-in-interest of the appellant, one M/s Vijay Machinery Store, submitted its bid for the work of installation of fire protection systems against prescribed specifications for the Ramagundum, Super Thermal Power Project, Stage I (hereafter '**the Project**'). Thereafter, on 18.02.1982, the respondent (hereafter '**NTPC**') issued a Telex of Award in favour of the predecessor. This was followed by the NTPC issuing a detailed Work Order dated 24.03.1982 (hereafter '**the Contract**') in favour of the predecessor. The firm M/s Vijay Machinery Store was succeeded by Vijay Fire Protection Private Ltd. Subsequently, the name of the said company was changed to Vijay Fire Protection Systems Limited and thereafter to Vijay Industries and Projects Limited and Kidde India Ltd. (the appellant herein). The firms or appellant are hereafter referred to as **the Contractor**.

4. After the work was executed, on 04.08.1986, NTPC took over the above-mentioned systems, albeit on a provisional basis. Thereafter, the Contractor raised bills for extra work claimed to have been done by it; however, the same were denied by NTPC. On 06.03.1989, the Contractor raised its Final Bill, relying on various communications exchanged between the parties. Disputes arose between NTPC and the Contractor, and the Contractor issued a letter dated 09.12.1989, invoking the arbitration clause under the Contract and proceeded to

appoint its nominee arbitrator. In terms of the said letter, the Contractor also called upon NTPC to nominate its arbitrator.

5. NTPC did not respond to the said letter. One of the principal controversies that arises is whether NTPC had received the said letter. The pleadings of the parties in this regard vary. However, the Contractor claims that NTPC and the Contractor entered into negotiations to settle the claims but the same remained unresolved. Consequently, the Contractor issued another notice dated 10.05.1994, requesting the respondent to nominate its arbitrator. However, the Contractor, in its letter dated 10.05.1994, clarified that it treated the letter dated 09.12.1989 as the first invocation of the arbitration agreement and that it was only reiterating that an arbitral tribunal be constituted for adjudicating its claims. NTPC claims that it did not receive the letter dated 09.12.1989.

6. NTPC did not take any steps to refer the disputes to arbitration. Consequently, the Contractor approached the Institute of Engineers for the appointment of an arbitrator as NTPC's nominee, and the chairman of the Arbitral Tribunal. On 02.06.1995, the Institute of Engineers appointed an arbitrator as NTPC's nominee, as well as the presiding arbitrator.

7. The first hearing of the Arbitral Tribunal as constituted was held on 29.07.1995, however, NTPC did not participate.

8. On 02.09.1995, NTPC filed a suit [being **CS(OS) 2065A/1996**] impugning the appointment of the Contractor's nominee arbitrator. The

proceedings before the Arbitral Tribunal were stayed by this Court. Thereafter, by an order dated 07.03.2003, the suit was disposed of after the arbitrator in question resigned.

9. The Contractor appointed its nominee arbitrator in the year of 2003 to fill the vacancy caused by the resignation of the arbitrator appointed earlier. Thereafter, in the year 2004, the Institute of Engineers re-appointed the presiding arbitrator to fill up the vacancy arising due to the demise of the presiding arbitrator. NTPC's nominee arbitrator resigned, and a new nominee arbitrator was appointed on 28.07.2006.

10. NTPC also filed another application under Section 33 of the Arbitration Act, 1940 (hereafter '**the Arbitration Act**') [which was numbered as **CS(OS) 1876/2006**], *inter alia*, praying that the mandate of the Arbitral Tribunal be terminated. NTPC had also filed an application impugning an order dated 02.12.2006 passed by the Arbitral Tribunal, whereby it had imposed costs of ₹70,000/- on NTPC. During the course of the said proceedings, NTPC agreed to enlargement of time for the Arbitral Tribunal to make the award. Initially, the Arbitral Tribunal was restrained from passing the final award. However, by an order dated 18.08.2008, the said suit filed by NTPC was disposed of as not pressed, and the order restraining the Arbitral Tribunal from delivering the award was lifted. However, NTPC retained its right to file objections, if any, to the arbitral award.

11. The Arbitral Tribunal (by majority) delivered the impugned award on 09.12.2008, whereby some claims made by the Contractor

were allowed and an aggregate amount of ₹1,12,36,762/- was awarded to the Contractor.

12. The Contractor filed an application for making the impugned award the Rule of Court [which was numbered as CS(OS) 72/2009]. However, in the meanwhile, the Arbitral Tribunal, *suo moto*, filed the impugned award in this Court and the same was registered as a separate suit [being CS(OS) 549/2009].

13. In view of the above, the Contractor's suit, [CS(OS) 72/2009] was disposed of.

CS(OS)549/2009

14. NTPC objected to the arbitral award on two grounds. First, that the claims raised by the Contractor were barred by limitation; and second, that Kidde India Ltd. was not the successor-in-interest of M/s Vijay Machinery Store.

15. The learned Single Judge did not find any merit in the objection that Kidde India Ltd. was not the successor-in-interest of M/s Vijay Machinery Store and rejected the said objection. NTPC accepted the said finding as it has not challenged the impugned order. It has not contested the said finding in these proceedings as well.

16. Insofar as the objection that the claims raised by the Contractor were barred by limitation is concerned, the learned Single Judge found that they were. The learned Single Judge held that the arbitration clause was invoked on 09.12.1989 and it was incumbent upon the Contractor

to approach the appointing authority (President, Institute of Engineers) within a period of sixty days thereafter. Since it had failed to do so, the claims were barred by limitation.

17. The conclusion of the learned Single Judge in this regard reads as under:

“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.”

18. The principal question to be addressed is whether the claims raised by the Contractor were barred by limitation as held by the learned Single Judge and the impugned award, whereby the Arbitral Tribunal concluded to the contrary, is vitiated by patent illegality.

Reasons and Conclusion

19. Undisputedly, the provisions of the Limitation Act, 1963 apply

to arbitral proceedings. Section 37(1) of the Arbitration Act expressly provides that the provisions of the Limitation Act, 1908 would apply to arbitration as it applies to proceedings before the Court. The Limitation Act, 1908 was subsequently replaced by the Limitation Act, 1963.

20. Section 37(3) of the Arbitration Act provides that the arbitration shall be deemed to commence on one party serving notice regarding the same either on the other party or to the person named or designated in the agreement. Sub-sections (1) and (3) of Section 37 of the Arbitration Act are set out below:

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

XXXX

XXXX

XXXX

(3) For the purposes of this section and of the Indian Limitation Act, 1908, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated.”

21. Section 21 of the Arbitration and Conciliation Act, 1996 (hereafter ‘**the A&C Act**’) also provides that unless the parties have agreed otherwise, the arbitral proceedings in respect of a dispute would commence on a date on which the request that the dispute be referred to arbitration is “*received by the respondent*”. Section 43(2) of the A&C Act provides that for the purposes of the Limitation Act, 1963, the

arbitration is deemed to have commenced on the date referred to in Section 21 of the A&C Act, that is, the date on which the request for reference of disputes to arbitration is received by the respondent.

22. It is, thus, apparent that once a notice of referring the disputes to arbitration is served on the respondent, the period of limitation for making the claims stops running. Therefore, the question whether the claims are barred by limitation has to be determined with reference to the date on which the arbitral proceedings are deemed to commence either in terms of Section 37(3) of the Arbitration Act or Section 21 of the A&C Act. In the present case, the learned Single Judge had concluded that the arbitration clause had been invoked on 09.12.1989, but the same had invoked no response. Therefore, it was incumbent upon the Contractor to approach the appointing authority – President, Institute of Engineers – within a period of sixty days from that date. Since the Contractor had not done so, the claims were barred by limitation.

23. We are unable to agree with the said reasoning. If it is accepted that the notice invoking arbitration was delivered to NTPC on 09.12.1989, the arbitral proceedings would be deemed to have commenced from that date in terms of Section 37(3) of the Arbitration Act. The period of limitation for raising the disputes would stop running on that date (09.12.1989). And, there is no dispute that the Contractor's claims were within time as on that date.

24. Undisputedly, the party invoking arbitration is also required to

take further steps for constitution of an arbitral tribunal and reference of disputes to the said tribunal. However, any delay in doing so does not render the party's substantive claims barred by limitation; it would deprive the party any recourse to courts to seek appointment of the arbitral tribunal pursuant to the arbitration agreement.

25. It is well settled that the statute of limitations bars recourse for remedies to courts; it does not extinguish the obligations (see: ***Bombay Dyeing & Manufacturing Co. Ltd. v State of Bombay & Ors: 1958 SCR 1122***). Thus, once an arbitration agreement is invoked and the party does not take steps for constitution of the arbitral tribunal within the period of limitation, its right to seek remedy in this regard, in any court, would be foreclosed. The period of limitation within which a party is required to approach the court for seeking constitution of the arbitral tribunal cannot be conflated with the period of limitation for invoking the arbitration agreement and commencing the arbitral proceedings. This period within which the party must avail of legal remedy to ensure constitution of the arbitral tribunal would commence once the party has invoked the arbitration agreement and not prior to that.

26. In the facts of the present case, if it is accepted that the arbitration had commenced on 09.12.1989, the Contractor's remedy to approach the court, either under Section 8 or Section 20 of the Arbitration Act, would be barred if the said remedy was not availed within the period of three years.

27. In *Bharat Sanchar Nigam Limited & Anr. v. Nortel Networks India Private Limited: (2021) 5 SCC 738*, the Supreme Court had considered the issue regarding the period of limitation for filing an application for appointing an arbitrator under Section 11 of the A&C Act. The Court held that Article 137 of the Schedule to the Limitation Act, 1963 would be applicable to an application under Section 11 of the A&C Act. The Court had also explained that the period of limitation for filing a petition seeking appointment of an arbitrator cannot be confused or conflated with the period of limitation applicable to the substantive claims relating to the underlying commercial contract. The relevant observations made in the said decision are set out as under:-

“15. It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days from issuance of the notice invoking arbitration. In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.

16. The period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognised even under Section 20 of the Arbitration Act, 1940. Reference may be made to the

judgment of this Court in J.C. Budhraj v. Orissa Mining Corpn. Ltd. [J.C. Budhraj v. Orissa Mining Corpn. Ltd., (2008) 2 SCC 444 : (2008) 1 SCC (Civ) 582] wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator. Para 26 of this judgment reads as follows : (SCC p. 460)

“26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4-6-1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Act. Insofar as a petition under Section 8(2) is concerned, the cause of action would arise when the other party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition 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 Inder Singh Rekhi v. DDA [Inder Singh Rekhi v. DDA, (1988) 2 SCC 338] , Panchu Gopal Bose v. Port of Calcutta [Panchu Gopal Bose v. Port of Calcutta, (1993) 4 SCC 338] and Utkal Commercial Corpn. v. Central Coal Fields Ltd. [Utkal Commercial Corpn. v. Central Coal Fields Ltd.,

(1999) 2 SCC 571] also make this position clear.””

28. The impugned order further indicates that it was NTPC’s contention that since the Contractor had invoked the arbitration on 09.12.1989 but had taken no steps for getting the Arbitral Tribunal constituted, its claims were barred by limitation. As noted above, the question, whether the substantive claims arising from the contract are barred by limitation, is required to be determined with reference to the date of commencement of the arbitral proceedings, that is, the date on which a notice invoking arbitration was served on NTPC. Thus, if it is accepted that the said notice was served on NTPC on 09.12.1989 then the conclusion that the claims made by the Contractor are barred by limitation is erroneous and cannot be sustained.

29. However, before this Court, it was earnestly contended on behalf of NTPC that the notice dated 09.12.1989 was not received by NTPC. It was claimed that the first notice invoking arbitration was received by NTPC on 10.05.1994 and therefore, the claims made by the Contractor were barred by limitation. Clearly, if the notice invoking arbitration was received by NTPC for the first time on 10.05.1994; the arbitral proceedings would commence from the said date and therefore, the question whether the claims made by the Contractor were barred by limitation would have to be considered in reference to the said date, that is, 10.05.1994.

30. In regard to the above, the parties have taken varying stands. It is relevant to note that NTPC, in its reply to the Contractor’s application

under Section 28 of the Arbitration Act seeking enlargement of time for making the award, had averred as under:-

“4. That after the aforesaid claim was raised by the applicant and when the Respondent did not reply, the applicant should have commenced proceedings as per arbitration clause stipulated in the conditions of contract. The applicant did not do so till 1988 when he had again raised a claim. In fact, it was only vide his letter dated 9.12.1989 that the applicant invoked the arbitration clause by informing the Respondent that it has appointed one Mr. M.M. Sharma, as their representative Arbitrator and called upon the respondent to appoint its Arbitrator within 15 days. However, the said letter was not received by the respondent. Applicant having invoked the arbitration clause, should have acted in accordance with the conditions of contract i.e., the respondent having failed to appoint its arbitrator, the applicant should have approached the President, Institution of Engineers India at that time seeking appointment of the Arbitrator. However, the petitioner failed to do so. Hence, it would be seen that cause of action, if any, had arisen in the year 1985 when a claim was raised by the applicant for Rs. 73,38,382.40. The said cause of action came to an end on the expiry of 3 years from that particular date and became barred by limitation. It cannot be said that the period of limitation for invoking the arbitration clause existed in favour of the applicant after the expiry of three years. Hence, the invocation of the Arbitration clause in the year 1989 vide its letter dated 9.12.1989 is barred by limitation and could not have been invoked.”

31. In the Statement of Defence filed by NTPC, it did not dispute receipt of the letter dated 09.12.1989, issued by the Contractor invoking the arbitration. The relevant averments made in the Statement of Defence, in this regard, are reproduced below:-

“That the claims of the Claimant are also barred by limitation. The initial claim was raised by the Claimant vide their letter dated 11.6.1985. Therefore, the Claimant vide their letter dated 6.3.89 demanded the payment in respect of claims failing which the Claimant would invoke the arbitration clause. No action has been taken in terms of the said letter of the Claimant. The Claimant again vide their letter dated 9.12.89 invoked the clauses 25 and 26 of the General Conditions and appointed one Shri M.M. Sharma as their Arbitrator. The Claimant called upon the Respondent to appoint its Arbitrator within fifteen days. Even though the procedure contemplated under the Agreement was not followed, the Claimant vide their said letter had given go-by to the procedure and appointed its Arbitrator. A copy of the letter dated 9.12.89 is annexed hereto and marked as Annexure.”

32. However, the question whether NTPC had received the notice dated 09.12.1989, stands settled by the Contractor’s admission that NTPC had not received the said letter. In its rejoinder, the Contractor accepted that NTPC had not received the notice dated 09.12.1989. On the contrary, it accepted the said admission and relied upon the reply filed by NTPC in OMP No. 16/2005, filed in this Court. The relevant averments made in the rejoinder, filed by the Contractor to the Statement of Defence, read as under:-

“As per the admission of the Respondent made in paragraph no.4 of its reply filed in OMP No. 16 of 2005 filed before Hon’ble Delhi High Court, it did not receive the said notice of invocation.

A copy of each of the aforesaid letter and the aforesaid reply filed in OMP No. 6 of 2005 is filed herewith and marked as Annexure R-1 (colly)”

33. Considering the above, we are of the view that the question whether the claims made by the Contractor were barred by limitation must be examined on the basis that NTPC had received the first notice invoking the arbitration on 10.05.1994 and had not received the notice dated 09.12.1989.

34. Bearing the aforesaid in mind, it would now be relevant to examine the impugned award to ascertain whether the same is vitiated by patent illegality. The Arbitral Tribunal had examined the question whether the claims made by the Contractor were barred by limitation. The Arbitral Tribunal had noted certain undisputed facts for the purpose of considering the said issue and it would be relevant to set out the same for the purposes of addressing the present controversy:-

“1.0 Issue No.1

“Whether Claimant’s Claims are barred by limitation as alleged by Respondent?”

1.1 For deciding this issue, following undisputed facts are important :

- i Claimant raised one bill dated 11.06.1985,
- ii By their letter dated 13.05.1986 (Ex-C-156) Respondent requested Claimant to postpone winding up of their establishment, which was otherwise scheduled to be closed by 12.05.1986.
- iii Document dated 04.08.1986 (Ex-C-273) issued by Respondent shows that they provisionally took over the system from Claimants that day.

- iv Claimant raised another bill dated 6.3.1989 (Ex-C-216) Claimant call it their final bill.
- v Claimant invoked arbitration on 9.12.1989 for non payment of their bill dated 6.3.1989 (Ex-C-253).
- vi In their reply dated 08.07.2005 filed by Respondent in OMP No. 16 of 2005 before Hon'ble High Court of Delhi (Annexure R-1 colly to rejoinder by Claimant), Respondent denied having received the said letter dated 09.12.1989.
- vii In their admission / denial dated 13.01.2007, Respondent denied receipt of "Letters Legal issued by Claimant."
- viii Claimant's witness in paragraph no. 17 of his affidavit dated 14.2.2007 averred that Respondent did not receive letter dated 09.12.1989. No question was put to Claimant's witness to unsettle this position.
- ix Respondent's witness no where states in his affidavit dated 10.2.2007 that letter dated 09.12.1989 was received by the Respondent.
- x After ongoing settlement process did not yield result, Claimant invoked arbitration once again by their lawyer's notice dated 10.5.1994 (Ex-C-261), which was received, by Respondent and they replied to it by their letter dated 02.06.1994 (Ex-C-262), stating that the issue of nominating arbitrator by them was under active consideration.
- xi First hearing in arbitration took place on 29.07.1995.

- xii This arbitration was stayed by order dated 11.09.1995 passed in suit no. 2065A of 1995 filed by Respondent before Hon'ble Delhi High Court. This stay was vacated on 7.3.2003 when suit was dismissed and Hon'ble Court allowed a fresh arbitral tribunal to be constituted and the stalled arbitration to proceed.
- xiii This arbitral tribunal was reconstituted and the arbitral process started from 03.04.2004.
- xiv While answering question no. 19 during, his cross-examination dated 08.05.2007, Respondent's witness, inter alia, stated, "NTPC has not prepared any final bill."

35. In addition to the above, the Arbitral Tribunal also accepted that NTPC had not received the letter dated 09.12.1989 and therefore, the arbitral proceedings had not commenced on the said date. This is clear from paragraph 1.3.1 of the impugned award, which reads as under:-

"1.3.1 Admittedly, even as per their admission denial as set out hereinabove, Respondent have denied receipt of letter / notice dated 9.12.1989. Admittedly, when they did not receive the said letter / notice, arbitration did not commence."

36. Notwithstanding the above, the Arbitral Tribunal concluded that the claims were not barred by limitation. The Arbitral Tribunal reasoned that the Final Bill was prepared by the Contractor on 06.03.1989, which was raised within the period of three years from 04.08.1986, the date on which NTPC took over the system. The Arbitral Tribunal held that there was no repudiation of the said bill and the parties were under negotiation for settling the same and therefore, the claims were within

time. The relevant extract of the impugned award reads as under:-

“1.5 What emerges from out of the above discussion is that system was provisionally taken over by the Respondent on 4.8.1986. That bill dated 6.3.1989 was raised within three years of the same. That letter dated 9.12.1989 seeking appointment of arbitrator was not received by the Respondent, hence it was no invocation. That no repudiation of the said bill was made by the Respondent. Parties were under negotiations for settling the said bill/s. That by their reply dated 2.6.1994, Respondent did not deny arbitrability of claims due to limitation. That arbitration started in 1995 was stalled because of stay order dated. 11.9.1995 passed in suit no. 2065A of 1995 filed by Respondent. This got vacated only on 7.3.2003. Upon Respondent having pointed out that its suit had become infructuous, the said suit was dismissed. By virtue of the said order passed in the suit, the once stalled arbitration started once again. As recorded in answer to question no. 19 of respondent witness cross-examination held on 08.05.2007, Respondent had not prepared its final bill as against the bill/s of the Claimant even till that date.”

37. The conclusion drawn by the Arbitral Tribunal that the claims made were within limitation is, *ex facie*, erroneous in view of the undisputed facts as noted by the Arbitral Tribunal.

38. The Contractor had raised the bill on 11.06.1985. Apparently, the said bill was not cleared. However, on 04.08.1986, NTPC had provisionally taken over the system. The Contractor had taken no steps to precipitate any of its claims. The Contractor had raised a bill almost three years thereafter on 06.03.1989, terming it as a Final Bill. NTPC did not clear the said bill. Under the said bill, the Contractor claimed a sum of ₹74,80,122.87/-.

39. Admittedly, the said bill was not cleared and the Contractor issued a letter dated 09.12.1989 seeking to invoke the arbitration agreement and appointing one Mr. M.M. Sharma, Executive Director, NTPC as the Arbitrator. Although NTPC denies receiving the said letter, there is no dispute that the Contractor had issued it. A plain reading of the said letter indicates that disputes had arisen between the parties. In the said letter, the Contractor had asserted that several meetings had been held between the executives of both the parties and NTPC had also, purportedly, assured that the claim would be settled provided the Contractor gave up a portion of its claim. It was stated that based on the said assurance, the Contractor had given up some claims, which were communicated by letters dated 25.07.1989 and 08.09.1989. The Contractor alleged that despite the same, NTPC had “*failed and neglected to settle*” the referred claim. The Contractor further stated that it had lost hope and felt that there was no alternative but to proceed for arbitration and, accordingly, had also withdrawn the letters dated 25.07.1989 and 08.09.1989, whereby it had agreed to waive a portion of its claim.

40. In view of the aforesaid letter, the conclusion of the Arbitral Tribunal that a cause of action had not arisen is, *ex facie*, erroneous and vitiates the decision. It is now well settled that unilaterally issuing communications and seeking settlement of the claims does not extend the period of limitation.

41. In ***Panchu Gopal Bose v. Board of Trustees for Port of Calcutta: (1993) 4 SCC 338***, the Supreme Court had observed that “*the*

period of limitation for commencement of arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued”.

42. It is also well settled that “*a party cannot postpone accrual of the cause of action by writing reminders or sending reminders*” [***Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority: (1988) 2 SCC 338***]. In certain cases where the parties are in negotiations and the claims made by a party have not been finally denied by the other, the dispute would arise on the breakdown of the negotiations. In ***Geo Miller and Company Private Limited. v. Chairman, Rajasthan Vidyut Utpadan Nigam Limited.: (2020) 14 SCC 643***, the Supreme Court had clarified that even in such cases, the party pleading that the parties were in negotiations must specify and specifically plead the entire negotiation history. The Court would carefully consider the same and ascertain the ‘breaking point’ at which any reasonable party would have abandoned the efforts in arriving at a settlement. In such cases, the ‘breaking point’ could be considered as the date on which the cause of action arises for the purpose of limitation.

43. In the present case, the contents of the letter dated 09.12.1989 clearly indicate that the negotiations, if any, had finally come to a breaking point and the Contractor had, in fact, elected to commence arbitral proceedings. The fact that the arbitral proceedings did not commence on account of non-receipt of the said notice would not defer the accrual of a cause of action. We are unable to agree that negotiations, if any, after 09.12.1989 or letters sent by the Contractor

after 09.12.1989, would defer the accrual of cause of action.

44. In view of the above, it is clear that the claims raised by the Contractor/appellant were, *ex facie*, barred by limitation as on the date of commencement of the arbitral proceedings, that is, on 10.05.1994.

45. In view of the above, the appeal is dismissed.

FEBRUARY 7, 2023
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VIBHU BAKHRU, J

AMIT MAHAJAN, J



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