M/s. Indian Farmers Fertilizer Co-operative Ltd Vs M/s.Bhadra Products

Court: Orrisa High Court

Date of Decision: March 12, 2019

Acts Referred: Arbitration Act, 1940 â€" Section 8(2)
Arbitration And Conciliation Act, 1996 â€" Section 14, 21, 34, 34(2)(a), 37(1)(c), 43, 43(2), 85(2)(a)
Limitation Act, 1963 â€" Section 5, Article 137

Hon'ble Judges: Biswanath Rath, J

Bench: Single Bench

Advocate: Ashok Kumar Parija, S.P. Sarangi, B.C. Mohanty, D.K. Das, P.K. Das, T. Patnaik, S.D. Das, N. Bisoi, H.S. Satpathy

Final Decision: Dismissed

Judgement

Biswanath Rath, J

1.Ã, This appeal involves a challenge to the judgment of the District Judge in ARBP No.21/2015 thereby confirming the First Partial Award by the

learned Arbitrator in Arbitration Case No.DAC/665(D)/12-14, thereby rejecting the objection by the respondent therein to dismiss the arbitration

proceeding on the ground of limitation.

2. The appellant is a Co-operative society limited under the provision of Multi State Co-operative Societies Act. Appellant is engaged in manufacture

of different type of chemical fertilizer and having its factory at Musadia, Paradeep in the District of Jagatsinghpur.

For arising of a dispute between the appellant and the respondent on supply of Defoamer, an arbitration proceeding was initiated before the learned

Arbitrator Mr. Justice Deepak Verma (Retd.) registered as Arbitration Case No.DAC/665(D)/12-14. In the Arbitration proceeding, the Arbitrator

framed the following issues:

Ã¢â‚¬Å“1. Whether claimant is entitled for the amounts as prayed for in Prayers Clause A to E in the Statement of Claim in the light of Agreement/Purchase Orders

entered into between the parties?

2. Whether the claim of the Claimant is barred by limitation?

3. Whether each Purchase order would constitute a separate contract and in one arbitration claim all the seven Purchase orders could be clubbed together?

4. Whether C Forms of Sales Tax could be construed as an acknowledgement of debt or liability?

5. Cost and Relief.Ã¢â‚¬â€‹

3. For involvement of number of litigations involving the dispute at hand to this Court as well as to the HonÃ¢â‚¬â„¢ble Apex Court, this Court likes to

bring the development through different litigation as of now which are narrated as herein below. It appears that both the parties pressed for prioritizing

decision on issue no.2 as to whether the Arbitration proceeding remain barred by limitation? The learned Arbitrator prioritized the hearing on the issue

no.2 as preliminary issue and by order dated 23.7.2015 passed the first partial award holding therein that the arbitration proceeding is not hit by

limitation. Being aggrieved by this order of the Arbitrator the appellant preferred application U/s.34 of the Arbitration and Conciliation Act, 1996 in the

Court of District Judge, Jagatsinghpur registered as ARBP No.21 of 2015. The proceeding U/s.34 of the Arbitration and Conciliation Act, 1996 was

finally dismissed by the learned District Judge, Jagatsinghpur holding that, the proceeding U/s.34 of the Act, 1996 before it is not maintainable as the

first partial award on the point of Lamination cannot be treated as an interim award.

4. Being aggrieved by the order of the learned District Judge dismissing the proceeding U/s 34 of the Act, 1996 as not maintainable, the present

appellant moved this Court U/s 37 of the Act, 1996, being registered as ARBA No.31 of 2015 and this appeal was dismissed by this Court on

30.6.2017 thereby confirming the above District JudgeÃ¢â‚¬â„¢s order. Being aggrieved by the order dated 30.6.2017 involving Arbitration Appeal No.31

of 2015 the appellant moved HonÃ¢â‚¬â„¢ble Apex Court in Special Leave Petition vide SLP(C) no.19771/17 on admission subsequently registered as

Civil Appeal No.824 of 2018. This Civil Appeal was allowed by the HonÃ¢â‚¬â„¢ble Apex Court by its judgment dated 23.01.2018 reported in 2018 SCC

Online SC 38 holding that the first partial award of the Arbitrator falls in the trap of interim award and thus can be challenged U/s.34 of the Act, 1996

and thereby issuing a consequential direction to the District Judge for deciding the proceeding U/s.34 of the Act 1996 on merit involved therein. For no

disposal of Section 34 proceeding even after direction of the HonÃ¢â‚¬â„¢ble Apex Court, present appellant filed W.P.(C) No.6352 of 2018 for issuing a

direction to the District Judge for timely disposal of the Section 34 proceeding. On 18.4.2018 this Court passed an interim order involving W.P.(C)

No.6352 of 2018 directing therein for stay of proceeding before the Arbitrator (DAC) Case no.DAC/665(D)/12-14 and at the same time also directed

the District Judge for taking a decision on the stay application at the instance of the appellant, in the meantime while fixing the case to 2.05.2018 for

final hearing but under fresh admission category.

5. Being aggrieved by the order dated 18.04.2018 in W.P.(C) No.6352 of 2018 present respondent moved the HonÃ¢â‚¬â„¢ble Apex Court in Special

Leave to Appeal (C) No.13264 of 2018. This Special Leave to Appeal (C) was taken up by the HonÃ¢â‚¬â„¢ble Apex Court on 9.07.2018 and on which

date, after hearing the respective submissions the HonÃ¢â‚¬â„¢ble Apex Court by order dated 9.07.2018 directed the District Judge to decide the

proceeding U/s.34 of the Act, 1996 involving a preliminary point within one month.

6. Based on the above direction of the HonÃ¢â‚¬â„¢ble Apex Court, the District Judge, Jagatsinghpur heard the proceeding U/s34 of the Act, 1996 ARBP

No.21/15 on merit finally and by his judgment dated 24.08.2018 was pleased to dismiss the application under Section 34 and thereby confirming the

first partial award of the learned Arbitrator dated 23.07.2015. Being aggrieved by the judgment dated 24.08.2018 in the Arbitration Petition No.21 of

2015 the present appellant preferred this Arbitration Appeal U/s.37 of the Act, 1996 bearing ARBA 47 of 2018. Entertaining the appeal this Court by

order dated 7.12.2018 while directing for notice to the respondent also directed for stay of further proceeding involving Arbitration Case

No.DAC/665(D)/12-14. In the meantime, involving SLP(C) No.13264 of 2018 by order dated 18. 02.2019 the HonÃ¢â‚¬â„¢ble Apex Court while directing

for disposal of the proceeding U/s 37 of the Act, 1996 on merit at earliest and preferably within a period of four weeks from the date of order,

directed this Court for time bound disposal of the ARBA No.47 of 2018.

7. Coming to the facts involving the Arbitration proceeding, it reveals that the appellant-company being engaged in production and marketing of

fertilizer with one of its unit located at Paradeep for production of phosphoric acid and respondent being a manufacturer of a range of Defoamers,

with an intention of purchasing Defoamers the appellant company floated a tender enquiry. Pursuant to which, various suppliers including the

respondent participated in the tendering process and submitted their sample of Defoamers for trial inspection. Following clause 8 in the tender inquiry,

it was made clear that the order for required quantity of the Defoamer will be placed on the vendors whose trial run operation is found successful for

the lowest quantity of the Defoamer consumed per tonne of P2O5 produced and as per the clause no.9 it was again clarified that monthly progressive

payment were to be released on the quantity of P2O5 produced and the lowest cost of the Defoamer per tonne of P2O5 achieved during the trial run.

Respondent having understood the conditions therein along with others submitted its bid. It further reveals that during the trial run of production of

P2O5 consumption of Defoamer applied by the respondent was found to be lowest i.e.2.59Kg. for each metric tonne of P2O5. It was thus agreed

between the parties that the respondent to the supply of Defoamer on the payment in terms of Rs.217.76/- per tonne P2O5 produced irrespective of

consumption of Defoamer /actual quantity of Defoamer received by the IFFCO. The appellant for the purpose of trial has issued a purchase order on

23.08.2006 on cost/supply basis and the price of the same was also duly paid. After the trial run, the appellant issued a letter of intent dated 2.11.2006

for 800 metric tonne of Defoamer on the existing rate i.e. Rs.217.76 per tonne of P2O5 produced irrespective of consumption of defoamer/actual

quantity of defoamer received. The letter of intent issued on 2.11.2006 further reveals that on issuance of the letter of intent the respondent was to

immediately commence the supply of Defoamer. On commencement of the item in terms of the letter of intent the appellant therein regularized letter

of intent by issuing a purchase order on 24.01.2007. It is claimed that as per the clause 4 of the letter of intent dated 2.11.2006 the duration/validity of

the contract was for a period of one year or consumption of 800 metric tonne of Defoamer whichever was earlier. It is also claimed that the purchase

order even indicated that the consumption of 800 metric tonne of Defoamer was intended to be achieved for production of 3,08,880 metric tonne of

P2O5, based on the standard set during the trial run. It also further claimed that as per the agreement by the parties the payments were to be released

on the basis of production of P2O5 irrespective of consumption of Defoamer or supplied by the claimant the respondent herein. The appellant claimed

that the respondent had supplied 800 metric tonne of Defoamer by 11.04.2007 but however, they could not achieve the targeted production of 3,08,880

metric tonne of P2O5 in terms of the subject letter of intent / purchase order. It is, at this point of time, the respondent approached the appellant and

requested it to allow supply further. It had the further commitment in the same terms and conditions as in the previous letter of intent or purchase

order. The pleadings further reveal that the respondent had been raising bills on a payment request term on the basis of production of P2O5 in every

month. The appellant claimed that since the respondent could not achieve the targeted production on or before one year i.e. on or before 1.11.2007

and it is, in the meanwhile, final payment, as agreed payment terms was made qua the letter of intent/purchase order dated 7.11.2007. It is further

contended that the respondent remained silent for long period and after a delay of 1307 days on 6.06.2011 appearing at page 116 of the Appeal

memorandum issued a legal notice to the appellants demanding payment of alleged outstanding amounting of Rs.6,35,74,245/- due under the letter of

intent dated 2.11.2006 to be paid within 8 days from the date of notice with further intimation that on failure of clearing the payment respondent would

resort to arbitration. The appellant, under the premises of a stale claim by the respondent, made a correspondence to the respondent on 29.07.2012

stating therein that no amount was due and payable besides also contended that the claim is even otherwise barred by limitation and afterthought.

Finding a negative response from the appellant, the respondent by notice dated 1.10.2014 intimated its intention of opting Arbitration involving the

unresolved dispute through the Arbitrator. Consequently, the respondent resorting to an arbitration proceeding submitted a claim statement on

9.12.2014 before the learned Arbitrator to arbitrate the dispute between the parties.

Considering the invocation of arbitration clause an arbitral tribunal was formulated with Justice Deepak Verma (Retd.) to act as the sole arbitrator and

the proceeding was conducted under the aegis of Delhi International Arbitration Center (DIAC), High Court of Delhi. The appellant appearing therein

while submitting written submission contended that the claim before the Arbitrator is grossly barred by limitation and the appellant, therefore,

convinced the arbitrator to take up the issue relating to limitation as a preliminary issue on reiteration of its ground stated in the communication dated

29.07.2012. Apart from the above the appellant taking resort to the provision U/s.21 & 43 of the Arbitration and Conciliation Act, 1996 contended that

the claim submitted by the respondent was grossly barred by limitation. The claim of the appellant that the claim statement is grossly barred by time

was seriously contested by the respondent-claimant disclosing therein that there has been regular discussion between the parties and ultimately, a

denial of the claim of the respondent was made by the appellant on 29.07.2012 indicating that there is no due payable and also denying the claim on

the premises that the claim was grossly barred by limitation. Further for the provision at Section 21 of the Act, 1996 date of receipt of notice of

respondent showing its interest for invoking the Arbitration based on communication dated 1.10.2014 should be the starting point of limitation.

8. Considering the rival contentions of the parties, learned Arbitrator by the first partial award dated 23.07.2015 declined the claim of the appellant on

the premises of claim being barred by limitation and directed the parties to appear before the Tribunal on 23.07.2015 to decide the future course of

action and to assist for determination on the other points involved in the arbitration proceeding. Resulting the appellant initiated a proceeding U/s.34 of

the Arbitration and Conciliation Act, before the District Judge, Jagatsinghpur being registered as the Arbitration Petition No.21 of 2015 arising out of

Arbitration Case No.DAC/665(D)/12-14. Even though there was some obstruction created in the proceedings of the District Judge, Jagatsinghpur

involving the above petition by the present appellant but ultimately the arbitration petition was taken up for final adjudication on the direction of the

HonÃ¢â‚¬â„¢ble Apex Court vide order dated 9.07.2018 in SLP(C) No.13264 of 2018. The District Judge, Jagatsinghpur upon hearing the contesting

parties by the judgment dated 24.08.2018 (Annexure-2) while dismissing the arbitration proceeding confirmed the order of the learned Arbitrator on

the question of limitation.

9. Shri Ashok Kumar Parija, learned Senior Advocate appearing on behalf of the appellant on reiteration of the ground taken before the learned

Arbitrator and the learned District Judge, Jagatsinghpur, taking this Court to the provision at Sections 21 & 43 of the Arbitration and Conciliation Act,

1996 contended that for the clear provision in Section 21, the Arbitral proceeding in respect of the particular dispute commenced. When the dispute to

be referred to arbitration is received by the respondent therein and for the provision in Section 43 of the Act, 1996 dealing with limitation, Shri Parija,

learned Senior Advocate again contended that the arbitration shall be deemed to have been commenced on the date as referred in Section 21. On the

premises that the claimant-respondent herein remained silent for several years and ultimately made a claim to the appellant on 6.06.2011 since

admittedly after 3 years, 6 months and 30 days from the date of completion of the contract on 1.11.2007, Shri Parija, learned Senior Advocate justified

his claim that the arbitration proceeding was grossly barred by time and as such contended that mere response of the appellant herein to the

respondent herein on 29.07.2012 denying the claim or the intimation of respondent pressing for Arbitration of the dispute in 2014 could not have given

rise to an arbitration proceeding and Shri Parija, thus contended that there is no proper consideration of the limitation issue by the sole arbitrator.

10. Further, taking this Court to the challenge to the judgment of the learned District Judge, Shri Parija, learned Senior Advocate placing the grounds

raised in the proceeding U/s 34 particularly the question summarized in paragraph no.4 of the judgment impugned, limited his argument involving the

appeal involving the challenge to the impugned judgment questioning the decision of the impugned judgment in absence of an answer to the question

raised by the appellant in the Section 34 proceeding. Shri Parija, learned Senior Advocate further referring to some of the correspondences including

proof of payment on particular dates from the materials available on record submitted that the claim of the claimant remain grossly time barred.

Shri Parija, learned Senior Advocate further submitted that for not attending to the questions raised by the appellant in the Section 34 proceeding as

enumerated in paragraph no.4 of the impugned judgment, the impugned judgment becomes bad and claimed that in the interest of justice, the matter

should be remitted back to the District Judge, Jagatsinghpur for disposing the proceeding U/s.34 of the Act, 1996 after attending to the questions taken

note of in paragraph no.4 of the impugned judgment.

11. Shri Ashok Kumar Parija, learned Senior Advocate appearing on behalf of the appellant taking this Court to the developments through

correspondences on 2nd November, 2006, 24. 1.2007, the letter of intent and the purchase order condition between the parties at page-111 of the

Appeal Memorandum, the notice dated 6.6.2011, the purchase order dated 23.8.2006, response of the appellant dated 27.9.2012, a notice for response

dated 1.10.2014 contended that mere correspondence after long gap cannot give rise a cause of action.

12. In the first phase of the argument involving the Arbitration Appeal No.47 of 2018 Shri Nilamadhaba Bisoi, learned counsel for the respondent

taking this Court to the stand of the respondent in the claim before the learned Arbitrator and more particularly reading the claim on the question of

limitation and cause of action contended that for the detail plea substantiating the plea on the question of limitation through the materials available on

record, learned Arbitrator on appreciation through the materials available on record has come to the correct findings holding that the claim is not

barred by limitation. Shri Bisoi, learned counsel further, also taking this Court to the decision referred to before the learned Arbitrator and the District

Judge, Jagatsinghpur and taken note of by both the learned Arbitrator as well as the learned District Judge submitted that the decision of both the

learned Arbitrator as well as the District Judge having support through the materials available on record as well as the law of land, both the orders of

the learned Arbitral Tribunal as well as the judgment impugned herein are legally sustainable.

13. In the second phase of argument Shri S.D. Das, learned Senior Advocate being assisted by Shri Nilamadhab Bisoi, learned counsel for the

claimant/respondent on the question raised by Shri Ashok Kumar Parija, learned Senior Advocate as to the sustainability of the impugned judgment for

not answering on the question raised by the appellant and taken note of by the learned District judge, Jagatsinghpur in paragraph no.4 of the impugned

judgment, Shri S.D. Das, learned Senior Advocate taking this Court to the discussions of the learned District Judge more particularly referring

paragraph nos.11 & 12 of the impugned judgment submitted that the District Judge has clearly answered the questions referred to hereinabove being

raised by the appellant. Shri Das, learned Senior Advocate again also taking this Court to the provision at Section 21 & 43 of the Act, 1996 contended

that the judgment impugned are also otherwise perfect having not only support of the materials available on record but also the support of the law of

the land. Shri Das, learned Senior Advocate taking this Court to the following judgments attempted to justify the impugned order:

In the case of Oil & Natural Gas Corporation Ltd. versus SAW Pipes Ltd. as reported in AIR 2003 SC 2629 : (2003) 5 SCC 705, in the case of

Associate Builders Versus Delhi Development Authority as reported in (2015) 3 SCC 49, in the case of Sutlej Construction Limited Versus Union

Territory of Chandigarh as reported in 2018 (4) ARb.LR210(SC), in the case of Gunwantbhai Mulchand Shah and others Versus Anton Elis Farel and

Ors. as reported in 2006 AIR SCW 1377: (2006) 3 SCC 634, in the case of Ahmadsahab Abdul Mulla (2) (Dead) versus Bibijan and others as

reported in (2009) 5 SCC 462, in the case of Chittaranjan Maity versus Union of India as reported in 2017 (6) Arb.LR41 (SC), in the case of AEZ

Infratech Pvt. Ltd. versus Vibha Goel and anr. as reported in 2017(5)Arb. LR210(Delhi), in the case of Milkfood Ltd. versus GMC Ice Cream (P)

Ltd. as reported in (2004)7 SCC 288 and in the case of Maharashtra State Electricity Distribution Company Ltd. versus Datar Switchgear ltd. & Ors.

as reported in 2018(1) Arb.LR 236 (SC).

14. Considering the rival contentions of the parties, this Court finds, this case involves determination of the following two issues :-

I) Whether the first partial award of the learned Arbitrator holding that the claim is not barred by limitation and the consequential judgment of the learned District

Judge in Arbitration petition No.21/2015 are sustainable ?

II) Whether the learned District Judge has answered the ground of challenge being raised by the appellant and as taken note by the learned District Judge in

paragraph-4 of the impugned judgment?

15. Learned Arbitrator on the basis of pleading of respective parties formed the following issues for determination involving the arbitration proceeding (Page-86):

Ã¢â‚¬Å“1. Whether claimant is entitled for the amounts as prayed for in Prayers Clause A to E in the Statement of Claim in the light of Agreement/Purchase Orders entered

into between the parties?

2. Whether the claim of the Claimant is barred by limitation?

3. Whether each Purchase order would constitute a separate contract and in one arbitration claim all the seven Purchase orders could be clubbed together?

4. Whether C Forms of Sales Tax could be construed as an acknowledgement of debt or liability?

5. Cost and Relief.Ã¢â‚¬â€‹

Considering the joint request for taking the issue no.2 indicated herein as preliminary issue, the learned Arbitrator took up the said issue. This Court

finds the learned Arbitrator taking into account the submission of respective parties, particularly on issueÃ, no.2Ã, theÃ, informationÃ, availableÃ,

throughÃ, theÃ, materials produced by the respective parties, further taking into account the provisions at Sections-21 & 43 of the Act, 1996 and the

citations shown by the respective parties, vide detailed discussion in paragraphs-39 to 45 observed that the claim of the claimant/respondent was not

time barred. The learned District Judge in Appeal on consideration of the rival contentions in paragraph-12 of the impugned judgment observed as

follows :-

Ã¢â‚¬Å“12. Now going through the award of the learned Arbitrator, it is found that the facts of the case, evidence led by the parties have been discussed and basing on

the material on record, the learned Arbitrator held that the claim of the claimant has not become time barred and this issue of time barred in favour of the claimant and

against the respondent.Ã¢â‚¬â€‹

In para-13 the learned District Judge taking into account a decision of HonÃ¢â‚¬â„¢ble Supreme Court in the case of Oil & Natural Gas Corporation ltd.

Vrs. Saw Pipe Ltd. reported in AIR 2003 SC 2629, observed for the limited scope with the learned District Judge involving proceeding U/s.34 of the

Act, 1996, there is no scope with it to interfere in the first partial award, thus declined to interfere in the partial award.

16. Before proceeding to answer on issue no.I framed herein, this Court wants to take note of the provisions at Section-21 and Section-43 of the

Arbitration and Conciliation Act, 1996, which are re-produced as herein below :-

Ã¢â‚¬Å“21.Commencement of arbitral proceedings- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the

date on which a request for that dispute to be referred to arbitration is received by the respondent.

43. Limitations. Ã¢â‚¬" (1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to

commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of opinion that in

the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the

justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be

excluded in computing the time prescribed by the Limitation Act, 1963 (3 6 of 1963), for the commencement of the proceedings (including arbitration) with respect to

the dispute so submitted.Ã¢â‚¬â€‹

While Section-21 of the Act, 1996 makes it clear that arbitral proceeding in respect of a particular dispute commence on the date on which a request

for the dispute to be referred to arbitration is received by the respondent. Section-43 of the Act while ensuring application of provision of Limitation

Act, 1963 to arbitration proceeding as it applies to courts also provide under Sub-Section (2), that for purpose of this Section and Limitation Act an

arbitration shall be deemed to have commenced on the date referred to Section-21.

17. Now coming to factual aspect involving the claim of the respondent, this Court finds, it involves the following chronology of events:-

Respondent-claimant being a manufacturer and seller of Defoamer selected for supply of 800 MT of Defoamer for a total value of Rs.6,72,60,880/-.

Letter of intent was issued on 2. 11.2016, which followed with a purchase order on 24.1.2007 with specific supply of 800 MT of Defoamer, total value

is Rs.6,72,60,880/-. There appears, there were another six purchase orders with similar quantities. They were all clubbed together in seven purchase

orders and in terms of minutes of meeting dated 6. 6.2007 entered into between the parties. Claimant made a total sale of 1911 MT of Defoamer

worth Rs.15,35,82,483/-, against which the present appellant-Company issued Ã¢â‚¬Ëœ Form worth Rs.15,27,17,124/- for corresponding 1900 MT

against which the claimant/respondent herein has already received till the date of claim petition, a total sum of Rs.9,00,08,238. In the meantime the

claimant made a correspondence on 7.5.2007. Then again another correspondence dated 5.6.2007 agreeing therein to supply Defoamer till the

proposed cycle of 308880 MT production of P2O5 gets over. It further reveals, the claimant has made a total supply of 911 MT shows worth

Rs.15,35,82,483/- as on 26.11.2007. It further reveals that in the meeting between the parties on 6.6.2007 it was discussed and agreed that the

claimant has completed supply of 800 MT Defoamer by 11.4.2007, but since the production of P2O5 was at lower side, the claimant had to supply

Defoamer till expiry of the contract period of one year or completion of production of 3.08.880 MT of P2O5 at agreed rate, terms and conditions

whichever is earlier. It is also borne from the record that the claimantÃ¢â‚¬â„¢s last sale was under bill no.07-0743 dated 26.11.2007. The materials and

the pleading available on record further go to show that there were interactions in between the parties between November, 2007 till 6.6.2011 when the

claimant issued a legal notice through its Advocate demanding its dues from the respondent. It also appears, for the denial of the present appellant to

the demand under correspondence of the claimant, vide letter dated 6.6.2011 till 27.9.2012 when the present appellant declined the request of the

respondent-claimant the issue on claim was kept alive. From the statement of claim, this Court on the claim of cause of action finds, the claimant-

respondent has the following pleading.

Ã¢â‚¬Å“25.The claimant says that even then the parties continued to have interactions and finally the Claimant by its Statement 2 dated 21.2.2014 re-submitted/re-

explained its stand in general & stand on above said letter dated 27.9.12. The said Statement is self-explanatory and is filed herewith as a matter of record (Annexure-

P).

29. The claimant specifically seeks the correct interpretation of the terms and conditions mentioned in the P.O. dated 24.1.2007 at Anne Ã¢â‚¬Å“EÃ¢â‚¬ which is applicable to

all other 6 purchase orders. The claimant be allowed to lead evidence and argue on this point of interpretation which will fix responsibility of the respondent to make

good the legitimate dues of this claimant + interest thereon till realization.

31. (d) The cause of action then continued to occur till 27.9.2012 when the technical director of the respondent through his even dated letter first expressed that the

payment may not be made on technical grounds.

(e) The cause of action thereafter continued till the claimant was asked to issue statement no.1 dated nil and statement no.2 dated 21.2.2014 during which period of

about 2 years, the issue continued to get addressed from all angles from both sides.

(f) The cause of action then arose when the claimant finally issued a notice dated 1.10.2014 calling for arbitration and it continued till filling of this claim before this

HonÃ¢â‚¬â„¢ble Authority.Ã¢â‚¬â€‹

18. Above clear statement of the claimant/respondent leaves no doubt that the parties remain engaged in the matter of payment till 27.9.2012 and

subsequent also till 21.2.2014 when the claimant was asked to submit further materials. Lastly on 1. 10.2014 when the claimant-respondent herein

served the notice opting for Arbitration. Thus, it appears, the date of notice pressing for arbitration is the date for the purpose of limitation continued

even beyond 1.10.2014. Ultimately the claimant was constrained to give a notice dated 1.10.2014 showing its ultimate intimation to go for arbitration of

the dispute between the parties. It is strange to note here that there is no contradiction to the claim of the claimant-respondent in paragraphs-25, 29 &

31(d)(e)(f) so also to the above developments, on the other hand, there is a casual reply by the appellant herein in its response to the claim application.

Looking to the provisions contained in Section-21 and Section-43(2) of the Act, 1996 on conjoint reading of the provision at Section-21 & Section-

43(2) goes to make it clear that the arbitration commences on the date, on which a request for the dispute to be referred to arbitration is received by

the respondent. There is no denial to the fact that the claimant vide notice dated 6.6.2011 made the claim for payment of balance sale price with

interest as indicated therein, rather such claim was denied by the present appellant by its correspondence dated 27.9.2012 and finally the claimant-

respondent issued a notice to opt for arbitration on 1.10.2014 and there appears no material in denial of any such notice by the appellant herein.

Therefore, looking to the legal provision indicated herein above, this Court finds, even though there is no material/pleading as to when the notice dated

1.10.2014 by the claimant was received by the present appellant and further this Court not finding any dispute by the appellant on issuance of such

notice, this Court finds, in the worse the cause of action in raising the arbitration proceeding at the minimum becomes 1.10.2014.

This Court here going through the decision of the HonÃ¢â‚¬â„¢ble apex Court in the case of Major (Retd.) Inder Singh Rekhi vrs. Delhi Development

Authority reported in (1988) 2 SCC 338 from paragraph-4 finds as follows :-

Ã¢â‚¬Å“4. Therefore, in order to be entitled to order of reference under Section 20, it is necessary that there should be an arbitration agreement and secondly, difference

must arise to which this agreement applied. In this case, there is no dispute that there was an arbitration agreement. There has been an assertion of claim by the

appellant and silence as well as refusal in respect of the same by respondent. Therefore, a dispute has arisen regarding non-payment of the alleged dues of the

appellant. The question is for the present case when did such dispute arise. The High Court proceeded on the basis that the work was completed in 1980 and,

therefore, the appellant became entitled to the payment from that date and the cause of action under Article 137 arose from that date. But in order to be entitled to ask

for a reference under Section 20 of the Act there must not only be an entitlement to money but there must be a difference or dispute must arise. It is true that on

completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and

when the assertion of the claim was made on 28th February, 1983 and there was non-payment, the cause of action arose from that date, that is to say, 28th of

February, 1983. It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been

finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim.

The existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Act. See Law of Arbitration by R.S.

Bachawat, 1st Edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever

grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion in denying, not

merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the

case.Ã¢â‚¬â€‹

This case has clear support to the case of the claimant/respondent and supports the first partial award of the learned Arbitrator.

Similarly in the case of State of Orissa & another vrs. Damodar Das reported in (1996) 2 SCC 216, HonÃ¢â‚¬â„¢ble apex Court in paragraphs-5 & 6 has

the following discussions :-

Ã¢â‚¬Å“5. Russell on Arbitration by Anthony Walton (19th Edition) at page 4-5 states that the period of limitation for commencing an arbitration runs from the date on

which the ""cause of arbitration"" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration

take place upon the dispute concerned. The period of limitation for the commencement of the arbitration runs from, the date on which, had there been no arbitration

clause, the cause of action would have accrued:

Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so

in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued"".

Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred until an award is made time still

runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.

6. In Law of Arbitration by Justice Bachawat at page- 549, commenting on Section 37, it is stated that subject to the Limitation Act, 1963, every arbitration must be

commenced within the prescribed period. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date.

when the cause of action accrues, so in the case of arbitrations the claim is not to be put forward after the expiration of"" a specified number of years from the date

when the claim accrues. For the purpose of Section 37(1) 'action' and 'cause of arbitration' should be construed as arbitration and cause of arbitration. The cause of

arbitration arises when the claimant becomes entitled to raise the question, that is, when the claimant acquires the right to require arbitration. An application under

Section 20 is governed by Article 137 of the schedule to the Limitation Act, 1963 and must be made within 3 years from the date when the right to apply first accrues.

There is no right to apply until there is a clear and unequivocal denial of that right by the respondent. It must, therefore, be clear that the claim for arbitration must be

raised as soon as the cause for arbitration arises as in the case of cause of action arisen in a civil action.Ã¢â‚¬â€‹

In the circumstance and for the rulings of the HonÃ¢â‚¬â„¢ble apex Court as narrated herein above, this Court finds, there is no infirmityÃ, inÃ, theÃ,

orderÃ, passedÃ, byÃ, theÃ, learnedÃ, ArbitratorÃ, on 23.7.2015 involving the first partial award. The learned District Judge having decided the

matter in approval of the findings of the learned Arbitrator for the reason assigned herein Ã, above, this Court also observes, there is no infirmity in the

order of the learned District Judge involving Arbitration Proceeding No.21/2015. Issue No.1 framed by this Court is answered accordingly.

19. It is at this stage, this Court takes into account some of the decisions relevant for the purpose, more particularly looking to the restrictions imposed

on the authority deciding the matters under Section 34 of the Act, 1996. In the case of Oil & Natural Gas Corporation Ltd. vrs. SAW Pipes Ltd.

reported in AIR 2003 SC 2629, the HonÃ¢â‚¬â„¢ble apex Court in paragraph-31 has observed as follows :-

Ã¢â‚¬Å“31. Therefore, in our view, the phrase Ã¢â‚¬Ëœpublic policy of IndiaÃ¢â‚¬â„¢ used in S.34 in context is required to be given a wider meaning. It can be sated that the

concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be

injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it patently in violation of statutory

provision cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in

addition to narrower meaning given to the term public policy in RenusagarÃ¢â‚¬â„¢s case (supra), it is required to be held that the award could be set aside if it is patently

illegal. Result would be-award could be set aside if it is contrary to :-

(a) Fundamental policy of Indian law ; or

(b) The interest of India ; or

(c) Justice or morality, or

(d) In additional, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set

aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.Ã¢â‚¬â€‹

In the case of Associate Builders vrs. Delhi Development Authority reported in (2015) 3 SCC 49, the HonÃ¢â‚¬â„¢ble apex Court in paragraphs-15, 16 &

17 has observed as follows :-

Ã¢â‚¬Å“15. This section in conjunction with Section 5 makes it clear that an arbitration award that is governed by Part I of the Arbitration and Conciliation Act, 1996 can

be set aside only on grounds mentioned under Section 34(2) and (3), and not otherwise. Section 5 reads as follows :

5. Extent of judicial intervention-Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial

authority shall intervene except where so provided in this part.

16. It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and

capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of

its jurisdiction; and to minimize the supervisory roles of courts in the arbitral process.

17. It will be seen that none of the grounds contained in sub-section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only

when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified

circumstances.Ã¢â‚¬â€‹

In the case of Sutlej Construction Ltd. vrs. Union Territory of Chandigarh reported in 2018 (4) Arb. LR 210 (SC) the HonÃ¢â‚¬â„¢ble apex Court in

paragraph-10 has observed as follows :-

Ã¢â‚¬Å“10. We are not in agreement with the approach adopted by the learned single Judge. The dispute in question had resulted in a reasoned award. It is not as if the

arbitrator has not appreciated the evidence. The arbitrator has taken a plausible view and, an in our view, as per us the correct view, that the very nature of job to be

performed would imply that there has to be an area for unloading and that too in the vicinity of 5 kilometres as that is all that the appellant was to be paid for. The

route was also determined. In such a situation to say that the respondent owed no obligation to make available the site cannot be accepted by any stretch of

imagination. The unpreparedness of the respondent is also apparent from the fact that even post termination it took couple of years for the work to be carried out,

which was meant to be completed within 45 days. The ability of the appellant to comply with its obligations were inter dependent on the respondent meeting its

obligations in time to facilitate appropriate areas for unloading of the earth and for its compacting. At least it is certainly a plausible view.Ã¢â‚¬â€‹

In the case of Aez Infratech Pvt. Ltd. vrs. Vibha Goel & another reported in 2017(5) Arb.LR 210 (Delhi), in paragraphs-10 & 26, the Delhi High

Court observed as follows :-

Ã¢â‚¬Å“10. I may now deal with the submissions of learned counsel for the petitioner. The first plea raised is that the agreement dated 9.9.2009 is actually an agreement for

the purpose of offering a security to the respondents. It has been urged that this plea was not taken in the reply to the claim petition but an amendment was sought

to the reply by filing an appropriate application which the learned Arbitrator had wrongly declined. A perusal of the Award would show that the learned Arbitrator

has dealt with the said contention of the petitioner. Hence, even though the application for amendment of the reply was dismissed, the award deals with the said

contentions of the petitioner. There is hence no merit in the contention of the petitioner that the amendment sought to the reply was wrongly dismissed by the

learned Arbitrator.

26. Hence, there is no merit in the contentions of the petitioner. The Award is a plausible award based on the facts placed on record. There are no reasons to interfere

in the Award. The petition is accordingly dismissed. All pending applications, if any, also stand disposed of.Ã¢â‚¬â€‹

Though the case involved here was under the provision of 1940 Act, yet in paragraphs-24, 26, 27, 45, 46, 49, 66 & 86, the HonÃ¢â‚¬â„¢ble apex Court in

the case of Milkfood Ltd. vrs. GMC Ice Cream (P) Ltd. reported in (2004) 7 SCC 288 observed as follows :-

Ã¢â‚¬Å“24. We may notice that Section 14 of the English Arbitration Act 1996 deals with commencement of arbitral proceedings. Sub-section (1) of Section 14 provides

that the parties are free to agree when arbitral proceedings are to be regarded as commenced for the purpose of this Part and for the purposes of the Limitation Act.

Section 14(3) provides that in the absence of such agreement, the provisions contained in sub-sections (3) to (5) shall apply. Both the 1940 Act and the English

Arbitration Act place emphasis on service of the notice by one party on the other party or parties requiring him or them to submit the matter to arbitration rather than

receipt of the request by the respondent from the claimant to refer the dispute to arbitration. Commencement of an arbitration proceedings for certain purposes is of

significance. Arbitration proceedings under the 1940 Act may be initiated with the intervention of the court or without its intervention. When arbitration proceeding

is initiated without intervention of a Court, Chapter II thereof would apply. When there exists an arbitration agreement the resolution of disputes and differences

between the parties are to be made in terms thereof. For the purpose of invocation of the arbitration agreement, a party thereto subject to the provisions of the

arbitration agreement may appoint an arbitrator or request the noticee to appoint an arbitrator in terms thereof. In the event, an arbitrator is appointed by a party,

which is not opposed by the other side, the arbitrator may enter into the reference and proceed to resolve the disputes and differences between the parties. However,

when despite http://JUDIS.NIC.IN SUPREME COURT OF INDIA Page 8 of 32 service of notice, as envisaged in sub-section (1) of Section 8 of the 1940 Act, the

appointment is not made within fifteen clear days after service of notice, the Court may, on the application of the party who gave the notice and after giving the other

parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be. By reason of sub-section (2) of Section 8 of the 1940 Act, a

legal fiction has been introduced to the effect that such an appointment by the court shall be treated to be an appointment made by consent of all parties. Section 8,

therefore, implies that where an appointment is not made with the intervention of the court but with the consent of the parties, the initiation of the arbitration

proceeding would begin from the service of notice. Section 37 of the 1940 Act provides that all the provisions of the Indian Limitation Act, 1908 shall apply to

arbitrations and for the purpose of the said section as also 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 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.

26. The commencement of an arbitration proceeding for the purpose of applicability of the provisions of the Indian Limitation Act is of great significance. Even

Section 43(1) of the 1996 Act provides that the Limitation Act, 1963 shall apply to the arbitration as it applies to proceedings in court. Sub-section (2) thereof provides

that for the purpose of the said section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in section 21.

27. Article 21 of the Model Law which was modelled on Article 3 of the UNCITRAL Arbitration Rules had been adopted for the purpose of drafting Section 21 of the

1996 Act. Section 3 of the 1996 Act provides for as to when a request can be said to have been received by the respondent. Thus, whether for the purpose of

applying the provisions of Chapter II of the 1940 Act or for the purpose of Section 21 of the 1996 Act, what is necessary is to issue/serve a request/notice to the

respondent indicating that the claimant seeks arbitration of the dispute.

45.Ã¢â‚¬Commencement of an arbitration proceedingÃ¢â‚¬ and Ã¢â‚¬Å“commencement of a proceeding before an arbitratorÃ¢â‚¬ are two different expressions and carry different

meanings.

46. A notice of arbitration or the commencement of an arbitration may not bear the same meaning, as different dates may be specified for commencement of arbitration

for different purposes. What matters is the context in which the expressions are used. A notice of arbitration is the first essential step towards the making of a default

appointment in terms of Chapter II of the Arbitration Act, 1940. Although at that point of time, no person or group of persons was charged with any authority to

determine the matters in dispute, it may not be necessary for us to consider the practical sense of the term as the said expression has been used for a certain purpose

including the purpose of following statutory procedures required therefor. If the provisions of the 1940 Act apply, the procedure for appointment of an arbitrator

would be different than the procedure required to be followed under the 1996 Act. Having regard to the provisions contained in Section 21 of the 1996 Act as also the

common-parlance meaning given to the expression Ã¢â‚¬Å“commencement of an arbitrationÃ¢â‚¬ which, admittedly, for certain purpose starts with a notice of arbitration, is

required to be interpreted which would be determinative as regards the procedure under te one Act or the other required to be followed. It is only in that limited sense

the expression Ã¢â‚¬Å“commencement of an arbitrationÃ¢â‚¬â€‹ qua Ã¢â‚¬Å“a notice of arbitrationÃ¢â‚¬â€‹ assumes significance.

49. Section 21 of the 1996 Act, as noticed hereinbefore, provides as to when the arbitral proceedings would be deemed to have commenced. Section 21 although may

be construed to be laying down a provision for the purpose of the said Act but the same must be given its full effect having regard to the fact that the repeal and

saving clause is also contained therein. Section 21 of the Act must, therefore, be construed having regard to Section 85(2)(a) of the 1996 Act. Once it is so construed,

indisputably the service of notice and/or issuance of request for appointment of an arbitrator in terms of the arbitration agreement must be held to be determinative of

the commencement of the arbitral proceeding.

66. Commencement of arbitration proceeding for the purpose of limitation or otherwise is of great significance. If a proceeding commences, the same becomes relevant

for many purposes including that of limitation. When Parliament enacted the 1940 Act, it was not in its contemplation that 46 years later it would re-enact the same.

The court, therefore, while taking recourse to the interpretative process must notice the scheme of the legislations concerned for the purpose of finding out the

purport of the expression Ã¢â‚¬Å“commencement of arbitration proceedingÃ¢â‚¬. In terms of Section 37 of the 1940 Act, law of limitation will be applicable to arbitrators as it

applies to proceedings in court. For the purpose of invoking the doctrine of lis pendens, Section 14 of the Limitation Act, 1963 and for other purposes presentation of

plaint would be the date when a legal proceeding starts. So far as the arbitral proceeding is concerned, service of notice in terms of Chapter II of the 1940 Act shall set

the ball in motion whereafter only the arbitration proceeding commences. Such commencement of arbitration proceeding although in terms of Section 37 of the Act is

for the purpose of limitation but it in effect and substance will also be the purpose for determining as to whether the 1940 Act or the 1996 Act would apply. It is

relevant to note that it is not mandatory to approach the court for appointment of an arbitrator in terms of sub-section (2) of Section 8 of the 1940 Act. If the other

party thereto does not concur to the arbitrator already appointed or nominates his own arbitrator in a given case, it is legally permissible for the arbitrator so

nominated by one party to proceed with the reference and make an award in accordance with law. However, in terms of sub-section (2) of Section 8 only a legal fiction

has been created in terms whereof an arbitrator appointed by the court shall be deemed to have been nominated by both the parties to the arbitration proceedings.

86. It is one thing to say that the parties agree to take recourse to the procedure of the 1996 Act relying on or on the basis of tenor of the agreement as regards

applicability of the statutory modification of re-enactment of the 1940 Act but it is another thing to say, as has been held by the High Court, that the same by itself is

a pointer to the fact that the appellant had agreed thereto. If the arbitral proceedings commenced for the purpose of the applicability of the 1940 Act in September

1995, the question of adopting a different procedure laid down under the 1996 Act would not arise.Ã¢â‚¬â€‹

In the case of Maharashtra State Electricity Distribution Company Ltd. vrs. Datar Switchgear Ltd. & others reported in 2018(1) Arb.LR 236 (SC),

the HonÃ¢â‚¬â„¢ble apex Court in paragraph-43 has observed as follows :-

Ã¢â‚¬Å“43. Categorical findings are arrived at by the Arbitral Tribunal to the effect that insofar as respondent No.2 is concerned, it was always ready and willing to

perform its contractual obligations, but was prevented by the appellant from such performance. Another specific finding which is returned by the Arbitral Tribunal is

that the appellant had not given the list of locations and, therefore, its submission that respondent No.2 had adequate lists of locations available but still failed to

install the contract objects was not acceptable. In fact, on this count, the Arbitral Tribunal has commented upon the working of the appellant itself and expressed its

dismay about lack of control by the Head Office of the appellant over the field offices which led to the failure of the contract. These are findings of facts which are

arrived at by the Arbitral Tribunal after appreciating the evidence and documents on record. From these findings it stands established that there is a fundamental

breach on the part of the appellant in carrying out its obligations, with no fault of respondent No.2 which had invested whooping amount of Rs.163 crores in the

project. A perusal of the award reveals that the Tribunal investigated the conduct of entire transaction between the parties pertaining to the work order, including

withholding of DTC locations, allegations and counter allegations by the parties concerning installed objects. The arbitrators did not focus on a particular breach qua

particular number of objects/class of objects. Respondent No.2 is right in its submission that the fundamental breach, by its very nature, pervades the entire contract

and once acted committed, the contract as a whole stands abrogated. It is on the aforesaid basis that the Arbitral Tribunal has come to the conclusion that the

termination of contract by respondent No.2 was in order and valid. The proposition of law that the Arbitral Tribunal is the master of evidence and the findings of fact

which are arrived at by the arbitrators on the basis of evidence on record are not to be scrutinised as if the Court was sitting in appeal now stands settled by catena

of judgments pronounced by this Court without any exception thereto.Ã¢â‚¬‹

20. Reading of aforesaid judgments, this Court finds, the power of the District Judge dealing with matter under Section 34 of the Act, 1996 is very

very restricted and as such, this Court approves the observation of the District Judge on its scope in deciding such matters. Coming to issue no.2

framed by this Court particularly on the allegation of Sri Parija, learned senior counsel that it was required for the learned District Judge to answer the

question taken note of in paragraph-4 of the impugned judgment, on Perusal of the discussions in paragraphs-11 & 12, this Court finds, the question

taken note of by the learned District in paragraph-4 of the impugned judgment has been taken care of. Thus this issue is also answered against the

appellant. For the observation of this Court on the question as to whether the claim of the respondent affected by limitation taking into account the

provision of law under Sections-21 & 43(2) of the Act, 1996 and for the plethora of decisions restricting interference in the award may be though here

involves a partial award supporting the view of the learned District Judge involving the impugned order, this Court finds, there is no infirmity in the

impugned judgment dated 28.8.2018 as well as the first partial award dated 23.7.2017 requiring interference by this Court. As a consequence the

Arbitration Appeal stands dismissed for having no substance.

21. Considering that the arbitration proceeding before the learned Arbitrator involved lot of litigations not only to the District Court but also to the High

Court so also to the HonÃ¢â‚¬â„¢ble apex Court in several forms, this Court finds, there is sufficient loss of time in resolving the main dispute involved

herein. In the process, to avoid any further loss of time, this Court directs both the parties to appear before the learned Arbitrator along with a copy of

this judgment in the week commencing 24th of March and to take the date of further proceeding involving the Arbitration Claim No.DAC/665(D) 6-12

of 2014.

Keeping in view the delay, the learned Arbitrator is also requested to conclude the arbitration proceeding pending before it within a period of four

months. Both the parties are restrained from resorting to dilly dally tactics and are directed to cooperate with the learned Arbitrator for timely disposal

of the Arbitration Case involving the other issues involved therein.

22. Ultimately, the Arbitration Appeal stands dismissed and in the circumstance, there is no order as to cost.

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