(2008) 12 DEL CK 0177

Delhi High Court

Case No: Arbitration Petition No. 210 of 2007

Prem Power Construction (Pvt.) Ltd.		APPELLANT
	Vs	
National Hydroelectric Power Corp. Ltd. and Another		RESPONDENT

Date of Decision: Dec. 11, 2008

Acts Referred:

- Arbitration Act, 1940 - Section 20
- Arbitration and Conciliation Act, 1996 - Section 11, 11(5), 11(6), 43
- Contract Act, 1872 - Section 28
- Limitation Act, 1963 - Article 137

Citation: (2008) 13 ILR Delhi 100

Hon'ble Judges: Hima Kohli, J

Bench: Single Bench

Advocate: S.K. Maniktala and Jeemon Raju K, for the Appellant; Tarkeshwar Nath, B.K. Pandey and P.K. Mishra, for the Respondent

Judgement

Hima Kohli, J.

The present petition is filed by the petitioner u/s 11(6) of the Arbitration & Conciliation Act, 1996 (in short ''the Act'') for appointment of a sole arbitrator to adjudicate the disputes and differences that have arisen between the parties. The facts of the case require to be recapitulated before proceeding to deal with the respective submissions of the counsels.

2. The respondents NHPC issued a Letter of Award dated 30.5.2000 to the petitioner in respect of procurement and construction of 132 KV S/C Transmission Line between Geylephug-Tintibi-Nanglam in Central Bhutan. The contractual date of completion of work was 25.3.2001. The actual date of completion of work was 10.6.2001. As per the petitioner, it raised its claim on the respondents, vide letter

dated 5.4.2001, claiming inter alia, amounts towards extra expenditure incurred on account of wages of labour and extraordinary exodus of labour and supervisory staff. In the meantime, the respondents claimed that they issued a Taking Over Certificate'' dated 20.5.2001 to the petitioner in terms of Clause 47 of the General Conditions of Contract (GCC) governing the parties.

3. Vide letter dated 10.9.2001, the petitioner repeated its request for payment of additional amounts. Thereafter, the petitioner issued a reminder dated 1.12.2001 to the respondents requesting for sanction and payment of its claims. This was followed by a letter dated 26.12.2001. The respondents replied to the petitioner on 31.12.2001 informing it that its claims were under examination and an appropriate decision on the matter would be communicated. On 1.3.2002, the petitioner referred to various meetings between its officers and the respondents and the written communications sent to the respondents, and requested them to arrange sanction and payment of the claimed amounts. On 5.3.2002, the respondents again replied to the aforesaid letter of the petitioner and informed the petitioner that its claim was under examination and that as soon as the examination would be completed, the status would be intimated to the petitioner.

4. On 20.3.2002, the petitioner again sent a reminder to the respondents with regard to its pending claim. Vide letters dated 14.5.2002 and 29.5.2002, the petitioner repeated its reminders to the respondents. In the meantime, in August 2002, the final bill was prepared by the respondents in terms of Clause 40 of the contract. On the last page of the said bill, is endorsed the contractor''s acceptance of the measurement recorded in the measurement book and that the bill was full and final and there was no labour dispute and no minor labour had been engaged during the course of the work. Further, the contractor endorsed the said bill with his signatures and seal by noting "bill amount accepted by contractor as full and final settlement".

5. In the very next month i.e. on 16.9.2002, the petitioner issued a letter to the respondents informing the respondents of its pending claim and calling upon them to appoint an Arbitrator under Clause 50 of the General Conditions of Contract (GCC) to decide its claim. The next correspondence is dated 16.1.2003, whereby the petitioner again repeated its request to the respondents for appointment of an arbitrator. On 20.2.2003, the respondents replied to the petitioner and requested the petitioner to intimate the respondents about the Clause of the contract under which the claims submitted by the petitioner were tenable and admissible. Vide letters dated 5.3.2003, 12.11.2003 and 12.3.2004, the petitioner once again requested the respondents for payment of its claims.

6. On 1.12.2004, the petitioner again invoked Clause 50 of the GCC governing the parties for appointment of an Arbitrator. It was also stated in the said letter that the petitioner had been assured by the respondents that its claim shall be settled by the departmental committee. On 30.3.2005, the respondents wrote to the petitioner

acknowledging the notice of the petitioner to go for arbitration for settlement for its claims and intimating the petitioner that the name of the Arbitrator shall be communicated very soon. On the same date, the petitioner also wrote a letter to the respondents for payment of its outstanding amounts.

7. The next relevant date in the matter is 30.7.2005, on which date, a joint meeting of the parties was held, wherein on the issue of arbitration, it was recorded as below:

PPCL was communicated that the matter of arbitration related with 132 KV S/C GTN Transmission line is under scrutiny and examination at Corporate Office. However, as requested, the list of empanelled arbitrating agencies shall be furnished to PPCL at the earliest.

8. It was also noted that in the meeting, the discussions were held in a cordial atmosphere and the participants assured their full assistance for compliance of the point taken up in the said meeting. On 6.8.2005, the petitioner issued a reminder to the respondents for its pending claims. On 23.8.2005, the respondents replied to the petitioner''s communications dated 5.4.2001 and 6.8.2005 and called upon the petitioner to substantiate its claim with relevant supporting documents for further perusal so as to obtain approval of the competent authority, before proceeding to communicate to the petitioner, the panel of Arbitrators. On 26.4.2006 and 6.7.2006, the respondent again wrote to the petitioner repeating its earlier request.

9. On 27.12.2006, the petitioner enclosed the details of its claims for perusal of the respondents with a request to settle the issue by appointing an Arbitrator at the earliest. This was followed by reminders dated 29.1.2007 and 15.3.2007 issued by the petitioner. Finally, on 1.5.2007, while referring to the claims of the petitioner and stating that the same were found to be devoid of merits, the respondents wrote to the petitioner, refusing to consider its claim and stated that not only were the claims untenable on merits, they were barred for arbitration as per the Clauses 50 & 50.4 of the GCC governing the parties.

10. Aggrieved by the aforesaid refusal on the part of the respondents to appoint an arbitrator, the petitioner filed the present petition on 23.5.2007. Notice was issued on the petition on 25.5.2007. The respondents entered appearance on 30.10.2007 and filed its reply reiterating its stand that the present petition is not maintainable.

11. Counsel for the respondents states that not only is the present petition barred by limitation, but even the claims raised by the petitioner are time barred. In this regard, he relies on the following judgments:

(i) National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another,

(ii) J.C. Budhraja Vs. Chairman, Orissa Mining Corporation Ltd. and Another,

12. He further states that there is no live issue pending between the parties for being referred to arbitration and as full and final payments have already been made and accepted by the petitioner, no further claims can be maintained by it. In support of his aforesaid contention, he relies on the following judgments:

(i) P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn.,

(ii) Nathani Steels Ltd. v. Associated Constructions

(iii) Prime Engineers and Consultants v. Punjab National Bank 2003 (1) RAJ 460 (Del)

13. Per contra, Counsel for the petitioner submits that neither its claims, nor the present petition are barred by limitation. To substantiate the said submission, he relies on the following judgments:

(i) Hari Shankar Singhania and Ors. v. Gaur Hari Singhania and Ors. 2006 (2) ALR 1 (SC)

(ii) Pandit Construction Co. v. DDA (143 2007 DLT 270

(iii) Shri Avinash Sharma v. MCD 2007 (4) Raj 380 (Del)

He also disputes the contention of the Counsel for the respondent that there is no live issue pending between the parties for reference or that full and final settlement of claims of the petitioner has already been made and accepted by the petitioner and thus no further claim can be maintained by it. In this regard, he refers to and relies upon the following judgments:

(i) Bharat Coking Coal Ltd. Vs. Annapurna Construction,

(ii) Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors,

(iii) Groupe Chimique Tunisien SA Vs. Southern Petrochemicals Industries Corpn. Ltd.,

(iv) Shree Ram Mills Ltd. v. Utility Premises (P) Ltd. 2007 (1) ALR 517 SC

14. I have heard the counsels for the parties and perused the records as also the judgments referred to and relied upon by both sides. In the first instance, the objections raised by the respondents with regard to limitation need to be dealt with. In this context reference is made to Clauses No. 40 and 50.4 of the Contract which are relevant. The said Clauses are reproduced hereinbelow:

Clause No. 40 – Final Bill – The final bill relating to the contract shall be prepared only when the plant has/have been installed and tested for final acceptance under Clause 45 and it will include the adjustment of all claims against the contractor as well as all claims admitted in favour of the contractor by the Engineer-in-Charge and awarded in his favour by the arbitrator up to the date of preparation of the final bill.

Clause 50.4 • A notice of the existence of any question, dispute or difference in connection with this contract, shall be served by either party within 180 days of the issue of taking over certificate by the Purchaser, failing which all rights and claims under this contract shall be deemed to have been forfeited and absolutely barred.

15. It is settled law that the Section 43 of the Act provides that the provisions of Limitation Act, 1963 would apply to arbitration in the same manner as it applies to the claims before the Court. The law is well settled that the provisions of Article 137 of the Limitation Act apply to an application for appointment of an Arbitrator u/s 11(6) of the Act Refer: The The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, , and Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, . A perusal of Article 137 of the Limitation Act reflects that the same is a residuary Article which deals with limitation in cases not specifically provided for in any other Article. As per Article 137, the limitation prescribed is three years from the date of accruing of cause of action. In other words, the period of three years prescribed under Article 137, starts running from the date when the right to apply for arbitration accrues. Though, in work contracts, a right to get payment would normally arise on completion of the work, but that is not enough for making an application for appointment of an Arbitrator u/s 11 of the Act.

16. The question of limitation has to be decided on the basis of the facts of each case. For the said purpose, it is necessary to examine the facts of the present case in hand. As already noted hereinabove, it is an undisputed position that the petitioner raised its claims on the respondents on 5.4.2001. It is also not disputed that even after issuance of the `Taking Over Certificate'' dated 20.5.2001, the petitioner again raised its claim vide letter dated 10.9.2001. The submission of the Counsel for the respondent is that the period of 180 days as stipulated in Clause 50.4 of the GCC started to run from the date of issuance of the aforesaid certificate by the respondents. Even if the said submission of the respondents is accepted and the period of 180 days is reckoned from 20.5.2001, 180 days would expire on 20.11.2001. Records reflect that by the said date, the petitioner had reiterated its earlier claim raised in its letter dated 5.4.2001, by virtue of letter dated 10.9.2001, i.e., well within the prescribed period of 180 days.

17. The other relevant date for consideration in the present case is August, 2002, when the final bill was prepared by the respondents and the petitioner accepted the bill amount by recording receipt in full and final settlement of the bill amount. If August, 2002 is taken as the relevant date, the period of 180 days reckoned therefrom would expire in the end of February, 2003. It is relevant to note that the petitioner had invoked the Arbitration Clause governing the parties much earlier, by virtue of its letter dated 16.09.2002. In these circumstances, it is not justified for the respondents to contend that the claims raised by the petitioner are barred by limitation as admittedly, the claims were raised on various dates including on 5.4.2001 and 10.9.2001, which were reiterated on 1.12.2001 and 26.12.2001.

18. It is also relevant to note that between the period 5.4.2001 and 16.9.2002, the respondents issued two letters dated 31.12.2001 and 5.3.2002, whereunder it confirmed that the claims raised by the petitioner were under examination. Insofar as the period of limitation as prescribed under Article 137 of the Limitation Act is concerned, if the relevant date for invocation of arbitration is taken to be 16.9.2002, which was the first date of invocation of the Arbitration Clause by the petitioner, then the period of three years would take the petitioner to September 2005. Had no further correspondence been exchanged between the parties thereafter and no meetings held to thrash out the issue, perhaps the respondents'' stand that the right of the petitioner to apply for arbitration had expired, would have held water. However, taking into consideration the fact that the respondent itself continued the negotiations with the petitioner in respect of the claims raised by it for extra items and went to the point of informing the petitioner vide letters dated 30.3.2005 and 23.8.2005, that it would communicate the name of the Arbitrator to the petitioner soon, it is apparent that the respondent itself chose to keep the matter alive and the parties were in dialogue.

19. It is further pertinent to note that the minutes of the joint meeting held between the parties on 30.7.2005, records that the respondents had agreed to furnish the list of empanelled arbitrating agencies to the petitioner. Hence the petitioner was not only justified in assuming that respondent would act on its assurance, it was also justified in holding back the present petition and continuing its negotiations with the respondents. Correspondence continued to be exchanged between the petitioner and the respondents even after 30.7.2005, till as late as 1.5.2007. During this period, the respondents called upon the petitioner on three occasions i.e. vide letter dated 23.8.2005 and 26.4.2006 and 6.7.2006, to submit documents in support of its claims, but went on to finally decline to appoint an Arbitrator by issuing a letter dated 1.5.2007, and stating inter alia that it had examined the claims of the petitioner at its end and found them to be devoid of merits. It further observed that the claims of the petitioner were not tenable and that the same were also barred for arbitration. Having kept alive the expectations of the petitioner of arriving at a settlement and in the alternate, of appointment of an Arbitrator, it does not lie in the mouth of the respondents to turn around and seek invocation of the Limitation Act for throwing out the present petition. It is also relevant to note that the present petition was filed by the petitioner by the end of the month of May 2007, itself. In these circumstances, it cannot be accepted that the present petition is barred by limitation, as asserted on behalf of the respondents. Also, the judgment in the case of J.C. Budhraja (supra) relied upon by the Counsel for the respondents is not applicable to the facts and circumstances of the present case, as it dealt with such an acknowledgment that was stricto-senso the subject matter of the suit. In the present case, the petitioner accepted the bill in full and final settlement but that is not to say that it is precluded from pursuing its other claims for additional expenditure which were not a subject matter of the bill.

20. Insofar as examining the claims of the petitioner from the perspective of the same being barred by limitation is concerned, it is no longer res integra that for the purpose of deciding a petition u/s 11 of the Arbitration and Conciliation Act, the Court is only expected to give a prima facie finding with regard to the claims and particularly, live issues between the parties and leave the rest for the arbitral tribunal. In this context, having regard to the conduct of the respondents on the basis of the written communication and correspondence exchanged between the parties, the exception carved out by the Supreme Court in the case of Hari Shankar Singhania (supra), comes to the assistance of the petitioner. In the aforesaid case, where the dispute was between the family members in respect of a partnership firm, and numerous letters were exchanged between the parties to find a way to settle the disputes pertaining to division of assets, the Supreme Court found the petition for appointment of an Arbitrator to be within time and held that the right to apply u/s 20 of the Arbitration Act, 1940, accrued to the appellant therein on the date of last correspondence exchanged between the parties and that the period of limitation was reckoned from the date of last communication which in that case was 29.9.1989. A reference to paras 24 and 25 of the aforesaid judgment is relevant:

24: On 29.9.1989, a letter was written by Shri Vijaypat Singhania, Shri Ajaypat Singhania, Shri Hari Shankar Singhania and Shri Bharat Hari Singhania to Shri Gaur Hari Singhania, respondent wherein it is stated that it is not fair to impute impropriety or to say that the stand taken by the appellants is an attempt to bring pressure upon immovable properties of dissolved partnership. It is also stated therein that the respondent will expedite the matter of dissolution of the immovable properties in the same spirit as was envisaged at the time of dissolving the firm. If this letter dated 29.9.1989 is taken into account, it would show that Section 20 suit would clearly be within time. In our opinion, the High Court has committed an error in construing Article 137 in a manner, which would unduly restrict the remedy of arbitration especially in family disputes of the present kind. It is a well-settled policy of law in the first instance is always to promote a settlement between the parties wherever possible and particularly in family disputes.

25: Where a settlement with or without conciliation is not possible, then comes the stage of adjudication by way of arbitration. Article 137, as construed in this sense, then as long as parties are in dialogue and even the differences would have surfaced it cannot be asserted that a limitation under Article 137 has commenced. Such an interpretation will compel the parties to resort to litigation/arbitration even where there is serious hope of the parties themselves resolving the issues. The learned Judges of the High Court, in our view, have erred in dismissing the appellants'' appeal and affirming the findings of the learned Single Judge to the effect that the application made by the appellants u/s 20 of the Arbitration Act, 1940 asking for reference was beyond time under Article 137 of the Limitation Act. The learned Judges ought to have allowed the appeal and quashed and set aside the impugned order passed by the learned Single Judge and ought to have restored and

allowed arbitration suit filed by the appellants. As already noticed, the correspondence between the parties, in fact, bears out that every attempt was being made to comply with and carry out the reciprocal obligations spelt out in the agreement between the parties. As rightly pointed out by learned Counsel for the appellant that the learned Judges of the Division Bench have erred in coming to the conclusion that the distribution of immovable properties in specie as provided in the deed of dissolution dated 26.3.1987 and a supplementary agreement dated 28.3.1987 could not be done before 31.5.1987, due to some differences. There is absolutely no material on record on the basis of which the learned Judges could have come to such a conclusion. None of the correspondence referred to by the learned Judges spells out the existence of any disputes as a result of which the properties could not be distributed prior to 31.5.1987.

21. In the present case also, having regard to the last letter dated 1.5.2007, issued by the respondents to the petitioner where the respondents for the very first time declined the request of the petitioner for appointment of an Arbitrator, rejected the claims of the petitioner and went on to state that the same were barred by limitation, it cannot be stated that the right to apply for arbitration by filing the present petition on 23.5.2007 is barred by limitation.

22. The last issue that requires consideration is the claim of the respondents that full and final payment having already been made and accepted by the petitioner in terms of the final bill raised by the respondents and endorsed by the petitioner, no further claims are maintainable. In other words, as per the respondents, there are no live claims that can be referred to arbitration. In this regard, reference is made to the last page of the bill where the endorsement made by the petitioner is as below:

Bill amount accepted by contractor as full and final payment.

In this regard, Counsel for the petitioner submits that it is not his case that the bill amount was not received by the petitioner in terms of the final bill. Rather, the claim of the petitioner is for extra expenditure towards additional claims, which were not a subject matter of the final bill raised by the petitioner on the respondents and hence there is no question of full or final payment of the said claims. Counsel for the petitioner states that the said claims were raised by the petitioner in its letter dated 5.4.2001, followed by a series of reminders and the letter of notification of arbitration dated 16.9.2002 issued to the respondents.

Therefore, the judgment in the case of P.K. Ramaiah (supra) relied upon by the Counsel for the respondents is of no assistance to the court as accord and satisfaction is in respect of items subject matter of the final bill, and not the additional claims raised by the petitioner and reiterated in its notice dated 16.9.2002 invoking arbitration. In the case of Nathani Steels Ltd., the disputes and differences between the parties were settled amicably and hence it was held that unless and until the settlement is set aside, the arbitration Clause cannot be invoked. Facts in

the present case are different. Rather, this is a case where the petitioner has vehemently denied accord and satisfaction. Here, the question as to whether there has been a full and final settlement of the claims under the contract, is itself a dispute arising "in connection with" the contract. Hence the terminology used itself is wide enough to take into its fold the dispute sought to be referred for arbitration Ref.: Chairman & M.D. NTPC Ltd. (supra) and Damodar Valley Corporation Vs. K.K. Kar,

23. Clause 50.4 of the GCC is hit by the provisions of Section 28(b) of the Contract Act, 1872. The said provision is reproduced hereinbelow:

28. Agreements in restraint of legal proceedings, void- Every agreement-

(a)xxx

(b)which extinguishes the rights of any party thereto, or discharged any party thereto, from any liability, under or in respect of any contact on the expiry of a specified period so as to restrict any party from enforcing his rights.

24. In view of the above provision, the petitioner cannot be barred from raising a claim under the contract, nor can it be held that the petitioner forfeited its right in this regard. Counsel for the respondents relied on the judgment in the case of National Insurance Co. (supra) rendered by the Supreme Court to state that though curtailment of the period of Limitation is not permissible in view of Section 28, but extinction of the right itself, unless exercised within a specified time, is permissible and can be enforced. The aforesaid judgment was duly considered in the case of Pandit Construction Co. (supra), wherein the Court observed that the judgment was dealing with the unamended Section 28 of the Contract Act. It is pertinent to note that in the case of National Insurance (supra), the decision was rendered by the Supreme Court on 21.3.1997, whereas an amendment to Section 28 of the Contract Act took place w.e.f. 8.1.1997 which was not a subject matter of consideration before this Court in the said case. Hence, Counsel for the petitioner is justified in stating that extinguishment of right of any party on expiry of a specified period which is contrary to the Statute is void under the provisions of Section 28 of the Contract Act. Even if Clause 50.4 is split into two parts for the purpose of reckoning the period of limitation, as contended by the Counsel for the respondents, it is pertinent to note that the petitioner had raised its claim on the respondent within the period of 180 days from the date of issuance of the `Taking Over Certificate'' i.e. on 10.9.2001 as envisaged by Clause 50.4 of the GCC. Therefore, the respondents cannot be heard to state that the forfeiture Clause would come into play. In the present case, it is also an undisputed position that the contract and all the subsequent events related thereto occurred after the amendment to Section 28 of the Contract Act and thus the amendment changing the substantive law would apply to the contract, subject matter of the present petition.

25. The plea of Counsel for the respondents that issuance of the "Taking Over Certificate" to the petitioner should be considered as the cut off point for the purpose of examining the limitation in respect of the claims raised by the petitioner, has to be examined in the light of the fact that admittedly, the respondents took over one year after issuance of "Taking Over Certificate" to finalize the bill of the petitioner which took place only in August 2002. For the petitioner to have anticipated as to whether the respondents would or would not have accepted the entire claims of the petitioner prior to August 2002, would be assuming too much as the petitioner could not have arrived at a conclusion in the year 2001 itself as to the admissibility or otherwise of the claims raised by it and paid by the respondents only in August 2002. If such an interpretation is given for reckoning the period for invocation of a dispute as sought to be contended by the Counsel for the respondents, then it would cause great injustice to the petitioner. A contractor cannot be expected to assume as to which of the items raised by him for payment would be passed in the final bill and be finally cleared for payment.

26. In the present case it is also pertinent to note that the endorsement made by the petitioner in the final bill is not being denied even today. The petitioner has not denied that the bill amount was accepted in full and final settlement. This is not to say that the petitioner waived its rights in respect of claims that were not a subject matter of the final bill in August 2002. There is nothing on record, to show that the petitioner waived its right in respect of its claims raised towards extra items. Furthermore, the petitioner invoked the arbitration Clause immediately thereafter, on 16.9.2002 and called upon the respondents to appoint an Arbitrator. In these circumstances, it cannot be said that the parties had arrived at a full and final accord and that no further claims would be maintainable or that there are no pending live claims. In this context, it is relevant to refer to the judgment of the Supreme Court in the case of Shree Ram Mills (supra), relied upon by the Counsel for the petitioner wherein, while discussing the issue of live claims and limitation with reference to the scope of an order u/s 11 of the Act, it was observed as below:

27. We shall take up the last contention raised by the appellant regarding the scope of the order passed by the Chief Justice or his Designate Judge. It was contended that since the Designate Judge has already given findings regarding the existence of live claim as also the limitation, it would be for this Court to test the correctness of the findings. As against this it was argued by the respondent that such issues regarding the live claim as also the limitation are decided by the Chief Justice or his Designate not finally but for the purpose of making appointment of the Arbitrators u/s 11(6) of the Act. In our opinion what the Chief Justice or his Designate does is to put the arbitration proceedings in motion by appointing an Arbitrator and it is for that purpose that the finding is given in respect of the existence of the arbitration clause, the territorial jurisdiction, live issue and the limitation. It cannot be disputed that unless there is a finding given on these issues, there would be no question of proceeding with the arbitration. xxxxx

xxxx A glance on this para would suggest the scope of order u/s 11(6) to be passed by the Chief Justice or his Designate. In so far as the issues regarding territorial jurisdiction and the existence of the arbitration agreement are concerned, the Chief Justice or his Designate has to decide those issues because otherwise the arbitration can never proceed. Thus the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the court for appointment of the Arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining this if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining. It is in this sense that the Chief Justice has to examine as to whether their remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that their remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation.

27. In the aforesaid facts and circumstances and in view of the foregoing discussion, the present petition is allowed as the respondent has failed to appoint an Arbitrator within the time stipulated u/s 11(5) of the Act. Accordingly, Mr. Justice Vijender Jain (Retd. Judge) is appointed as an Arbitrator to adjudicate the disputes between the parties. The learned Arbitrator shall fix his own fee which shall be shared equally by the parties apart from administrative expenses. The payment of costs of the proceedings shall be a subject matter of the decision by the learned Arbitrator. The parties shall appear before the learned Arbitrator on 29.1.2009 at 4.30PM.

28. Needless to state that the aforesaid observations made in the present case are only for the purposes of deciding the present application for appointment of an

Arbitrator, by examining the prima facie case of the parties from the angle of limitation, existence of live issues as also maintainability of the petition. It is made clear that the parties shall be entitled to raise all their objections as may be available to them in law including those raised by the respondents as pertaining to limitation, live claims etc., before the arbitral tribunal, which shall be decided in accordance with law.

29. The parties shall inform the learned Arbitrator about the order passed today. The Registry is also directed to forward a copy of this order to the learned Arbitrator forthwith.

30. The petition is disposed of.