

Construction Arbitration Newsletter

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Construction Arbitration Law Firm

- **'Back-to-back' contract - claims of sub-Contractor against the principal Contractor - contradictory stand of the principal Contractor in the arbitration against the Employer - coextensive liability of the principal Contractor and the Employer - tenability of sub-Contractor's claims against the principal Contractor whether dependent upon acceptability and tenability of those claims before the Employer under the main contract - in the two arbitration proceedings, the very same claim, which the sub-Contractor made against the principal Contractor had been made by the principal Contractor against the Employer and on that basis, an award had been passed in favour of the principal Contractor - no provision in the main contract between the Employer and the principal Contractor for "back to back" sub-contracts whereby the Employer would be directly liable for the payment claims raised by sub-Contractors notwithstanding that the subletting was provided for by the main contract - there was no transfer of liability from the principal Contractor to the Employer.**
- **'Back-to-back' contract - meaning of - depending on the wording of the sub-contract, the terms and conditions relating to technical specifications, and quality, quantum, manner and method of work to be done by the principal Contractor in the main contract, stood transposed into the sub-contracts - in the absence of covenant in the main contract to the contrary, the rules in relation to privity of contract will mean that the jural relationship between the Employer and the principal Contractor on the one hand and between the sub-Contractor and the principal Contractor on the other will be quite distinct and separate.**

*[Zonal General Manager, M/s Ircon International Ltd.
v. M/s Vinay Heavy Equipments - Supreme Court -
Decided on 6.5.2015]*



- **Limitation period for filing of claims by the Contractor - commencement of three years for counting limitation - acknowledgment of outstanding payment - extension of limitation period - where a claim is made for a specific sum of money as one indivisible claim, without mentioning any specific sum as being the price of goods or price of the work done, neither Article 14 nor Article 18 will apply, but only Article 55, which provides for all actions ex contractu i.e., based on a contract, not otherwise provided for, would apply - Employer failed to fulfil its obligation of making payment of the outstanding principal amount to the Contractor, which had become due and payable under the contract - the claim by the Contractor is one for 'compensation'.**
- **Applicability of Article 55 of the Limitation Act - is a residuary Article in respect of all actions based on a contract not otherwise specially provided for - one indivisible claim, and that is for the balance of the money due on the basis of a contract, by which a party has to be paid for everything supplied and done by him - for the applicability of Article 55, four requirements should be satisfied, namely, (1) the suit should be based on a contract; (2) there must be breach of the contract; (3) the suit should be for compensation; and (4) the suit should not be covered by any other Article specially providing for it - phrase 'compensation for breach of contract', in Article 55 of the Schedule to the Limitation Act, 1963, would include a claim for money due under a contract - claim raised was not in respect of non-payment of any specific bill or invoice during execution of the contract - it is for the outstanding principal amount due to the Contractor on discharge of his obligations under the contract - cause of action for the claim was the Employer's failure to make payment of the outstanding principal amount to the Contractor despite discharge of contractual obligations by it.**
- **Compensation - meaning of - a general term comprising any payment which a party would be entitled to claim on account of any loss or damage arising from a breach of a contract - the expression is not limited only to a claim for unliquidated damages and is wide enough to include a claim for payment of a certain sum.**
- **Applicability of Article 14 of the Limitation Act - applies where the suit is for the price of the goods sold and delivered, and there is no fixed period of credit agreed upon - an indivisible claim raised for outstanding principal amount for the goods supplied and the work done - full payment under the supply / erection purchase orders were dependent on certificates relating to completion, commissioning, guaranteed performance etc. - the Contractor waited till successful completion, commissioning, guaranteed performance of the project to file a composite claim for the balance amount payable under the purchase orders - Article 14 is not applicable to the claim as framed.**
- **Applicability of Article 18 of the Limitation Act - applies when the claim is for the price of the work done by the Contractor for the Employer at his request, and where no time has been fixed for payment - if there is an indivisible claim for the outstanding amount in respect of goods supplied and the work done, the Contractor is entitled to make a composite claim for the goods supplied and the work done after the project is successfully completed i.e., when the Unit is commissioned followed by guaranteed performance, because it is only then, when the outstanding amount, as per the bills / invoices raised, becomes due and payable to the Contractor in terms of the contract.**
- **Liability of holding company - the holding company is bound by the arbitration agreement and jointly and severally liable if it has actively participated in the formation of the contract for the project - both must act as a single economic enterprise.**

- **Extension of limitation period by acknowledgment - for a valid acknowledgement, the essential requirements are (a) it must be made before the relevant period of limitation has expired; (b) it must be in regard to the liability in respect of the right in question; and (c) it must be made in writing and must be signed by the party against whom such right is claimed - acknowledgement of liability must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability - the admission need not be in regard to any precise amount nor by expressed words - writing, to be treated as an acknowledgement of liability should consciously admit his liability to pay or admit his intention to pay the debt - an acknowledgement made with reference to a liability, cannot extend limitation for a time barred liability or a claim that was not made at the time of acknowledgement or some other liability relating to other transactions.**
- **Acknowledgment of liability for the purpose of extension of limitation period - Employer had acknowledged that the amount claimed by the Contractor is the balance amount payable, though subject to debit, by way of set off, against various claims made by the Employer - limitation is extended only in regard to the liability which was acknowledged.**
- **Limitation period for counter claim - counter claim is to be treated as a separate suit for the purposes of limitation - counter claim is like a cross suit - to ascertain whether it is within limitation, the date of reckoning is the date when the counter claim is filed and not when the claim / suit is filed - only exception is where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant under Section 21 but subsequently raises that claim as a counter claim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under Section 11 of the Arbitration Act, 1996 the limitation for such counter claim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counter claim.**

*[OPG Power Generation Private Limited v. Enexio Power Cooling Solutions
India Private Limited - Supreme Court - Decided on 20.9.2024]*



The principal Contractor entered into two sub-contract agreements in respect of two packages for laying of roads. The sub-Contractor completed substantial portion of work under the two sub-contracts but thereafter ceased work on both. The principal Contractor terminated the sub-contracts and engaged other agencies to complete the balance work. The sub-Contractor claimed amounts due to it and referred the disputes to arbitration. The principal Contractor also took recourse to arbitration against the Employer in respect of the pending payments pertaining to the two packages. The arbitral tribunal adjudicated the claims made by the sub-Contractor against the principal Contractor in the first arbitration and claims made in turn by the principal Contractor against the Employer in the second arbitration. The arbitral tribunal made a common award and allowed the claims of the sub-Contractor against the principal Contractor for works on both packages. The sub-Contractor contended that the principal Contractor had rejected the sub-Contractor's claims for payment arrears under the two sub-contracts, it had, at the same time and contradictorily, claimed in the second arbitration against the Employer that its dues to sub-Contractor were in turn payable to it by the Employer. The arbitral tribunal found that the primary liability of the principal Contractor did not transfer onto the Employer despite the "back-to-back" contract between the principal Contractor and sub-Contractor. Further, the principal Contractor had reiterated the "back-to-back" nature of the sub-contract and agreed that the sub-Contractor would be entitled to payment of dues as and when the principal Contractor received the payment for these from the Employer. The principal Contractor had agreed to a direction passed against it to make payment upon realization of the sum from the Employer. In the two arbitration proceedings, the very same claim, which the sub-Contractor made against the principal Contractor had been made by the principal Contractor against the Employer and on that basis, an award had been passed in favour of the principal Contractor. The Court observed that in the absence of covenant in the main contract to the contrary, the rules in relation to privity of contract will mean that the jural relationship between the Employer and the principal Contractor on the one hand and between the sub-Contractor and the principal Contractor on the other will be quite distinct and separate. There was no such clause to the contrary, existent in the main contract between principal Contractor and the Employer. There was no transfer of liability from the principal Contractor to the Employer. There was nothing in the main contract between the Employer and the principal Contractor for "back to back" sub-contracts whereby the Employer would be directly liable for the payment claims raised by sub-Contractors notwithstanding that the subletting was provided for by the main contract. The principal Contractor having admitted an unconditional contractual liability on its part to pay to the sub-Contractor depending on a favourable outcome in the second arbitration, is liable to make the payment to the sub-Contractor.



The Employer floated a tender for design, manufacture, supply, erection and commissioning of air-cooled condenser unit (ACC Unit) with auxiliaries for 160 MW Coal Based Thermal Power Plant at Gummidipoondi in the State of Tamil Nadu. The holding company of the Employer issued the supply and erection orders in favour of the Contractor. There was delay in commissioning. The disputes between the parties were referred to arbitration. The Employer had deducted from the Contractor's payment amounts towards liquidated damages for delay in supply and erection, customs duty, dismantling modification and duct fabrication. The Contractor, amongst others, raised a claim for outstanding principal amount due under the purchase orders. The arbitral tribunal arrived at the finding that the Contractor was not liable to pay liquidated damages and was entitled to extension of time up to the date of completion. The liability to pay all taxes, duties and local levies payable would be borne and paid by the purchaser i.e. the Employer. The Employer's counter claim was barred by limitation. The Court concluded that the claim was for compensation (in as much as the term 'compensation' includes a specified amount payable under a contract) in respect of the goods supplied and the work done under a contract. The claim was based on a breach of the contractual obligation as, according to the findings returned by the arbitral tribunal, the Employer to the claim had failed to fulfil their obligation of making payment of the outstanding principal amount payable under the contract despite raising of bills / invoices by the Contractor. The Court concluded that there was a clear acknowledgment by the Employer of the Contractor's claim in the minutes of meeting which stated that the amount claimed by the Contractor is the balance amount payable, though subject to debit, by way of set off, against various claims made by the Employer. The benefit of an acknowledgement would not be lost merely because a set off is claimed. The counter claims raised by the Employer was barred by limitation. The Court further concluded that the holding company was jointly and severally liable since it had actively participated in the formation of the contract for the project. The claim of the Contractor was an indivisible claim for compensation in lieu of goods supplied, and work done, based on breach of the contract, therefore limitation for the claim was governed by Article 55, and not by Articles 14, 18 and 113, of the Schedule to the Limitation Act, 1963. The Court upheld the findings of the arbitral tribunal in the award.



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