

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) 303/2005

% DATE OF DECISION : 1st SEPTEMBER, 2008

UOI THRU DIRECT.OF GENERAL OF
DIRECTORATE GENERAL OF SUPPLIES
& DISPOSAL

..... Appellant

Through: None.

versus

PRABHU STEEL INDUSTRIES LTD.

..... Respondent

Through: Mr. N.M. Popli, Advocate.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE MANMOHAN

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the digest?

JUDGMENT

MUKUL MUDGAL, J (Oral)

1. None appears for the Appellant in spite of a pass-over.
2. This FAO (OS) challenges the order of the learned Single Judge dated 23rd March, 2005 in OMP No. 102/1988. The learned Single Judge vide its order dated 23rd March, 2005 held that the breach, if any, was committed by the Respondent

(petitioner) prior to November, 1981 and the contract was terminated on 17th November, 1981 and consequently, the arbitration in 1987 was beyond limitation.

3. The brief facts of this case are as follows:-

- (A) That the Appellant/Union of India floated a tender for supply of various sizes of M.S. Rounds for indenting Department
- (B) The tender were opened on 10.06.1980. The Respondent participated in the contract. The Appellant awarded the contracts to the Respondent by their telegram dated 09.01.1981.
- (C) The delivery of the ordered stores was to be completed by 31.03.1981 but the Respondent failed to supply the said goods. On 30.06.1981 as advised by the Ministry of Law, the Appellant issued a performance notice cum extension for date of delivery upto 31.07.1981
- (D) Due to the failure of supply on 17.11.1981 the Appellant cancelled the contract/tender at the risk and expense of the Respondent.
- (E) The indenting department informed Appellant on 04.03.1982 that due to failure of the Respondent firm they had to resort to local purchase and they had to incur additional expenditure on such purchases. In this exercise the department/Indenter suffered a loss.
- (F) The Appellant requested the indenting department on 25.03.1982 to forward risk purchase details. The Appellant received risk purchase document from the indenting department on 14.11.1983.
- (G) On 15.04.1985, the Appellant issued a demand notice to the Respondent claiming general damages of Rs. 11,09,550/-. The Respondent firm failed to deposit general damages and also did not

reply to this letter. The demand made on behalf of the Petitioner from the Respondent having become futile, the Arbitration clause was invoked.

- (H) On 16.10.1987, the Appellant nominated/appointed Mr. B.N. Mani as Arbitrator. The Respondent firm had not objected to the Clause of Sole Arbitrator while accepting the tender.
- (I) On 27.05.1988, the Appellant filed the claim statement before the Sole Arbitrator.
- (J) In September 1988, the Respondent filed a petition being OMP No. 102/1988 under Section 5, 11, 12 and 33 of the Arbitration Act, 1940 objecting to the arbitration proceedings with the following prayers:-

- “(a) Quash and set aside arbitration proceedings pending on the file of the Respondent No. 2 being arbitration case No. 66-B of 1987 holding it is without jurisdiction, without authority of law and consequently bad, illegal and inoperative in the eyes of law.*
- (b) That the appointment of Respondent No. 2 as sole arbitrator in the facts and circumstances of the above case be quashed and set aside and the authority of Respondent No. 2, sole arbitrator, in Arbitration Case No. 66-B of 1987 be revoked and/or the arbitrator be removed and the arbitration agreement be superseded.*
- (c) It be held and declared that the alleged contract giving rise to the arbitration agreement was not a concluded contract nor the terms and conditions thereof include terms to refer the dispute to arbitration and that the arbitration agreement is not in existence as the alleged right to claim damages from the petitioner is barred by limitation, consequently, the appointment of Respondent No. 2 and the proceedings undertaken by him are without jurisdiction.”*

4. The main plea of the Respondent which was not accepted by the learned single Judge was that there was no concluded contract. The learned Single Judge

held against the Respondent that the furnishing of security deposit is clearly a condition antecedent and not a condition precedent and thus the contract was concluded. It was thus, further held by the learned Single Judge that once a contract is concluded, merely because one of the parties claims a higher price due to increase in cost of raw material does not mean that parties are not ad-idem on the terms of the contract pertaining to the price. The Petitioner's offer had already been accepted on 9th January, 1981 and the subsequent price rise could not unsettle the concluded contract. The learned Single judge, in any event, held that this was a post contract dispute and would have required adjudication in terms of the contract through the process of arbitration. Thus, the learned single Judge in our view had rightly held that the right to seek reference of dispute to an arbitrator would accrue when there exists a dispute which can be subject matter of reference. The aforesaid findings have attained finality as they have not been challenged by the Respondent.

5. The learned Single Judge vide its order dated 23rd March, 2005, however, held that the breach, if any, was committed by the Respondent (petitioner) prior to November, 1981 and after the termination of the contract on 17th November, 1981, the indenting department sent all the risk purchase documents to the Appellant on 14th November, 1983. Since the Respondent did not pay the demanded amount and the period of limitation referring the dispute to an arbitrator being three years, the present arbitration, on 16th October, 1987 was barred by limitation.

6. In the present case the learned Single Judge held that the period of limitation would commence at least from 14th November, 1983, if not from 17th November, 1981. In our view, the contract having been terminated by the Appellant on 17th November, 1981 and pursuant to the risk purchase, the indenting

department having sent all the risk purchase documents to the Appellant on 14th November, 1983, the Arbitrator could not have been appointed on 16th October, 1987. We are satisfied that the Appellant has not been able to dislodge Single Judge's finding of its claims being barred by limitation

7. The Hon'ble Supreme Court in *1993 (4) SCC 338* titled "*Panchu Gopal Bose v. Board of Trustees for Port of Calcutta*" and *1996 (2) SCC 216* titled *State of Orissa and Anr. vs. Damodar Das*, has held 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 takes place upon the dispute concerned. Just as in the case of actions, the claim is not be brought after the expiration of a specified number of years from the date on which 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. Thus, we see no reason to interfere with the judgment of the learned Single Judge which is supported by the aforementioned judgments of the Hon'ble Supreme Court. Accordingly, there is no merit in the appeal and it stands dismissed.

MUKUL MUDGAL, J

MANMOHAN, J

SEPTEMBER 01, 2008

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