IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

WEDNESDAY, THE 29TH DAY OF JULY 2015/7TH SRAVANA, 1937

Arb.A.No. 17 of 2008 ( )

AGAINST THE ORDER/JUDGMENT IN OPARB 237/2006 of VI ADDL.DISTRICT COURT, ERNAKULAM DATED 15-10-2007

/APPELLANT/PETITIONER/RESPONDENT:

THE FERTILISERS AND CHEMICALS
TRAVANCORE LIMITED, MARKETING DIVISION, UDYOGAMANDAL.

BY ADVS.SRI.E.K.NANDAKUMAR
SRI.K.JOHN MATHAI
SRI.P.BENNY THOMAS
SRI.NITHIN GEORGE

RESPONDENT/RESPONDENT/CLAIMANT:

CARDAMOM PROCESSING AND MARKETING,
CO-OPERATIVE SOCIETY LIMITED, VANDANMEDU,
IDUKKI DISTRICT.

BY ADVS. SRI.K.V.SOHAN
SMT.SREEJA SOHAN.K.

THIS ARBITRATION APPEALS HAVING BEEN FINALLY HEARD ON 29-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

vpv

P.N.RAVINDRAN & ANU SIVARAMAN, JJ.
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Arbitration Appeal No.17 of 2008
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Dated this the 29th day of July, 2015

JUDGMENT

P.N.Ravindran, J.

This appeal arises from the order passed by the Court of the VIth Additional District Judge of Ernakulam on 15.10.2007 in O.P.(Arb.) No.237 of 2006. The appellant is the petitioner therein. By the said order, the Court of the VIth Additional District Judge of Ernakulam dismissed the application filed by the appellant under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for short) wherein the appellant had prayed that the award passed by the Arbitral Tribunal on 29.6.2006 may be set aside. The brief facts of the case are as follows:

2. The appellant is engaged in the business of manufacture and marketing of fertilizers and chemicals. It manufactures fertilizers and chemicals in the Udyogamandal Division at Udyogamadal and in the Cochin Division at Ambalamedu. The respondent is a wholesale dealer appointed by the appellant for the sale of fertilizers and other products at Peermedu, Udumbanchola and Devikulam Taluks of Idukki District. The dealership agreement was initially entered into on 23.11.1980. The agreement was being periodically renewed and it is stated that

even today the said agreement is in force. Upto 23.11.2000, the appellant was giving the respondent transport rebate at the rate of Rs.275/- per metric tonne for fertilizers lifted from Udyogamandal and Ambalamedu and at Rs.200/- per metric tonne for fertilizers lifted from Kottayam and Chingavanam depots. On a request made by the respondent in its letter dated 20.10.2000, the appellant revised the transport rates for all products as detailed below:-

Ex-factory (Both UD and CD)	*Rs.400 per MT.*
Ext-port Cochin	*Rs.400/- per MT.*
Ex-Kottayam/Chingavanam	*Rs.275/- per MT.*

Such revision was sanctioned as per Ext.C1 letter dated 23.11.2000 subject to the condition that during the period from November 2000 to March 2001, 85% of the goods should be lifted from Udyogamandal and Cochin Port and the balance 15% only should be lifted from Kottayam/Chingavanam. This was for the period commencing from 1.11.2000 and ending with 31.03.2001. Yet another condition was that during the period from 1.04.2001 to 31.03.2002, credit notes will be issued for the rebates on half yearly basis after assessing the off-takes during the two seasons- kharif and rabi. It was also stipulated that if there is a hike in the diesel price during the period from 21.11.2000 to 31.03.2012 the escalation clause as applicable in other contracts will be given based on the same formula. By that letter, the respondent was also called upon to honour its commitment for the off-take of 10,000 metric tonnes during the period from November 2000 to March 2001 and 30,000 metric tonnes during the year 2001-2002.

3. It appears the respondent did not lift the required quantity of goods from Udyogamandal/Cochin Port. With the result, revised transport rebate was not given to it. However, after discussions, revised transport rebate was extended to the respondent with effect from 1.02.2002. The respondent thereafter sent Ext.C2 letter dated 18.05.2002 to the Deputy General Manager of the appellant at Udyogamandal, demanding payment of the sum of Rs.15,04,047.50 towards transport rebate for the period commencing from 23.11.2000 and ending with 31.03.2002. The respondent had in the aforesaid letter contended that it could not lift 85% of the stock from Udyogamandal/ Cochin Port for the reason that the materials were not available either at the factory at Udyogamandal or at Cochin Port. In that letter it had also stated that revised transport rebate was extended to it with effect from 1.02.2002 after discussions and therefore, it is eligible for enhanced transport rebate during the period from 23.11.2000 to 31.01.2002 as well. Upon receipt of the said letter, the Chief Sales Manager of the appellant sent Ext.C3 letter dated 5.06.2002 to the Secretary of the respondent society. The said letter reads as follows:

> *"We are in receipt of your letter.*
>
> *This is to inform you that we have gone*

through your request in detail and had granted you enhancement of transport rebate as a special case from Feb. 2002 onwards. As your are well aware FACT is going through a critical and trying period, Extending additional benefits to you with retrospective effect cannot be considered as we cannot afford to do this at this juncture.

While we appreciate your valuable patronage we hope you will understand and co-operate with us to tide over our present crisis."

4. The respondent did not take any further action in the matter. The respondent thereafter sent a letter dated 7.06.2004 to the Chairman and Managing Director of the appellant. The appellant in turn sent Ext.R2 letter dated 30.9.2004 to the Secretary of M/s.Cardamom Processing and Manufacturing Co-operative Society Ltd. The relevant portion of the said letter is extracted below:-

"This has reference to your representation dt. 07-06-2004 addressed to our Chairman and Managing Director. The matter has been examined afresh and we would like to inform the following.

1. *As per agreed terms, the differential amount of transport rebate is payable subject to the condition that 85% of the total requirement is taken on Ex-factory basis. Since the off-take was less than prescribed norm, the differential transport rebate was not paid.*
2. *This issue was taken up by you earlier vide your letter dt. 18-5-02. We have informed you vide our letter CSM-MK/614 dt. 15-6-02 that on account of the critical position of the Company, we are unable to consider your representation and requested you to co-operate with us.*
3. *The financial position of the Company continues to be very critical and on further review, it is felt that we will not be able to consider your request for the additional transport rebate for the period from 23-11-2000 to 31-1-2002.*

In the light of the above, we would request you to kindly co-operate with us and continue the patronage for FACT

Products."

5. The respondent thereupon invoked the arbitration clause contained in the agreement and appointed Sri.A.Krishnan, Advocate, M/s.Varma & Krishnan, M.G.Road, Ernakulam as the Arbitrator. The appellant in turn nominated and appointed Sri.N.Sukumaran, former District and Sessions Judge, as the Arbitrator. The Arbitrators thus nominated by both parties appointed Sri.M.P.R.Nair, learned Senior Advocate of this court as the Presiding Arbitrator. Before the Arbitral Tribunal, the respondent filed a claim statement wherein it prayed that an award may be passed allowing it to realise the sum of Rs.15,04,047.50 with interest at 12% per annum from 31.3.2002 as also costs. The appellant filed a defence statement wherein it raised two principal contentions. The first was that the claimant had not complied with the stipulation that 85% of the goods should be lifted from Udyogamandal/Cochin Port and the balance 15% alone should be lifted from Kottayam/Chingavanam depots and therefore, the claimant is not entitled for transport rebate. Yet another contention raised was that as the claim relates to the period from 23.11.2000 to 31.01.2002 it is barred by limitation for the reason that the claim for arbitration contained in Ext.R3 letter dated 24.06.2005 was received only on 28.06.2005. The appellant also contended that the claim for transport rebate during the period from 23.11.2000 to 31.01.2002 was declined

and the decision communicated to the claimant in Ext.C3 letter dated 5.06.2002. The claimant thereupon filed a reply statement wherein it contended relying on Ext.R2 letter that it was only by that letter that the appellant informed the claimant that they are not in a position to consider the request for additional transport rebate and therefore, there is no merit or force in the contention that the claim before the Arbitral Tribunal is barred by limitation.

6. The Arbitral Tribunal considered the rival contentions regarding the question whether the claim is time barred and held by majority by award passed on 29.06.2006 that the claim is not barred by limitation. The Arbitral Tribunal held that as the final rejection of the claim was made only by Ext.R2 letter dated 30.09.2004, the contention of the appellant (respondent before the Arbitral Tribunal) that the claim is barred by limitation is not sustainable. The Arbitral Tribunal also held that the failure to lift the required quantity of goods from Udyogamandal/Cochin Port cannot be held out against the claimant for the reason that the required quantity of goods was not available at Udyogamandal/Cochin Port and that the claimant cannot be compelled to perform an impossible condition. As the quantum of transport rebate claimed was not in dispute, an award was passed directing the appellant herein to pay the sum of Rs.15,04,047/- with interest at 6% per annum from the date of the award till realisation as

also the sum of Rs.2,350/- as costs. The appellant thereupon filed O.P.(Arb.)No.237 of 2006 in the Court of the VIth Additional District Judge of Ernakulam under section 34 of the Act praying that the award may be set aside. By order passed on 15.10.2007, the court below dismissed the said application. Hence this appeal.

7. We heard Sri.B.Deepak, learned counsel appearing for the appellant and Sri.K.V.Sohan, learned counsel appearing for the respondent. Sri.B.Deepak, learned counsel appearing for the appellant contended that the finding entered by the Arbitral Tribunal as also the court below that the claim made by the respondent/claimant is not barred by limitation is perverse and cannot be sustained having regard to the admitted facts. Learned counsel for the appellant contended that though transport rebate was revised with effect from November 2000, the claimant was given revised transport benefits only with effect from 1.02.2002, that the claimant thereupon submitted Ext.C2 letter dated 18.05.2002 claiming the sum of Rs.15,04,047.50 by way of transport rebate, that the said request was considered and the claimant was informed that the claim in that regard cannot be considered by Ext.C3 letter dated 5.06.2002, that the claim for transport benefits stood rejected as on that date and therefore, by no stretch of imagination can it be said that the claim made before the Arbitral Tribunal was not barred by limitation. Learned counsel contended that as the period of

three years had expired by the time the request for arbitration was made and the Arbitral Tribunal commenced its proceedings, the finding entered by the Arbitral Tribunal and upheld by the District Court is liable to be set aside. Learned counsel contended that the mere fact that at a later point of time a representation dated 7.06.2004 had been sent and the request therein was negatived by Ext.R2 letter dated 30.09.2004 is not a reason to hold that the period of limitation will begin to run only from that date.

8. Per contra, Sri.K.V.Sohan, learned counsel appearing for the respondent contended, inviting our attention to the terms of Ext.C3 letter dated 5.06.2002 that the claim for transport rebate was not rejected, that the claimant was only informed that its request cannot be considered at that juncture, meaning thereby that the claim will be considered as and when the financial position of the appellant improves and therefore, it cannot be said with certainty that the claim for transport benefits stood rejected when Ext.C3 letter dated 5.06.2002 was issued. Referring to Ext.R2 letter dated 30.09.2004, learned counsel contended that it was by that letter that the claimant was informed that the appellant is not in a position to consider its request for additional transport rebate for the period from 23.11.2000 to 31.01.2002 and therefore, as the claim for transport rebate was rejected only by Ext.R2 letter dated 30.09.2004, it cannot be said that

the claim before the Arbitral Tribunal was barred by limitation.

9. We have considered the submissions made at the Bar by the learned counsel appearing on either side. We have also gone through the pleadings and the materials on record. The fact that the transport rebate was revised with effect from November 2000 is not in dispute. The fact that the stipulation in the letter dated 23.11.2000 that 85% of the goods should be lifted from Udyogamandal/Cochin Port was incapable of performance is also not in dispute. For that reason, transport rebate was denied to the claimant for the period commencing from 23.11.2000 and ending with 31.01.2002. However, after discussions, revised transport rebate was extended to the claimant with effect from 1.02.2002 without insisting on the stipulation that 85% of the goods should be lifted from Udyogamandal/Cochin Port. After the revised transport rebate was thus given, the claimant sent Ext.C2 letter dated 18.05.2002 to the Deputy General Manager of the appellant at Udyogamandal demanding payment of the sum of Rs.15,04,047.50 by way of transport rebate for the period from 23.11.2000 to 31.01.2002. That request was considered and the claimant was informed by Ext.C3 letter dated 5.6.2002 that extending additional benefits to the claimant with retrospective effect cannot be considered as the appellant cannot afford to do it at that juncture. The claim thus stood rejected. There was no offer in Ext.C3 letter dated

5.06.2002 that the claim will be considered as and when the financial position of the appellant improves. The claimant knew when it received the letter dated 5.06.2002 that its claim stood rejected on the ground that the financial position of the appellant does not permit its claim to be entertained. The said letter gave rise to a cause of action to the claimant to move for appropriate reliefs either by instituting a civil suit, if that was the permissible course of action or as in the instant case, to invoke the arbitration clause contained in the agreement. Instead, it waited for more than two years and thereafter sent a letter dated 7.06.2004 reiterating its demand. To that letter, the appellant sent Ext.R2 letter dated 30.09.2004 in reply reiterating its earlier stand. The claimant was also informed that the appellant is unable to consider its request. In our opinion, merely for the reason that two years after the first request of the claimant was declined, another letter was sent and in reply thereto, the earlier stand of the appellant was reiterated, it cannot be said that the claim for transport rebate for the period commencing from 23.11.2000 and ending with 31.01.2002 was rejected only when Ext.R2 letter dated 30.09.2004 was communicated. As stated earlier, the receipt of Ext.C3 letter gave rise to a cause of action for the claimant to sue for the disputed amount. Under Article 113 of the Limitation Act, 1963, which the Arbitral Tribunal and the District Court have held applies to the case on hand, the period of limitation prescribed for instituting a suit is three years from the date on which the right to sue accrues. It is not in dispute that the provisions of the Limitation Act, 1963 apply to arbitral proceedings as well. In such circumstances, the conclusion is inescapable that the demand for arbitration which was made in Ext.R3 letter dated 24.06.2005 was clearly barred by limitation. The mere fact that a request was again made and that request was also rejected will not in our opinion result in postponement of the cause of action to institute a suit or to move for arbitration. The finding entered by the Arbitral Tribunal and upheld by the District Court that the period of limitation commenced to run only on 30.09.2004 cannot in our opinion be sustained having regard to the materials on record. We accordingly hold that the claim made by the respondent/claimant before the Arbitral Tribunal was barred by limitation could not have been entertained. The court below ought to have in that view of the matter allowed the application and set aside the award.

10. The mere fact that the letters had been sent after the initial rejection will not in our opinion stop the period of limitation from running. It is settled law that once the period of limitation starts running, except where an order of injunction which is referable to section 15 of the Limitation Act, 1963 has been issued, the period of limitation will not stop to run. The claimant has no case that it was

prevented by an order of injunction or any of the circumstances mentioned in section 15 of the Limitation Act, 1963 from moving for arbitration. The appellant had also not held out any promise to the respondent that it will reconsider its claim at a later point of time. In such circumstances, merely for the reason that after the initial rejection, the claimant again moved the respondent and that request was also rejected is not a reason to hold that the period of limitation would commence to run only from the date of Ext.R2 letter namely 30.09.2004.

For the reasons stated above, we allow this appeal, set aside the impugned order and allow O.P.(Arb.)No.237 of 2006 on the file of the Court of the VIth Additional District Judge of Ernakulam. Consequently, the award passed by the Arbitral Tribunal on 29.06.2006 directing the appellant to pay the sum of Rs.15,04,047/- with interest and costs to the respondents shall stand set aside. The parties shall bear their costs throughout.

P.N.RAVINDRAN
JUDGE

ANU SIVARAMAN
JUDGE

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