

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 29.08.2016

DELIVERED ON: 04.10.2016

Coram

The Honourable **Mr.Justice RAJIV SHAKDHER**

Original Petition No.56 of 2015

M/s.Aptech Ltd.,
rep. by its Authorized Signatory
Aptech House,
A-65, MIDC, Marol, Andheri East,
Mumbai - 400 093.

.. Petitioner

Vs.

1. M/s.Precision Techserve Pvt. Ltd.,
rep. by its General Manager - In Charge
Mr.S.Bhaskar,
No.22, Habibulla Road, T.Nagar,
Chennai - 600 017.

2. Hon'ble Mr.Justice
K.Venkataraman (Retd.)
Sole Arbitrator,
L-Block, No.125, East Anna Nagar,
Chennai - 600 102.

(R2 deleted from the array of parties
vide order dated 28.06.2016).

.. Respondents

Petition filed under Section 34 of the Arbitration and
Conciliation Act, 1996 to set aside the award dated 11.10.2014.

For Petitioner : Mr.M.L.Joseph

For Respondent : Mrs.Suseela Devi

ORDER

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "1996 Act") to assail the award dated 11.10.2014. The challenge to the award, broadly, arises in the background of the following facts.

Prefatory facts:

2. The Government of Tamil Nadu, it appears, mandated Electronic Corporation of Tamil Nadu (hereinafter referred to as "ELCOT") to provide training and facility services in the field of Information and Technology in the State of Tamil Nadu.

2.1. In furtherance of this mandate, ELCOT had entered into an agreement dated 08.10.2003 with the Commissioner of Survey and Settlement (in short "COSS"), Government of Tamil Nadu. This agreement was executed to implement the mandate of Government of Tamil India.

2.2. ELCOT, in turn, selected the petitioner, i.e., Aptech Ltd (in short "AL") for providing training and facility services. It is, in this connection, that ELCOT had executed an agreement dated 08.10.2003 with COSS. AL, with this mandate, approached the respondent, i.e, Precision TechServe Pvt. Ltd. (in short "PTPL"), to act as its franchisee. Towards this end, AL and PTPL executed an agreement dated 30.04.2004.

3. Under the arrangement, which AL had with ELCOT, to render services, it was to be paid a total sum of Rs.82,62,037/-. As against this, under the agreement dated 30.04.2004, PTPL was to receive a sum of Rs.72,33,800/-.

3.1. I may only indicate here, that before the learned Arbitrator, PTPL had claimed that AL had agreed to pay to it, a sum of Rs.76,79,462/-.

4. Be that as it may, ELCOT closed the arrangement, it had with AL, on 30.04.2005.

4.1. In the context of the aforesaid, a dispute arose between AL and PTPL, with regard to non-payment of the entire agreed amount. As was indicated above, while there was a dispute as to what was the agreed amount to be paid to PTPL, it was PTPL's case that even out of the amount payable according to AL, a substantial amount was withheld.

5. The record would show that it was the case of AL that the last payment was made by it, to PTPL, in the sum of Rs.5.00 lakhs, on 20.09.2005, and that, PTPL, in turn, had triggered the arbitration agreement obtaining between the parties, vide a notice dated 26.03.2009.

5.1. Pertinently, AL received its last payment from ELCOT, on 16.06.2010. This date is, important, as the learned Arbitrator has considered this date as significant in determining as to whether PTPL's claim, was within limitation.

6. The fact remains, that finally, PTPL had to approach this Court by way of a Petition, which was numbered as: O.P.No.457 of

2010, for appointment of an Arbitrator. The Arbitrator, who, finally decided the issue between the parties, was appointed by an order dated 25.06.2013, in a Petition filed under Section 11 of the 1996 Act.

7. It is, the award, which emerged, upon adjudication by the Arbitrator appointed vide order dated 25.6.2013, which is assailed by AL in the instant proceedings.

8. Before the learned Arbitrator, PTPL had raised a claim for the balance amount in the sum of Rs.18,99,462/- along with interest at the rate of 18% per annum. Furthermore, PTPL also raised a claim of Rs.10.00 lakhs towards loss of business and profit due to default in timely payment being made by AL. In addition, costs for conducting arbitration was also claimed.

9. As against this, AL, while refuting the tenability of claims filed by PTPL, lodged its counter claim under the following heads:

i) Towards loss of Annual Maintenance Contract (AMC):
Rs.1,99,600/-

ii) Amount forfeited by ELCOT: Rs.3,64,081/-

iii) Penalty imposed on AL by ELCOT: Rs.8,29,745/-

iv) Amount deducted from the bills of AL: Rs.6,52,540/-

10. Based on the aforesaid, the learned Arbitrator framed nine (9) issues. For the sake of convenience, the issues framed are set out herein below:

"1. Whether the claimant is entitled for an amount of Rs.18,99,462/- (Rupees Eighteen Lakhs Ninety Nine Thousand Four Hundred and Sixty Two only) towards outstanding bills as claimed in the claim statement.

2. Whether the claimant is entitled for interest and if so, at what rate.

3. Whether the claimant is entitled for costs and if so, the amount of costs.

4. Whether the claimant is guilty of having committed the breach of contract for facility management and annual maintenance.

5. Whether the maintenance contract with ELCOT was not extended due to the poor performance of the claimant.

6. Whether the Respondent has suffered losses due to imposition of penalty of Rs.8,29,745/- by ELCOT, as a result of breaches committed by the Claimant.

7. Whether the amount deducted by the Respondent by way of penalty is proper.

8. Whether the claim made by the claimant is

barred by limitation.

9. Whether the claimant is entitled to any other reliefs."

11. Learned Arbitrator allowed parties to lead evidence and cross examine each others witnesses. Based on the evidence placed before the learned Arbitrator, he returned the following findings of fact:

11.1 First, under the contract dated 30.04.2004, executed between AL and PTPL, PTPL was entitled to a sum of Rs.72,33,800/-. Thus, in effect, the learned Arbitrator ruled that PTPL, was not entitled to the sum of Rs.76,79,462/- as claimed by it.

11.2 Second, AL had paid a sum of Rs.59,80,000/- to PTPL, as against the stand taken by PTPL, which is, that it had been paid a sum of Rs.57,80,000/-. This finding was reached after the learned Arbitrator came to the conclusion that AL, vide cheque No.162078, dated 16.08.2004, had, in fact, paid a sum of Rs.4.00 lakhs to PTPL, as against the stand taken by PTPL that it had only been paid Rs.2.00 lakhs. It is on this account that there is a difference of Rs.2.00 lakhs

in the total amount, which PTPL claimed it had received from AL and the total amount found by the learned Arbitrator, as having been paid by AL to PTPL.

11.3 Third, based on the difference in the total amount receivable under the contract by PTPL, (which, according to the learned Arbitrator, was a sum of Rs.72,33,800/-) and, the amount PTPL had already received from AL, i.e., Rs.59,80,000/-, the learned Arbitrator came to the conclusion that the balance sum payable to PTPL by AL was Rs.12,53,800/-.

11.4 Fourth, interest, though demanded by PTPL from 2005, should be paid from the date when Arbitration was first triggered by PTPL, i.e., 26.03.2009 and that too, at the rate of 9% per annum.

11.5. Fifth, cost of Rs.25,000/- should be awarded in favour of PTPL towards not only payment of the cost, per se, but also, for the trouble of having to get an Arbitrator appointed for adjudication of its claims.

11.6 Sixth, the deduction in the sum of Rs.8,29,745/- claimed

by AL on account of the penalty levied by ELCOT was liable to be rejected, as there was no evidence found to support that such penalty had been levied on AL by ELCOT. The certificate of the Chartered Accountant (CA) (Ex.R.7), which was produced by AL was also not considered sufficient as the person, who had issued the certificate was not examined as a witness.

11.7 Seventh, ELCOT's decision not to extend the AMC, in respect of the second year operation was propelled not on account of poor performance of PTPL, but on a view taken, which was simply not to extend, the arrangement beyond 15.6.2005. The Arbitrator concluded that ELCOT had not terminated the contract and instead, had taken a decision not to extend the arrangement, as indicated above, beyond 15.6.2005. The Arbitrator found that Phase-II commenced on 01.05.2004 and closed on 30.04.2005. In other words, it was a case of non- extension and, not that, the contract was terminated during its subsistence.

11.8. Eighth, while deficiency in service had been pointed out by ELCOT to AL, via its letters dated 29.04.2005 (Ex.R.5), which, in turn, was based on the letter dated 13.07.2004 (Ex.R.3) issued by

COSS, there was nothing on record which would demonstrate that it was deficiency in service rendered by PTPL which had caused the closure of the contract. This finding was arrived at in the context of the stand taken by PTPL that under Clause 8, it was required to cure the defects within 15 days upon due intimation, and that, in the past, such defects had been addressed by PTPL as and when it was informed of the same.

CONTENTIONS:

12. It is in the background of the aforesaid that arguments were addressed by counsels for both parties. Mr.M.L.Joseph, appeared on behalf of AL, while, Mrs.Suseela Devi, appeared on behalf of PTPL.

13. The arguments addressed on behalf of AL were as follows:

13.1. Firstly, that the impugned award was patently illegal, as the issue pertaining to limitation was not considered in the light of the provisions of the Limitation Act, 1963. In this connection, it was submitted by Mr.Joseph that the claim made by PTPL was barred by time, as it was made after the expiry of three years from the date of last payment made by AL to PTPL, which was, 20.09.2005. Learned

counsel submitted that the learned Arbitrator by taking into account, the factum of when, payment was received by AL from ELCOT (which was June, 2010), in coming to the conclusion whether the notice dated 26.03.2009 was within limitation or not, had committed a patent illegality.

13.2. Secondly, it was argued that since deficiencies in the execution of the contract by PTPL were exemplified in the two letters dated 13.07.2004 and 29.04.2005 issued by ELCOT, the Arbitrator's finding that there was nothing on record to show that it was because of deficiency in the services rendered by PTPL, that AL had terminated the contract, was distinctly, contrary to the record.

13.3. Thirdly, the learned Arbitrator erroneously ignored the Chartered Accountant's (CA) certificate dated 05.09.2013, which clearly reflected the deductions made by ELCOT in respect of payments made to AL. In this context, it was submitted that, if, the learned Arbitrator had taken into account the two deductions made by ELCOT, that is, the deduction in the sum of Rs.5,18,000/- made towards non-extension of the AMC and the deduction, in the sum of Rs.8,29,745/-made towards penalty, then, the only conclusion that he

would have reached was that there were no sums to be paid by AL to PTPL. In support of the submission that no sums were payable, reliance was also placed on the balance sheets of PTPL for the years 2010-11 and 2011-2012. Based on these balance sheets, it was sought to be argued that under the heading "Sundry Debtors", as on 31.03.2011, PTPL had shown the figure as "Nil" in the sub-heading "dues outstanding for more than six (6) months".

14. As against this, Mrs.Suseela Devi, learned counsel for PTPL argued that the deduction claimed by AL in the sum of Rs.5,18,000/- towards AMC receivable for second year of Phase - II was not sustainable, as it was contrary to Clause 10 of the agreement dated 30.04.2004, which dealt with Phase -II of the second year. Learned counsel submitted that the Phase - II of the second year was not a firm part of the contract, and that, under the contract obtaining between the parties, the contract could be closed on 30.04.2005; which was exactly what had been done in the instant case.

14.1. Insofar as the issue qua limitation was concerned, learned counsel relied upon Clause 8 of the agreement dated 30.04.2004 and the testimony of AL's witness R.W.1, to contend that the Arbitrator

had, rightly, found that PTPL's claim was within limitation. In this context, Mrs.Suseela Rani submitted that even though AL had received a sum of Rs.22,17,142/- from ELCOT via a cheque dated 16.06.2010, it had not paid a single paise to PTPL.

14.2. Learned counsel also refuted the submission advanced by the counsel for AL in the course of the proceedings, which was that, even if, the CA's certificate was ignored, the statement of account of AL should be taken into account, and if the said Statement of Account was considered, against the total sum of Rs.82,62,038/-, AL had received only a sum of Rs.61,57,143/-. This argument was advanced by the counsel for AL to demonstrate that deductions had been made by ELCOT while paying monies to it.

14.3. Mrs. Suseela Devi, in this context, pointed out that the bank statement filed by AL was only for the period spanning between 01.07.2004 and 30.09.2004. It was pointed out that the entire bank statement for the period 2003-2010, was not filed.

14.4. Furthermore, learned counsel also laid stress on the fact that AL had billed ELCOT only for a sum of Rs.76,39,428/- and not for

Rs.82,62,038/-. In other words, AL, to date, had not raised a bill for the balance amount, which is Rs.6,22,610/-.

14.5. According to the counsel, the fact, was that the CA's certificate showed a net receivable of Rs.6,52,540/-, as on 31.08.2013, which would include the sum of Rs.6,22,610/-, qua which, admittedly, no bill was raised by AL. According to the very same certificate issued by the CA, the amount, which was shown as receivable by AL, excluded the security deposit of Rs.3,64,081/-, apparently, paid by AL to ELCOT.

14.6. Learned counsel submitted that there was no material on record, which would demonstrate that ELCOT had either forfeited the security deposit or, imposed a penalty in the sum of Rs.8,29,745/-. It was also the submission of the learned counsel, based on clause 5 of the agreement, dated 08.10.2003, executed between AL and ELCOT, that, while that clause required payment of security deposit in the sum of Rs.3,64,081/- to ELCOT, the said agreement did not vest any right of forfeiture in ELCOT. In other words, the agreement did not articulate as to the circumstances, in which, ELCOT could forfeit the security deposit.

14.7. Learned counsel, thus, emphasised the fact that was there no material on record which would establish ELCOT's right to forfeit the security deposit and if, forfeiture had, in fact, taken place, then, in the absence of relevant provision in the agreement obtaining between AL and ELCOT, AL ought to have resisted the same, and therefore, the failure to do so, had impacted the interests of PTPL.

14.8. Learned counsel also contended that no admissible evidence had been produced to demonstrate that PTPL was deficient in rendering services under the contract obtaining between itself and AL. It was the submission of the learned counsel that assuming without admitting that AL had suffered a loss, then, that loss had to be borne by AL, as PTPL had no privity of contract with ELCOT. It was the submission of the learned counsel that the lethargy displayed by AL in seeking recovery of moneys owed to it by ELCOT cannot be the reason for not paying the just dues of PTPL.

Reasons:

15. I have heard learned counsel for the parties and perused the record, what emerges therefrom is as follows:

a) COSS had entered into a contract with AL, on 08.10.2003, for providing computer training and Information Technology services.

b) Based on the aforesaid, AL, in turn, appointed PTPL as a franchisee under an agreement dated 30.04.2004.

c) The agreement dated 30.04.2004 was followed by a revised Letter of Intent dated 14.05.2004, issued by AL in favour of PTPL.

d) Under the contract obtaining between AL and COSS, which was facilitated by ELCOT, a sum of Rs.82,62,038/- was receivable by AL.

e) On the other hand, under the contract dated 30.04.2004, PTPL was to receive a sum of Rs.72,33,800/- from AL.

f) The Special Commissioner and Director of Survey and Settlement, vide letter dated 30.07.2004, addressed to ELCOT, had complained about the deficiency of service.

g) ELCOT, on its part, vide letter dated 28.07.2004 had indicated to AL the concerns of the Special Commissioner and Directorate of Survey and Settlement with regard to the services rendered by PTPL.

h) The aforesaid letter of ELCOT was followed by a letter sent nine (9) months later, which is dated 29.04.2005, whereby, ELCOT

indicated to AL that it would not be extending AMC qua the second year of operation of Phase - II Taluks, and that, it would also be terminating the appointment of System Administrator and Programmer.

i) AL, on its part, on 02.05.2005 indicated to PTPL that ELCOT would not be extending the AMC for second year's operation of Phase - II locations (154 Taluks), beyond 30.04.2005. It was further indicated by AL that, accordingly, contract for Facility Management and AMC for phase - I locations (47 Taluks) would get terminated on 15.06.2005. This intimation was sent under a communication dated 02.05.2005.

16. As noted by the learned Arbitrator, while COSS, the ultimate client, had raised some concerns with regard to the quality of work in its letter dated 13.07.2004 to ELCOT, which, in turn, were conveyed by ELCOT to AL in a letter dated 28.07.2004, no punitive measures were taken.

16.1. As a matter of fact, even in the letter dated 02.05.2005, AL did not communicate to PTPL that on account of its failure to perform its obligations, it had suffered any injury and/or damages in

the form of forfeiture of security deposit, retention of monies or, imposition of penalty by ELCOT. The said letter did not articulate or quantify any claims under any of these heads. It was only after the PTPL lodged its claim that such defence was put up by AL.

17. I must record here that the counsel for AL repeatedly stressed upon the fact that the learned Arbitrator had failed to recognise the fact that AL had received only a sum of Rs.61,51,143/- against the total amount of Rs.82,62,038/-, which, itself, would show that ELCOT had deducted sums in the form of penalty, forfeiture of security deposit and retention of payment from sums payable to AL.

17.1. This argument was advanced by the learned counsel for AL to get over the fact that CA's certificate (Ex.R.7) had not been proved in accordance with law. The aforesaid submission advanced on behalf of AL demonstrated that the learned counsel himself was not convinced that argument based on the CA's certificate (Ex.R.7) could be sustained. In any event, in my view, the learned Arbitrator has, quite correctly, ruled, that the CA's certificate (Ex.R.7) cannot be relied upon, in view of the fact that the person, who had issued the certificate was not examined as witness by AL.

18. In so far as the statement of account was concerned, I tend to agree with the learned counsel for PTPL that the account is not complete. The account only records transaction for the period spanning between 01.07.2004 and 30.09.2004, whereas, even according to AL's own witness R.W.1, the last payment, which AL had received from ELCOT was in June, 2010. Furthermore, the statement of account would show that AL had billed ELCOT only for a sum of Rs.76,39,428/-, whereas, under the contract dated 08.10.2003, it would be entitled to bill for a sum of 82,62,038/-. There was, thus, under billing by AL to the extent of a sum of Rs.6,22,610/-.

19. I had put to the learned counsel for AL as to whether there was anything on record, which would show that steps had been taken by AL to recover, at least, this amount from ELCOT. Counsel for AL fairly conceded that no steps had been taken by AL to recover the said amount from ELCOT.

19.1. Therefore, the argument advanced on behalf of AL that the amount received by AL, which was a sum of Rs.61,57,437/-, as against the total amount receivable i.e., Rs.82,62,038/-, would, itself,

show that there were deductions made by ELCOT, and therefore, the burden qua such deductions had to be borne by PTPL, is not sustainable. In any event, I tend to agree with the argument advanced by the counsel for PTPL that insofar as PTPL and AL were concerned, they were governed by the contract dated 30.04.2004, and that, PTPL had no privity of contract in respect of the obligations undertaken by AL, vis-a-vis, ELCOT, under the contract dated 08.10.2003.

20. In these circumstances, I find no difficulty in sustaining the finding of the learned Arbitrator that PTPL was entitled to payment of the sum of Rs.12,53,800/-.

21. Having regard to the fact that against the total amount of Rs.72,33,800/-, it had received a payment of Rs.59,80,000/-, the findings in this behalf returned by the learned Arbitrator, both with regard to the total consideration and the amount received by PTPL, are pure findings of fact and cannot be found fault with. Similarly, as indicated above, I am in agreement with the learned Arbitrator that AL cannot be permitted to claim deduction towards penalty, as no admissible material was placed on record to support the contention.

The deduction in the sum of Rs.8,29,745/- claimed by AL towards penalty can neither be sustained based on the CA's certificate (Ex.R.7), which is clearly inadmissible, nor can it be sustained on the basis of statement of account produced by AL, which is inherently a weak and an incomplete piece of evidence, even if, one were rely upon it.

22. This brings me to the last aspect, which, as a matter of fact, was, not an aspect, raised by AL's counsel. This aspect pertains to the counter claim made by AL under the following two heads: (i) towards loss of AMC contract : Rs.1,99,000/- and (ii) amount forfeited by ELCOT: Rs.3,64,081/-.

23. A perusal of the award would show that while there is a reference to these heads in the award in paragraph 9(d) and paragraph 11(A)(c), neither are any issues drawn nor is any specific finding given qua them. The fact, that counter claims were raised under these heads, to which, a reply has been filed by PTPL would show that these were issues in the knowledge of the parties.

24. Pertinently, since, no issues were drawn up by the learned

Arbitrator in respect of aforementioned claims preferred by AL in its counter, I would have, in the ordinary course, adjourned the proceedings, for a period of time, to enable the Arbitrator to return a finding qua them, had the counsel for AL made a request in that behalf. This power could have been exercised under Section 34(4) of the 1996 Act upon initiative being taken in that behalf by AL, in this Court, or else, under Section 33(4) of the 1996 Act, AL could have asked the learned Arbitrator to make an additional award in respect of the aforementioned claims. De hors the provisions of Section 34(4) and 33(4) of the 1996 Act, there is no scope under 1996 Act for the Arbitrator to rehear the matter in respect of the claims, which though raised and had not been decided by him.

24.1. The only reason that I can fathom, as to why, AL did not move in that direction, is that, it did not have the requisite material to sustain the said claims. AL's only trump card was, the Statement of Account which, as discussed above, was clearly deficient in sustaining its counter claim. Even otherwise, I would refrain from tinkering with the award on this score, however tempting it may be, if the party, which should have been aggrieved, raises no challenge. Besides, to have parties at this late juncture to initiate fresh

proceedings, would be, completely unfair to PTPL which has been awaiting payment of its dues, since 2005.

25. Thus, for the foregoing, I see no reason to interfere with the impugned award. Accordingly, the petition is dismissed leaving the parties to bear their own costs.

Index : Yes/No

04.10.2016

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RAJIV SHAKDHER,J.

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Pre-Delivery Order in

Original Petition No.56 of 2015

Dated: 04.10.2016