IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.11.2016

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The Honourable **Mr.Justice RAJIV SHAKDHER**

O.P.No.27 of 2012

M/s.Industrial Engineering Instruments,
203, 12th Main, III Phase,
Peenya Industrial Area, Peenya,
Bangalore-560 058
represented by its Proprietor
R.Parameshwariah .. Petitioner

Vs.

1. Union of India
represented by the
Director of Supplies and Disposals,
Shastri Bhavan, 26, Haddows Road,
Chennai-600 006.

2. Dr.Gita Rawat,
Sole Arbitrator,
Ministry of Law and Justice,
Room No.3, I Floor,
Jeevan Tara Building,
5, Parliament Street,
New Delhi-110 001. .. Respondents

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Prayer : Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the award passed by respondent No.2, dated 15.07.2005 and consequently allow the claims made by the petitioner, award costs in favour of the petitioner herein, and thus render justice.

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For Petitioner : Mr.G.Balasubramanian

For Respondents : Mr.V.T.Balaji

ORDER

1. This is a petition filed, under Section 34 of the Arbitration and Conciliation Act, 1996 (in short "the 1996 Act") to assail the award dated 15.07.2005.

2. In order to adjudicate upon the instant petition, the following broad facts require to be noticed :

2.1. The petitioner, which is a proprietary concern had bid for a tender, which was floated by respondent No.1, on 12.10.1989. Respondent No.1, in terms of the tender floated by it, invited offers for manufacture and supply of a 200 Tonne Load Frame Motorized Machine with Monitor and Digital Control Designed to give 90 cycles per minute.

2.2. The petitioner was successful in winning the tender, and accordingly, respondent No.1 issued a Letter of Acceptance (in short "LOA") dated 18.09.1990 in its favour. This was followed by the petitioner issuing a communication dated 26.09.1990, whereby, it accepted the order placed upon it, by respondent No.1.

2.3. The aforesaid was followed by a letter dated 08.10.1990, issued by respondent No.1, whereby, it proceeded to accept the quotation raised by the petitioner. By this very communication, respondent No.1 informed the petitioner that the contract would have to be executed in accordance with the terms and conditions contained in DGS&D-68(R).

2.4. Furthermore, as per the LOA, the petitioner was also required to make over a Security Deposit (in short "SD") in the sum of Rs.18,890/- to ensure due performance of the contract. The petitioner was also informed by respondent No.1 that the subject machine was to be delivered within a time frame of four to eight (4 – 8) months from the date of receipt of the order.

2.5. The record would show that the petitioner fulfilled the requirement of making over a SD, by furnishing a Bank Guarantee in the sum of Rs.18,890/-. The record would also show that, if, the time frame of four to eight (4-8) months for delivery of the subject machine were to be applied, then, the petitioner was required to make delivery by 30.04.1991. Furthermore, the record would also show that time for delivery of the subject machine was extended till 30.06.1991.

2.6. It appears that, since, the petitioner was unable to fulfil its commitment under the contract, respondent No.1 cancelled the contract, vide communication dated 29.07.1991. It was, however, made clear vide the very same communication that the cancellation of the contract would be at the risk and cost of the petitioner.

3. Consequently, respondent No.1 floated a Risk Purchase Tender on 13.09.1991. Notice, in this behalf, was given to the petitioner. Respondent No.1 concluded the risk purchase tender,

and, as per the stand taken before the learned Arbitrator, it suffered a loss in the sum of Rs.13,58,804/-.

3.1. In respect of the loss suffered by respondent No.1, a demand was raised on the petitioner, in the first instance, vide notice dated 16.05.1997.

3.2. This demand was followed by yet another demand, which was made on 09.08.2001.

4. It appears, that in the interregnum, the petitioner, after raising a protest with respondent No.1, with regard to its actions, which, it categorised as unfair vide communication dated 12.08.1991, proceeded to file a civil suit. This suit was filed on 20.08.1991, in the City Civil Court at Bengaluru. The suit was numbered as : O.S.No.5004 of 1991.

4.1. Pertinently, in the suit, the only relief sought was, for passing a decree of permanent injunction against invocation of Bank Guarantee by respondent No.1.

4.2. While in the plaint, there was an averment made that the contract was unlawfully cancelled by respondent No.1, no relief with regard to cancellation of contract was sought in the suit instituted by the petitioner.

4.3. The petitioner, as it appears, upon a perusal of the averments in the plaint, only reserved a right to claim damages qua the cancellation of the contract.

5. Respondent No.1, on its part, immediately, upon the institution of the suit by the petitioner, filed an application under Section 34 of the Arbitration Act, 1940, for seeking a stay qua the suit proceedings. This application was filed on 06.09.1991.

5.1. The record shows that the concerned Court allowed the said application on 27.06.1995, whereby, the suit was stayed. It is a matter of record that the suit was, thereafter, taken up formally from time to time, and finally, dismissed on 01.04.2000.

5.2. Though parties before me have not filed the order dated 01.04.2000, this aspect of the matter is not disputed by the learned counsel appearing for the parties.

6. Continuing with the narrative, respondent No.1, finally appointed an Arbitrator on 30.10.2003.

6.1. Learned Arbitrator gave requisite opportunity to parties to file their respective claims.

6.2. As a matter of fact, the petitioner, by way of counter-claim, filed before the learned Arbitrator, sought not only refund of the Bank Guarantee amount, which was encashed by respondent No.1, but also sued for damages in the sum of Rs.4,00,000/- along with interest. The interest was also sought with respect to the amount received by respondent No.1, upon encashment of the Bank Guarantee.

6.3. The learned Arbitrator, after hearing the parties and perusing the record placed before her, passed the impugned award.

6.4. By virtue of the said award, the learned Arbitrator allowed the claim of respondent No.1 in respect of the risk purchase loss. Consequently, the petitioner was directed to pay to respondent No.1, a sum of Rs.13,58,804/-.

7. The petitioner, being aggrieved, filed a petition under Section 34 of the 1996 Act, in the first instance, in the City Civil Court at Bengaluru, which was numbered as A.S.No.15007 of 2005.

7.1. The City Civil Court at Bengaluru returned the petition vide order dated 01.10.2011, for filing the same before the Court of proper jurisdiction.

8. It is, in this background, the instant petition came to be presented in this Court, on 09.11.2011.

9. On behalf of the petitioner, Mr.G.Balasubramanian has advanced submissions, whereas, on behalf of respondent No.1, submissions have been advanced by Mr.V.T.Balaji.

10. Counsel for the petitioner, at the outset, says that he does not wish to assail the award, insofar as it rejects the petitioner's claim.

10.1. As regards the other part of the award, whereby, the claim made by respondent No.1 has been allowed, the learned counsel for the petitioner makes one singular assertion, which is that the claim of woefully time barred.

10.2. Learned counsel for the petitioner says that the cause of action, in respect of the claim made by respondent No.1 on 29.07.1991, when the contract was cancelled. Learned counsel further submits that, even if, this date is ignored, the cause of action would, surely, have arisen in respect of the risk purchase loss, on 16.05.1997, when, respondent No.1, raised a demand, for the loss suffered by it.

10.3 Learned counsel, therefore, says that the initiation of arbitration on 30.10.2003 was clearly beyond limitation.

11. On the other hand, learned counsel for respondent No.1 seeks to rely largely upon, the impugned award, in support of his submissions.

11.1. Learned counsel submits that the suit was stayed by the City Civil Court on 27.06.1995, which came to be dismissed only on 01.04.2000. It was further submitted that, therefore, the arbitration initiated in the year 2003 was within time.

12. I have heard the counsel for the parties.

13. According to me, the claim petition filed by respondent

No.1 is clearly beyond limitation.

13.1. The learned Arbitrator has committed a patent error inasmuch, she failed to appreciate the fact that the suit filed by the petitioner was to seek a relief of permanent injunction in respect of the Bank Guarantee in issue. There was no relief sought vis-a-vis cancellation of the contract. Therefore, the stay of the suit on 27.06.1995 did not freeze the limitation.

14. Furthermore, in my view, the petitioner is right in submitting that even if, one were to ignore the factum of cancellation of the contract, which occurred on 29.07.1991 and willy nilly gave rise to cause of action, surely, cause of action did arise on 16.05.1997, when a demand was raised by respondent No.1 on account of loss caused due to risk purchase. What makes it worse, is that, even if, I were to take 01.04.2000 as the date, when the suit was finally and formally dismissed, when the cause of action last arose, the claim lodged by respondent No.1 is still beyond time, as the learned Arbitrator was appointed on 30.10.2003.

15. Therefore, on all grounds, respondent No.1's claim is beyond limitation.

15.1. I must, however, record that it is the case, where, my sense, is that, on merits, respondent No.1, may have, perhaps, succeeded, but because of procrastination, respondent No.1 stands denied of fruits of what seemingly appears to be a just claim, as statute of limitation has intervened in the meanwhile. Limitation, as is often said, does not obliterate the right, it only interdicts the remedy. It punishes those who sleep over their rights. Which is why it termed as a statute of repose.

16. For the foregoing reasons, the impugned award is set aside.

17. The captioned petition is disposed of, in the aforesaid terms. The parties are directed to bear their own costs.

02.11.2016

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RAJIV SHAKDHER, J.

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