IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.02.2018

CORAM

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

O.P.No.1 of 2008

Task Engineering,
a Sole Proprietary Concern,
rep. by its Proprietor K.Madhavan,
No.11, Crescent Road,
Shenoy Nagar, Chennai-600 030. ... Petitioner

Vs.

1.M/s.Thermax Babcock and Wilcox Ltd.,
Sagar Complex, Kasarwadi,
Pune-411 034.

2.Sri.K.Natarajan,
District Judge (Retd.), Co-Arbitrator,
6, (Old No.10) II Trust Cross Street,
Madavelipakkam, Chennai-600 028.

3.Sri.S.Sai Prasad,
Advocate, Co-Arbitrator,
Flat No.B-1, Ashok Vatika,
No.1, Dr.Guruswamy Road,
Chetpet, Chennai-600 031.

4.Sri.R.Rajagopalan,
District Judge (Retd.),
Presiding Arbitrator, 70/1, Indra Colony,
Ashok Nagar, Chennai-600 083. ... Respondents

Petition filed under Section 34 of the Arbitration and

Conciliation Act, 1996 to set aside the award dated 03.02.2007 passed by the Arbitral Tribunal between the petitioner and the first respondent in the matter of purchase order No.220678 dated 18.04.1996 and in the matter of Arbitration and Conciliation Act, 1996, and pass consequential order in terms of the petitioner counter claim.

For Petitioner : Mr.S.Subbiah, Senior Counsel for M/s.P.Sugumaran and P.Raja

For Respondents : No Appearance

O R D E R

The petitioner has filed this original petition to set aside the award dated 03.02.2007 passed by the Arbitral Tribunal between the petitioner and the first respondent in the matter of purchase order No.220678 dated 18.04.1996.

2.Heard Mr.S.Subbiah, learned Senior Counsel appearing for the petitioner. None appears for the respondents.

3.The first respondent issued a purchase order dated 18.04.1996, in favour of the petitioner for erection and commissioning of 1x100 TPH Boiler at Madras Fertilizers Limited, Manali. The petitioner was a sub-contractor of the first respondent, who already entered into an agreement with Madras Fertilizers Limited, Manali. The original contract also provides for sub-contract. The work was duly done.

4.According to the first respondent, a sum of Rs.4,25,918/- was wrongly paid by his Finance Department to the petitioner. Thus, notices were sent to the petitioner to make the payment. The petitioner made a reply denying the same. Thereafter, the arbitration clause was invoked. The petitioner made a counter claim. The Tribunal rejected the claim of the petitioner both on limitation and on merits. On limitation, it was held that the claim was made after a period of eight years. Thereafter, considering Exs.C1 to C11, an award was passed. It was put into challenge before this Court.

5.Learned Senior Counsel appearing for the petitioner would submit that, though various contentions have been raised, only the issue of limitation will have to be taken note of. Even as per Ex.C5, the excess amount claimed was paid through the demand draft dated 18.10.1997. Therefore, the period of limitation will have to be reckoned from that date. Legal notice on behalf of the first respondent was issued only on 13.10.2000 to the petitioner. Hence, the claim of the first respondent is also barred by limitation.

6.Learned Senior Counsel incidentally would submit that award of interest at 12% and 18% is excessive. The interest normally being levied is only 9% per annum. Similarly, 18% levying interest from the date of the award till the date of realisation is also liable to be set aside. A perusal of the award would show that, it was passed on merit after going through the entire records. The first respondent filed 11 documents as against the petitioner's 59 documents. Even while rejecting the counter claim of the petitioner, the Tribunal passed the award on merits. The petitioner did not raise the plea of limitation before the Tribunal. Though Section 3 of the Indian Limitation Act requires a Court to take this jurisdiction qua the limitation when it becomes a question of fact and law, it requires an adjudication on both. Admittedly, the issue was not raised. Therefore, the same was not framed and answered. A perusal of Ex.C5 would show that the first respondent came to understand from his Finance Department that payment has been made wrongly to the petitioner instead of crediting the same in the account of Madras Fertilizers Limited. Therefore, the demand was made for the first time under Ex.C5. For better appreciation, Ex.C5 is re-produced hereunder:

"Please refer to the Minutes of Meeting you had

with us on 13th August, 1997 wherein it was agreed that an amount of Rs.80,593/- is payable to you towards the extra final & payment, after adjusting all debits & credits. It was also agreed that you will submit the final bill (RA Bill No.17 – 6.8%) for regularising our accounts and also enable us to release the amount of Rs.80,593/-.

Understand from our Finance that an amount of Rs.4,25,919.27 by Demand Draft bearing No.496355 dated 17.10.97 drawn on Corporation Bank, Madras against the above RA Bill No.17 has been released to you, instead of crediting this amount to MFL.

Under these circumstances, we request you to return the excess amount of Rs.3,45,326.27 immediately, by Demand Draft. Details are :

- DD sent towards final bill	:	4,25,919.27
- Balance amount Payable as per MOM dated 13.8.97	:	80,593.00

- Excess amount paid	:	3,45,326.27

Your immediate action is requested.

With regards,"

7.Ex.C5 makes a deduction of the amount otherwise payable to the petitioner as seen from the statement made above. Therefore, the starting at best would come from the date of Ex.C5. There are subsequent communications also. Ex.C5 also speaks about payment to be made in favour of the petitioner for a sum of Rs.80,593/-. It was further agreed, as per the aforesaid documents that the petitioner while submitting final bill for regularising the accounts to enable the first respondent to release the amount of Rs.80,593/-, the petitioner does not dispute the receipt of this letter. Despite the fact the petitioner denied the receipt of the excess payment in their reply dated 19.08.2006. The first respondent has clearly stated that the accounts having been not finalized, the same would be sent shortly. A further reply was given under Ex.C6 by the first respondent and thereafter, legal notice was issued. Therefore, the contention of the learned Senior Counsel for the petitioner that the date on which the demand was drawn-17.10.1997 will have to be taken into account cannot be countenanced, as it was sent by mistake and oversight. The petitioner, as rightly observed by the Tribunal did not prove that it was entitled for the aforesaid amount. Under Ex.C5, a request was only made to return the excess amount having found from the concerned Finance Department. The minutes of meeting dated 13.08.1997 was earlier to the demand draft drawn on 17.10.1997. Thus, the meeting was convened only to the payment of Rs.80,593/- alone. Therefore, this Court does not find any merit in the contentions raised based upon the claim being barred by limitation. However, this Court finds some force on the submission made by the learned Senior Counsel that interest awarded is excessive. After all, the excess amount was paid by mistake committed by the first respondent and not at the instance of the petitioner.

8.Considering the above fact situation, particularly when the entire prayer cropped up due to the mistake committed on behalf of the first respondent coupled with the fact that interest at 18% per annum is excessive post award, this Court is inclined to modify the same both prior to the award and thereafter, at 9% per annum. Accordingly, this original petition stands allowed. No costs.

26.02.2018

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Index : Yes/No

Speaking/Non Speaking Order

M.M.SUNDRESH, J.

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