

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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|------------------------|------------|
| Judgment reserved on   | 27.11.2019 |
| Judgment pronounced on | 08.01.2020 |

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

**O.P. No.145 of 2009**

M/s.Delkon (India) Private Limited  
Through its Managing Director,  
Shri G.S.Singhal  
No.240, 2<sup>nd</sup> floor,  
25-A, Park Street,  
Kolkata – 700 016.

... Petitioner

Vs.

1.M/s.Bharat Heavy Electricals Limited,  
through Group General Manager  
Power Sector – Eastern Region,  
Plot No.9/1, Block – DJ, Sector – 11,  
Salt Lake City, Kolkata – 700 091.

2.Mr.Justice K.Ramamurthy(Retd),  
Supreme Court Bar Association,  
Supreme Court, New Delhi.

... Respondents

**PRYER:** Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Impugned Award dated 18.06.2007 passed by the learned Sole Arbitrator and for costs.

For Petitioner : Mr.S.S.Rajesh  
for M/s.S.K.Rakhunathan

For Respondent : Mr.Krishna Srinivasan  
for M/s.S.Ramasubramaniam and  
Associates

**ORDER**

The Petitioner was awarded a contract for handling at site stores/storage yard, transportation to site of work, pre-assembly, erection, testing and commissioning and handing over of fans, mills, electrostatic precipitators, ducts and connected structurals in Unit I and II at Tenughat TPS 2 x 210 MW Boilers for the Bihar State Electricity Board, Bihar. Based on the bid submitted by the Petitioner pursuant to the tender floated by the first Respondent, a Letter of Intent dated 29.09.1988 was issued to the Petitioner by the first Respondent. The entire work was to be carried out within a period of 26 months from the date of commencement of work, which was on 20.09.1988. According to the Petitioner, work could not be carried out, as per schedule, because of acts of prevention by the first Respondent that caused delay in commencement and execution of the work. The admitted position is that work was completed on or about 31.07.1997, i.e. after a delay of about 74.33 months. This resulted in a dispute between the parties and the Petitioner herein referred the dispute to arbitration before the Sole Arbitrator. In the said Arbitration proceeding, the Petitioner made claims under 9 heads of claim such as release of

payment against the final contract value, payment of withheld amount of compensation, extra work, expenses incurred in a court case under the Essential Commodities Act, transportation cost of ball-mill shells, non payment of overrun charges and loss of profits and overheads due to under utilization of mobilized men and material, extended stay and reduction in scope of work. In the aggregate, the Petitioner herein claimed a sum of Rs.2,62,89,193.06 with interest thereon at 15% per annum from 01.05.2005 till the date of payment. All the claims were refuted by the first Respondent herein and, in turn, the first Respondent herein made six counter claims towards refund of extra over run charges, supply of tools and tackles, damages, use and occupation of flat by the employee of the Petitioner, payment to a sub vendor, interest on Rs.44,87,568/- and cost of the proceedings. In the aggregate, the first Respondent counter claimed a sum of Rs.99,87,568.60. Upon completion of pleadings, the Arbitral Tribunal framed eight issues at paragraph 105 of the award. Issue Nos.3 to 5 were preliminary issues as to whether the Petitioner is entitled to invoke arbitral proceedings without complying with clause 2.5.14 of the General Conditions of Contract (GCC), whether the claims are barred by limitation and whether the first Respondent can invoke the arbitration clause without issuing notice as per clause 2.14 of the GCC. Eventually, by Arbitral Award dated 18.06.2007(the Award), the Arbitral Tribunal held that the Petitioner herein failed to act in accordance

with clause 2.14 of the GCC and that, therefore, the Petitioner is not entitled to invoke the Arbitration clause(finding on issue No.3). On issue No.4, which related to limitation, the Arbitral Tribunal held that the claims of the Petitioner are barred by time. In respect of issue No.5, which corresponds to issue No.3 as regards the first Respondent, once again, the Arbitral Tribunal held that the first Respondent is not entitled to invoke the arbitration clause as it did not issue notice in terms of clause 2.14 of the GCC. Consequently, the Arbitral Tribunal rejected all the nine claims that were made by the Petitioner herein. Likewise, all the counter claims of the first Respondent were also rejected. The said Award is impugned by the claimant in the Arbitration, which is the Petitioner herein.

2. I heard the learned counsel for the Petitioner and the learned counsel for the first Respondent.

3. The learned counsel for the Petitioner submitted that the findings of the Arbitral Tribunal with regard to the non-issuance of a notice as per clause 2.14 of the GCC are patently incorrect. In this regard, he referred to the findings of the Arbitral Tribunal at paragraphs 149 to 164 of the Award. By referring to the said paragraphs, the learned counsel contended that the Petitioner herein issued a notice to the first Respondent on 04.03.2002 and despatched the same on 05.03.2002.

However, the learned Arbitrator rejected the said notice entirely on the ground that the notice was addressed and despatched to a different address from that specified in the letter dated 08/15.10.1998. In specific, the Petitioner was informed that notice should be sent to the Deputy General Manager/Construction Management, Eastern Region, Head Quarters, BHEL, 33-A, Chowringhee Road P.B.No.9244, Calcutta - 700 071, whereas the notice was sent to the General Manager I/c, Bharat Heavy Electricals Limited, Power Sector - Eastern Region, Block 'B' & 'C' 4<sup>th</sup> Floor, Gillandar Hoose, 8, Netaji Subash Road, Kolkotta - 700 001.

4. The learned counsel further submitted that the findings of the Arbitral Tribunal that the claims are barred by limitation are patently erroneous. In this connection, the learned counsel referred to the findings at paragraphs 165 and 166 of the Award, wherein the Arbitral Tribunal concluded that the Arbitral proceeding should have been commenced within three years from the date of completion of work by referring to Article 18 of the Limitation Act, 1963 (the Limitation Act). On that basis, the Arbitral Tribunal computed the period of limitation from 31.07.1997 (i.e. the date of completion of work) to the date of filing of the petition under Section 11 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) on 31.03.2003. According to the learned counsel, the limitation period should have been computed from the date when the

cause of action arose and not from the date of completion of work. In this regard, he submitted that communications were issued even on 10.03.2000 with regard to the final bill and, therefore, the computation of the period of limitation from 31.07.1997 is an error apparent on the face of the Award. For all these reasons, the learned counsel for the Petitioner submitted that the Award is liable to be set aside.

5. In response and to the contrary, the learned counsel for the first Respondent submitted that the Petitioner did not comply with clause 2.14 of the GCC as correctly held by the learned Arbitrator. In this connection, the learned counsel referred to Issue Nos.3, 4, 5 and 6 at page 125 of the typed set of pleadings. He also referred to the letter dated 08.10.1988, which is at page 14 of the first Respondent's typed set of papers. With regard to the notice dated 04.03.2002, which is said to have been issued by the Petitioner to the first Respondent, he pointed out that the said notice was never received by the first Respondent. He also submitted that the Petitioner admittedly did not issue a notice under Section 21 of the Arbitration Act so as to invoke the arbitration clause. Instead, he submitted that a Petition under section 11 of the Arbitration Act was filed on 31.03.2003 and an order was issued in the said Petition on 31.03.2005. Therefore, he submitted that the Arbitral Tribunal correctly computed the limitation period from the date of completion of

work till the date of filing of the Section 11 petition. Consequently, he concluded his submissions by stating that there are no infirmities in the Award.

6. The records were examined and the submissions of the learned counsels were considered carefully. The main question that arises for consideration, in this case, are whether the findings of the Arbitral Tribunal in respect of Issue Nos. 3, 4,5 and 6 warrant interference. The said issues are set out hereunder:

- i) Whether the claimant is entitled to invoke the Arbitration proceedings without complying with the clause 2.14 of the General Conditions of the Contract and without issuing notice?
- ii) Whether the claims made by the claimant are in time?
- iii) Whether the respondents can invoke the Arbitration clause without issuing notice as required under clause 2.14 of the contract?
- iv) Whether the Respondents are entitled to the amounts claimed in the counter claim?

7. In order to enter a finding on Issue No.3, I find that the Arbitral Tribunal referred to and, in fact, extracted clause 2.14 of the GCC

at paragraph 150 of the Award. The said clause provides that the reference of the dispute to Arbitration should be preceded by a written notice by either party to the contract to the other party. After extracting clause 2.14, the Arbitral Tribunal determined the factual controversy as to whether a valid notice was issued by the Petitioner on 04.03.2002. By considering the relevant evidence, the Arbitral Tribunal concluded that the alleged notice dated 04.03.2002 was admittedly issued to the wrong address and not to the address for service of notice as per communication dated 08/15.10.1988 from the first Respondent/BHEL. Moreover, the Arbitral Tribunal entered a finding that the claimant had not referred to the alleged notice dated 04.03.2002 in the claim statement (paragraph 156 of the Award). Thereafter, the Arbitral Tribunal referred to section 3 of the Arbitration Act, which relates to receipt of written communications and provides that the notice shall be deemed to be duly received if it is delivered to the correct mailing address. On the above basis, the learned Arbitrator concluded that the Petitioner did not conform to clause 2.14 of the GCC and, therefore, did not have a right to invoke the arbitration clause. I find that the above conclusion is based on a reasonable construction of clause 2.14 of the GCC read with Section 3 of the Arbitration Act. Consequently, the Petitioner has failed to make out a case for interference with this finding under Section 34 of the Arbitration Act.

8. The next question that should be considered is whether the finding that the claims are barred by limitation warrants interference. On this issue, the Arbitral Tribunal referred to and, in fact, extracted Article 18 of the Limitation Act. After extracting Article 18, the Arbitral Tribunal proceeded to calculate the period of limitation from the date of completion of work, which is admittedly on 31.07.1997. In view of the finding that a notice under section 21 of the Arbitration Act was not issued by the Petitioner, the Arbitral Tribunal fixed the date of filing of the Petition under Section 11 of the Limitation Act as the date on which the limitation clock stops. By this process, the Arbitral Tribunal concluded that the period of limitation commenced on 31.07.1997 and ended on 31.07.2000, whereas the section 11 petition was filed on 31.03.2003, which is about 6 years after the completion of work. In this connection, the judgment of this Court, which was reported in 2007 II MLJ 105 was also referred to by the Arbitral Tribunal. On perusal of the Statement of Claim, I find that the Petitioner stated, in paragraph 22 thereof, that the work was completed, commissioned and put to use on 31.07.1997 and there is no explanation therein as to how a claim made on 30.04.2005 is within the prescribed limitation period. The learned counsel for the Petitioner was also unable to establish that the claims are within time on any other acceptable basis. It is also pertinent to note that both with regard to compliance with clause 2.14 of the GCC and with regard to the issue of limitation, the Arbitral

Tribunal found that neither party had complied with clause 2.14 nor presented the claims or counter claims, respectfully, within the period of limitation. Thus, the Arbitral Tribunal concluded, at paragraph 167 of the Award, that neither the Petitioner nor the first Respondent/BHEL had complied with clause 2.14 of the GCC or presented their claims within time. On that basis, both the claims and counter claims were rejected. Once again, I find that the the conclusion of the Arbitral Tribunal, by relying upon Article 18 of the Limitation Act, is based on a reasonable interpretation of the law of limitation and the Petitioner has clearly failed to make out a case for interference with the Award.

9. In the result, the challenge to the Award dated 18.06.2007 fails and, consequently, the Petition under Section 34 of the Arbitration Act is dismissed. No costs.

**08.01.2020**

Speaking order  
Index: Yes  
Internet: Yes  
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O.P.No.145 of 2009

**SENTHILKUMAR RAMAMOORTHY, J.**  
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**Pre Delivery order**  
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**O.P.No.145 of 2009**

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**08.01.2020**