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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 28.09.2021

PRONOUNCED ON: 05.10.2021

CORAM:

THE HON'BLE MR.JUSTICE ABDUL QUDDHOSE

CMA NO.2556 OF 2012

Neyveli Lignite Corporation Ltd.,
Rep. By its Company Secretary,
Corporate Building,
Neyveli - 607 801.

... Appellant/
Respondent

versus

M/s.Eswari Enterprises Limited,
Rep. by its Managing Partner,
No.P-2, II Cross Street,
Turn Bulls Road,
Nandhanam,
Chennai - 600 035.

...Respondent/
Petitioner

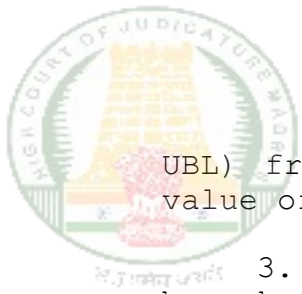
Civil Miscellaneous Appeal filed under Section 37 of Arbitration and Conciliation Act, 1996 aggrieved by the judgment and decree passed in Arbitration O.P. No.153 of 2010 on the file of the Principal District Judge, Cuddalore, Cuddalore District dated 30.03.2012.

For Appellant : Mr.N.Nithianandam

JUDGMENT

This appeal has been filed under Section 37 of the Arbitration and Conciliation Act challenging the order dated 30.03.2012 passed by the learned Principal District Judge, Cuddalore in Arbitration OP No.153 of 2010 under Section 34 of the Arbitration and Conciliation Act, 1996 allowing the application filed by the respondent and setting aside the Arbitral Award dated 30.10.2009 passed in favour of the appellant against the respondent.

2. The respondent was awarded a contract by the appellant for the retrieval and removal of Un-Burnt Lignite (for short



UBL) from 3 Bunds of Thermal Station - I for a total contract value of Rs.2,25,55,556.40

3. According to the appellant, the respondent committed breach of contract. The claimant referred the dispute to Arbitration in accordance with the Arbitration clause contained in the contract and sought recovery of a sum of Rs.1,52,95,000/- together with interest at 12% p.a. from the respondent.

4. The Arbitral Tribunal passed an Arbitral award on 30.10.2009 directing the respondent to pay a sum of Rs.88,50,000/- to the appellant along with interest at 9% per annum with effect from the date of claim viz., 09.06.2007.

5. Aggrieved by the same, the respondent filed an application under Section 34 of the Arbitration and Conciliation Act before the Principal District Court at Cuddalore in Arbitration OP No.153 of 2010 on the ground that the claim made by the appellant before the sole Arbitrator is barred by law of limitation apart from raising other grounds.

6. By order dated 30.03.2012 in Arbitration OP No.153 of 2010, the learned Principal District Judge, Cuddalore allowed Arbitration OP No.153 of 2010 in favour of the respondent and set aside the Arbitral Award dated 30.10.2009 passed in favour of the appellant.

7. Aggrieved by the order dated 30.03.2012 passed in Arbitration OP No.153 of 2010, this appeal has been filed under Section 37 of the Arbitration and Conciliation Act by the respondent in Arbitration OP No.153 of 2010.

8. Heard Mr.N.Nithianandam, learned counsel for the appellant. Despite service of notice on the respondent and their name having been printed in the cause list, today, there is no representation on their side.

9. The learned counsel for the appellant drew the attention of this Court to the order dated 30.04.2004 passed by a Division Bench of this Court in W.A. No.1808 of 2002 and would submit that only pursuant to that order, the arbitration was initiated by the appellant against the respondent for the recovery of the value of the stocks removed from the appellant premises by the respondent for which payments were not made. According to the learned counsel for the appellant, the order dated 30.04.2004 passed by the Division Bench referred to supra is in the nature of a decree and therefore, the claim filed by the appellant before the Arbitral Tribunal on 14.08.2007 is well within the period of limitation though the order was passed by the Division



Bench on 30.04.2004 itself.

10. The learned counsel for the appellant also drew the attention of this Court to the letters dated 07.08.2004, 01.12.2004, 09.08.2005, 24.11.2005 and 23.04.2007 sent by the appellant to the respondent demanding payment of the outstanding dues and submitted that since the respondent has not responded to those letters of demand, it amounts to admission of liability and therefore, according to him, the claim filed before the sole Arbitrator by the appellant on 14.08.2007 is well within the period of limitation.

11. The learned counsel for the appellant also drew the attention of this Court to the reply dated 26.07.2004 sent by the respondent and would submit that the learned Principal District Judge under the impugned order failed to take note of the fact that in the reply, the respondent has stated that the invocation of the Bank Guarantee by the appellant is unilateral and illegal and have reserved their right to get back the said bank guarantee by appropriate legal action, which will indicate that the respondent did not deny its liability to the appellant.

12. The learned counsel for the appellant then drew the attention of this Court to the impugned order and would submit that the learned Principal District Judge has misdirected himself by not appreciating the evidence available on record and has come to the erroneous conclusion that the claim filed by the appellant against the respondent is barred by the law of limitation. In support of his contentions, the learned counsel for the appellant drew the attention of this Court to a judgment of the Hon'ble Supreme Court in the case of State of Goa v. Praveen Enterprises reported in (2012) 12 SCC 581 and would submit that since the notices of demand were sent by the appellant to the respondent on 07.08.2004, 01.12.2004, 09.08.2005, 24.11.2005, 23.04.2007 and 14.08.2007 calling upon the respondent to pay the dues which was not responded to, the claim made before the Arbitrator on 14.08.2007 is well within the period of limitation. The learned counsel for the appellant also drew the attention of this Court to Section 43 (3) of the Arbitration and Conciliation Act as well as Section 21 of the Act in support of his contentions.

13. The learned counsel for the appellant also relied upon a Single Bench decision of this Court in the case of Ion Exchange India Limited, represented by its Authorized Signatory v. Angeripalayam Common Effluent Treatment Plant Limited and would submit that the said decision has made it clear that the notices of demand sent by the appellant on 07.08.2004, 01.12.2004, 09.08.2005, 24.11.2005 and 23.04.2007, which were not responded by the respondent saves limitation.



Discussion :-

14. Section 43 of the Arbitration and Conciliation Act makes it clear that Limitation Act applies to Arbitrations. The said section also makes it clear that Arbitration shall be deemed to have commenced on the date referred to under Section 21 of the same Act.

15. Section 43 of the Arbitration and Conciliation Act, 1996 reads as follows :-

43. Limitations.-

(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

16. Section 21 of the Act makes it clear that unless and otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which the request for the dispute to be referred to arbitration is received by the respondent.

17. Section 21 of the Act reads as follows :-

21. Commencement of arbitral proceedings : Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.



18. In the case on hand, the Division Bench of this Court in its order dated 30.04.2004 in W.A. No.1808 of 2002 granted liberty to the appellant to initiate proceedings against the respondent for the recovery of the losses alleged to have been suffered by them on account of the breach of contract committed by the respondent while removing the stocks from the appellant's factory premises. The cause of action for the claim arose on 30.04.2004 when the aforesaid order was passed by the Division Bench of this Court.

19. The appellant, as seen from the typed set of documents has sent several letters dated 07.08.2004, 01.12.2004, 09.08.2005, 24.11.2005 and 23.04.2007 demanding payment of their alleged dues. Admittedly as seen from the evidence available on record, no response has been received by the appellant from the respondent to those letters of demand. Only on 14.08.2007, the appellant has intimated the respondent by their letter that in the event of failure to pay the dues, they will be constrained to initiate arbitration proceedings by appointing Mr.M.Thangarajan, Chief Manager (Chemicals), M/s.NLC limited as the Sole Arbitrator to decide the dispute between the parties. Since the cause of action for the claim arose on 30.04.2004, the notice of appointment of Arbitrator by the appellant sent on 14.08.2007 to the respondent is beyond the period of three years from 30.04.2004. The contention of the appellant is that since notices of demand was sent by the appellant on 07.08.2004, 01.12.2004, 09.08.2005, 24.11.2005 and 23.04.2007 which were not responded, the claim made by the appellant before the sole Arbitrator is well within the period of limitation. Admittedly, subsequent to the letters of demand referred to supra, the respondent has not admitted its liability and even in the letter dated 26.07.2004, the respondent has denied its liability to the appellant. The only question that arises for consideration is whether the learned Principal District Judge under the impugned order passed under Section 34 of the Arbitration and Conciliation Act was right in holding that the claim filed by the appellant against the respondent before the Arbitrator is barred by the law of limitation.

20. Section 18 of the Limitation Act reads as follows :-

18. Effect of acknowledgment in writing.

(1)Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the

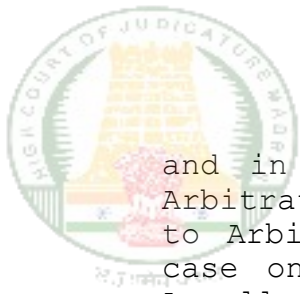


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acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received

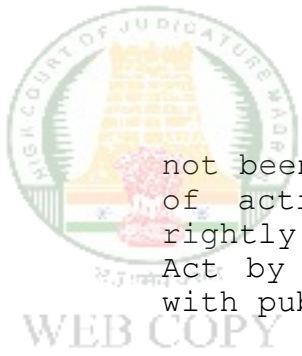
21. The cause of action for the claim made by the appellant admittedly arose on 30.04.2004 when the Division Bench of this Court disposed of the Writ Appeal filed by the appellant in W.A. No.1808 of 2002 by granting liberty to the appellant to recover its alleged dues from the respondent. Admittedly, the appellant appointed a sole Arbitrator to decide the dispute between the parties only on 14.08.2007 after a period of three years through their letter sent to the respondent. Excepting for making demands to the respondent between the period from 07.08.2004 to 23.04.2007 requesting the respondent to pay the dues, the actual arbitration claim was made only on 14.08.2007 by the appellant through its letter dated 14.08.2007. Infact in a reply dated 26.07.2004 issued by the respondent to the appellant, they have categorically denied their liability to pay the claim made against them. As seen from Section 18 of the Limitation Act, the acknowledgment of liability must be in writing to entitle the appellant to get a fresh period of limitation. Further, the said acknowledgment of liability must be given before the expiry of the limitation period for making a claim. In the case on hand, the cause of action for the appellant to make a claim against the respondent admittedly arose on 30.04.2004 when the Division Bench of this Court disposed of the Writ Appeal viz., W.A. No.1808 of 2002. But the appellant initiated the arbitration proceedings only on 14.08.2007 through their letter sent to the respondent appointing a Sole Arbitrator. Section 43 (3) of the Arbitration and Conciliation Act, which the learned counsel for the Appellant referred to does not extend the statutory period of limitation as prescribed under the Limitation Act. It applies to cases where parties stipulate under the contract a lesser period for initiation of Arbitration than what is statutorily prescribed under the Limitation Act. Under Section 43 (3), only under those circumstances, the Court has the power to extend the time for initiating the Arbitration claim for such a period as it thinks proper in the interest of Justice but not beyond the statutory period of limitation as prescribed under the Limitation Act. In both the Judgments relied upon by the learned counsel for the Appellant namely State of Goa Vs. Praveen Enterprises rendered by the Hon'ble Supreme Court in C.A. No.4987 of 2011 on 04.07.2011 as well as in Single Bench Decision of Madras High Court dated 30.04.2019 passed in O.P. No. 942 of 2018 and A.No.8508 of 2018, the statutory period of limitation as prescribed under Limitation Act was never extended



and in both the Judgments, it was consistently held that an Arbitration claim is commenced by the reference of the dispute to Arbitration by any of the parties to the dispute. In the case on hand, the dispute was referred to Arbitration by the Appellant only on 14.08.2007, that is after a period of three years from the date of the Order passed in W.A. No. 1808 of 2002, when the cause of action arose for the claim. Infact, the decision rendered by the Hon'ble Supreme Court in State of Goa vs. Praveen Enterprises referred supra in Paragraph 13 of the said Judgment, the Hon'ble Supreme Court has categorically stated that "having regard to Section 43 of the Act, any claim made beyond period of limitation prescribed by the Limitation Act, 1963 will be barred by limitation and the Arbitral Tribunal will have to reject such claims as barred by limitation". Therefore, from the evidence available on record, the claim of the Appellant before the Arbitral Tribunal is barred by the Law of Limitation. Limitation can never be cured and as leniency can be shown by the counsels even if the claim is a genuine one. The statutory period of limitation can never be cured and no leniency can be shown by the Courts, even if the claim is a genuine one.

22. Section 21 of the Arbitration and Conciliation Act also makes it clear that the arbitral proceedings in respect of a particular dispute commences only from the date on which a request for the dispute to be referred to arbitration is received by the respondent. In the case on hand, a request for arbitration was made by the appellant only on 14.08.2007 through its letter to the respondent, whereas the cause of action for the alleged claim arose on 30.04.2004 itself when the Writ Appeal in W.A. No.1808 of 2002 was disposed of by the Division Bench of this Court i.e. after a period of three years from the date of the cause of action. Therefore, the learned Principal District Judge under the impugned order has rightly allowed the application filed by the respondent under Section 34 of the Arbitration and Conciliation Act by setting aside the Arbitral Award on the ground of limitation.

23. The Law of Limitation is a procedural law founded on public policy. It prescribes certain periods after the expiry of which the Suit and other proceedings cannot be maintained. Law of limitation ensures that the parties do not resort to dilatory tactics and avail the remedy promptly. The purpose of the Limitation Act is not to destroy the rights but is founded on public policy by fixing a life span for legal remedy. The Courts cannot bypass the mandatory provisions of the Limitation Act. Under Section 34 (2) (b) (ii) of the Arbitration and Conciliation Act, an Arbitral award can be set aside if it is in conflict with the public policy. The Law of Limitation is also founded on public policy. Hence, when the Arbitral claim has



not been made within three years from the date when the cause of action arose, the learned Principal District Judge has rightly allowed the application filed under Section 34 of the Act by setting aside the Arbitral award as it is in conflict with public policy.

24. Before this Court, the learned counsel for the appellant contended that the order dated 30.04.2004 passed in W.A. No.1808 of 2002 by the Division Bench of this Court is in the nature of a decree and therefore, the arbitral claim made by the appellant is well within the period of limitation as the claim has been filed within a period of twelve years which is applicable for execution of a decree.

25. A decree is a decision of a Court. For any decision of the Court to be a decree, the following essential elements are required :

- a) There must be an adjudication.
- b) The adjudication should be done in a suit/ legal proceedings.
- c) It must determine the rights of parties regarding the matter in dispute.
- d. The determination of the right should be of conclusive in nature.
- e. There must be a formal expression of such adjudication.

26. In the case on hand, the ingredients referred to supra has not been satisfied to enable the appellant to contend that the order dated 30.04.2004 passed in W.A. No.1808 of 2002 by the Division Bench of this Court is a decree. The claim of the appellant has not been adjudicated in the aforesaid order of the Division Bench of this Court but the appellant has only been granted liberty to initiate legal action for the recovery of the alleged dues from the respondent.

27. The letters of demand sent by the appellant to the respondent between 07.08.2004 and 23.07.2007 is immaterial for the purpose of saving limitation. As observed earlier, there must be an acknowledgment of liability in writing given by the respondent to enable the appellant to get a fresh period of limitation. In the case on hand, no such acknowledgment of liability in writing was given by the respondent. But instead, the respondent has only denied its liability by its letter dated 26.04.2004. This Court is of the considered view that the learned Principal District Judge under the impugned order has rightly considered the evidence available on record before the Arbitral Tribunal and only thereafter has come to the right conclusion that the Arbitral claim made by the appellant against the respondent is barred by the law of limitation.



28. The respondent has taken the defence of limitation in its objections filed before the Arbitral Tribunal as well as before the learned Principal District Judge in Arbitration OP No.153 of 2010. Even according to the Appellant, as seen from the Arbitral award, the contract is for a period of 180 days commencing from 13.11.2001 to 11.05.2002. The Arbitral Tribunal has misdirected itself by deciding the issue of limitation only with regard to pre-order dated 30.04.2004 passed in W.A. No.1808 of 2002 by a Division Bench of this Court but not to the post-order dated 30.04.2004. When the cause of action for the Appellant to initiate Arbitration against the respondent arose only on 30.04.2004, the Arbitration ought to have been commenced by the Appellant on or before 29.04.2007 that is within three years but admittedly, the commencement of Arbitration took place as per Section 21 of the Arbitration Act only on 14.08.2007 beyond the period of limitation. Therefore, this Court is of the considered view that there is no merit in this appeal. Accordingly, the Civil Miscellaneous Appeal stands dismissed. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

The Principal District Judge,
Cuddalore.

Copy To

The Section Officer,
VR Section, High Court,
Madras.

CMA No.2556 of 2012

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