

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY THE 05TH DAY OF OCTOBER, 2021

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

O.P.NO.189 OF 2018

In the matter of Arbitration and
conciliation Act,1996

And

In the matter of Disputes regarding the
Contract Agreement in
P.O.No.OA8098/TC/04089W/MM
11(3)/20/11 dated 20.05.2004 issued by the
Claimant in favour of the Respondent for
the supply of 9500 Nos. of forged Rolled
Fish Plates.

And

In the matter of Arbitration Award dated
20.11.20217 passed by the Sole Arbitrator
Mr.Justice.K.MohanRam, Former Judge of
the Madras High Court

Shree.Laxmi Iron and Steel Works Private Limited,
Rep by its Director
No.206, Acharya Jagadish Chandrabose Road,
Kolkatta,
(Adminstrative Office at
No.49-A, Hindustan Park, Ground Floor,
Kolkatta – 700 029).

...Petitioner

Vs

M/s.Neyveli Lignite Corporation Ltd.,
“Neyveli House”
No.135, Periyar EVR High Road,
Kilpauk, Chennai – 600 010.
Rep. by its Company Secretary

...Respondent

Original Petition praying that this Hon'ble Court be pleased to set aside the award dated 20.11.2017 regarding the counter claim of the petitioner passed by the Arbitral Tribunal.

This Original Petition along with O.P.No.188 of 2018 coming on this day before this court for hearing in the presence of Mr.V.Anand, Advocate for the petitioner herein and Mr.N.Nithianandham, Advocate for the respondent herein and upon reading the Petition and the award dated 20.11.2017 filed herein and this court having observed that the learned Arbitrator has not considered the Limitation period for making any claim for recovery of money or damages which has not been dealt with by the Arbitrator, the learned Arbitrator invoked the proceedings as if the pendency of the suit will keep the limitation alive, this Court is of the view that such approach is not correct legally, in fact, it goes to the root of the matter, it is also to be noted that the moment Section 8 application has been ordered, the question of keeping the OP on file does not arise at all, therefore, this Court is of the view that the claim made by the respondent is hopelessly barred by limitation which has not been considered by the learned Arbitrator and as far as counter claim is concerned, it is also barred by limitation since the dispute arose in the year 2014, and **it is ordered as follows:-**

(i) That the Petition being filed as counter claim in O.P.No.189 of 2018 be and is hereby dismissed.

(ii) That there shall be no costs.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE,
CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS
THE 05TH DAY OF OCTOBER 2021.

Sd./-

ASSISTANT REGISTRAR (O.S. II)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments.

VSP
29/10/2021

O.P.No.189 of 2018

ORDER

DATED : 05.10.2021

THE HON'BLE MR. JUSTICE
N.SATHISH KUMAR

FOR APPROVAL:29/12/2021

APPROVED ON:03/01/2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.10.2021

CORAM

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

O.P.Nos.188 & 189 of 2018

Shree Laxmi Iron and Steel Works

Private Limited,

Rep. By its Director,

No.206, Acharya Jagadish Chandrabose Road,

Kolkatta

(Administrative Office at

No.49-A, Hindustan Park,

Ground Floor,

Kolkatta – 700 029).

... Petitioner in both OPs

Vs

M/s.Neyveli Lignite Corporation Ltd.,

“Neyveli House”

No.135, Periyar EVR High Road,

Kilpauk, Chennai – 600 010.

Rep. By its Company Secretary.

...Respondent in both OPs

Prayer: Petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 20.11.2017 passed by the Arbitral Tribunal.

For Petitioner : Mr.V.Anand
(in both cases)

For Respondent : Mr.N.Nithianandan
(in both cases)

COMMON ORDER

Challenge has been made to the award passed by the learned Arbitrator on the following grounds namely that (i) there is no concluded contract, (ii) the claim is barred by limitation and (iii) the reasoning of the arbitrator is nothing but perverse.

2. The brief facts leading to the filing of the claim petition is that the respondent herein floated a tender in Tender No.4089W/MM II (3)/2003 dated 28.10.2003 for the purchase of Forged Rolled Fish Plates. Pursuant to the said tender, the petitioner herein took part in the bidding process along with necessary supporting documents and also furnished bank guarantee for a sum of Rs.70,000/- as per Clause 7 of the tender condition besides providing liquidated damages. Clause 8 provides for extension of time for delivery. Clause 9 deals with the risk purchase. The technical bid was opened on 28.11.2003. The petitioner being the successful bidder, the contract was concluded in its favour, letter of intent was issued and purchase order was also sent to the petitioner on 20.05.2004. Despite several letters sent by the respondent, the petitioner has not supplied the materials as agreed. As the petitioner failed to

supply the materials, the respondent cancelled the purchase order. Stating that due to breach of contract committed by the petitioner, the respondent suffered hardship and monetary loss, the following claim has been made:

“1.Pass an Award in the sum of Rs.47,62,956/- in favour of the Claimant and against the Respondent towards the additional/extra expenditure incurred by them due to the breach committed by the Respondent;

2.Award interest of Rs.52,39,252/- @ 18% per annum compounded annually on the sum of Rs.47,62,956/- from December, 2004 to July,2015 approximately of the present claim;

3. Award damages of Rs.10,00,000/- @ 18% per annum compounded annually on the sum of Rs.10,00,000/- from December, 2004 to July, 2015;

4. Other pendent lite future interest @ 18% per annum compounded annually on the aforesaid amount till the payment thereof;

5. Cost of litigation incurred by the Claimant as well as cost of the present arbitration proceedings”

3. The petitioner disputed the claim on the ground that the claim is barred by limitation as it has been preferred several years after the date of the purchase order. According to the petitioner, the purchase order was not served and, therefore, there was no concluded contract. The so-called courier receipt relied upon by the respondent has been a fabricated one and hence the respondent is not entitled to claim the damages. Based on the same, the learned arbitrator framed the following issues:-

“ISSUES:

- a. Whether the Purchase Order was served on the respondent within the Bid validity period?*
- b. Whether there is a concluded contract between the claimant and the respondent? And*
- c. Whether the respondent committed breach of Terms and Conditions of the Tender Contract?”*

4. After analyzing the evidence and documents produced, the learned arbitrator finally passed the award, which is extracted below:-

“34. In the result, the respondent is directed:

(a) to pay the sum of Rs.47,62,959/- (Rupees

Forty Seven Lakhs sixty Two Thousand Nine

Hundred and Fifty Six Only) together with interest at 18% per annum for the pre-award period (19.12.2005 to 05.09.2015);

(b) to pay 18% interest per annum on the award amount from the date of Award till the date of payment of the Award amount;

(c) to pay the costs incurred by the claimant;

(d) to pay the sum of Rs.2,00,000/-(Rupees Two Lakhs Only) as damages;

(e) the respondent is given 12 weeks' time from today to pay the AWARD amount to the claimant failing which the claimant is entitled to enforce the AWARD''

5. Thus, the main challenge is that the claim is barred by limitation besides there is no concluded contract.

6. Learned counsel appearing for the petitioner vehemently contended that the dispute arose in the year 2004 itself and though the suit was originally filed by the petitioner herein, challenging the contract, application under Section 8 of the Arbitration and Conciliation Act, 1996

(hereinafter referred as 'the Act') has been taken out, which was ordered and pursuant to the same, notice of invocation was issued on 05.12.2006 itself. Thereafter, no action was taken and finally the application for appointment of arbitrator was once again filed before this Court in the year 2015 in O.P.No.71 of 2014 which was ordered on 28.04.2015. Even in the above order, this Court has left the limitation aspect to be raised by the parties before the Arbitrator. Hence it is the contention that the learned Arbitrator has not even considered this aspect and erroneously accepted the case of the respondent/claimant without appreciating the legal aspect and therefore, submitted that the award is nothing but a suppression of patent illegality.

7. Whereas, the learned counsel appearing for the respondent submitted that the contention with regard to non-serving of the purchase order cannot be countenanced. Even assuming that the purchase order has not been served, Letter of Intent was issued as early as 19.05.2004, which is within the valid period. Hence it is his contention that once the letter of intent is served, the contract is concluded between the parties and the courier receipt was also received at the regular address of the petitioner. Hence his contention is that the contract is concluded one and the Arbitrator has taken a plausible view in this aspect. Therefore, there is no scope to interfere with the same in a Section 34 application.

8. As far as the limitation aspect is concerned, it is the contention that the suit was filed by the petitioner in O.S.No. 146 of 2004 which was disposed of in the year 2017 only. Thus, it is the contention that the period has not expired and the delay has occasioned due to the pendency of the suit. Therefore, at any stretch of imagination, it cannot be stated that suit is barred by limitation and contended that the learned Arbitrator has taken note of the case and factually recorded the findings. Hence it is submitted that no grounds have been made out to set aside the award.

9. In the light of the above submission and in line with the scope and object of Section 34 of the Act, this Court is aware that the Court cannot re-appreciate the entire evidence as the contention is with regard to the concluded contract. It is admitted by the petitioner that the letter of intent received on 19.05.2004 by way of fax, which is within the valid period. Once the letter of intent has been issued, it cannot be said that there is no concluded contract besides there are other materials also produced before the arbitrator to show the communications through courier to the regular business address of the petitioner. In such view of the matter, the contention that the purchase order has not been served within the valid period and, therefore, there cannot be any concluded contract has no legs to stand.

10. Be that as it may, with regard to the limitation aspect, the learned Arbitrator has mainly discussed the pendency of the suit from the year 2004 and has held that the application is not barred by limitation. It is to be noted that the notice inviting tender was issued on 28.10.2003, the petitioner herein submitted the tender on 22.11.2003 and on the same day, the petitioner has also furnished bank guarantee in favour of the respondent and the letter of intent has been sent to the petitioner on 19.05.2004. Thereafter, the purchase order was also sent through courier in the month of May, 2004. On 01.06.2004, the respondent has sent the letter indicating the non-service of purchase order through courier. The letter also indicates that the purchase order was sent by registered post with acknowledgement due and certificate of posting. Thereafter, the dispute arose between the parties.

11. The petitioner has raised the dispute and questioned the very contract and filed suit before the Sub-Court, Vridhachalam in O.S.No.146 of 2004 and in the above suit, the respondent herein filed an application under Section 8 of the Act in I.A.No.42 of 2005 for referring the dispute to the Arbitrator. The same was ordered by the Court below referring the parties for arbitration by order dated 21.08.2006. Pursuant to the above order, the respondent issued notice of invocation by letter dated 05.12.2006 nominating one Mr.Krishnamoorthy as their Arbitrator

and intimating the same to the petitioner requesting them to nominate an Arbitrator on their side. However, no response was received from the petitioner within the period. Thereafter, it appears that without taking any steps to approach the Court for appointing the Arbitrator, within the period of three years, the respondent appears to have filed an application under Section 11 before the Additional Sub-Court, Virudhachalam and thereafter, the same has been returned and filed before the Principal District Judge, Virudhachalam seeking a direction to the parties to go for arbitration. The above application is ordered on 10.10.2011 in O.P.No.183 of 2009. Though the respondent has approached the wrong Court, which has no jurisdiction, at the relevant point of time to entertain the application under Section 11 of the Act, even after the said order passed by the Court which has no jurisdiction, the respondent slept over the matter till 2014 and they approached this Court only in the year 2014 for appointment of Arbitrator. This Court vide order dated 28.04.2015, passed an order appointing the Arbitrator leaving open the limitation issue to be decided during the arbitration proceedings.

12. From the above narration of facts, it is made clear that even though the suit was pending, till the matter is referred to arbitration by invoking Section 8 of the Act, the respondent has not taken any steps

within a period of three years for appointing Arbitrator or commencing for arbitration, rather they prosecuted the application before the wrong forum, seeking a direction. The above application was also ordered in the year 2011. Even thereafter, they did not proceed immediately but belatedly came to this Court in the year 2014, by the time, the claim has been hopelessly barred by limitation. Therefore, when the dispute has arisen in the year 2004, till passing of the order under Section 8 of the Act and even thereafter, the respondent has not prosecuted the matter within the period of limitation and slept over the matter and the claim has been hopelessly barred by the time which has not been taken note of by the learned Arbitrator. The learned Arbitrator has not considered the limitation period for making any claim for recovery of money or damages which has not been dealt with by the Arbitrator. The learned Arbitrator invoked the proceedings as if the pendency of the suit will keep the limitation alive. This Court is of the view that such approach is not correct legally, in fact, it goes to the root of the matter. It is also to be noted that the moment Section 8 application has been ordered, the question of keeping the suit on file does not arise at all. Therefore, this Court is of the view that the claim made by the respondent is hopelessly barred by limitation which has not been considered by the learned Arbitrator.

13. In view of the above, the award is set aside and as far as counter claim is concerned, it is also barred by limitation since the dispute arose in the year 2014. Accordingly, O.P.No.188 of 2018 stands allowed and the other petition being filed as counter claim in O.P.No.189 of 2018 stands dismissed. No costs.

Sd./-N.S.K.J
05.10.2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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