

(2009) 03 DEL CK 0160
In the Delhi High Court
Case No : OMP No. 325 of 2006

Manish Jain

APPELLANT

Vs

Ambuja Cement Rajasthan Ltd.

RESPONDENT

Date of Decision : 13-03-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 24, 28(2), 28(3), 34, 34
Limitation Act, 1963 — Section 18, 19

Citation : (2009) 03 DEL CK 0160

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Sonia Mathur, for the Appellant; T.S. Ahuja and Arun Arora, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—This is a petition u/s 34 of the Arbitration & Conciliation Act, 1996 filed by Sh.Manish Jain, proprietor of M/s.Chetanya Road Carriers for setting aside the award dated 12th February, 2006.

2. The petitioner contended that he is running a transport company having its head office at 181-182, Sadar Bazar, Nasirabad District, Ajmer, Rajasthan. The respondent claimant is alleged to be a company engaged in the business of manufacturing and marketing cement under the brand name of "Ambuja Cement". In terms of an agreement dated 29th January, 1999 the petitioner was appointed as the authorized transporter of the respondent with effect from 1st February, 1999.

3. Under the agreement for transporting the goods of the respondent/claimant, the petitioner was also liable for any shortage, pilferage, damage etc during handling and transportation. The petitioner contended that 729 metric tons of cement was taken by the petitioner from the claimant for transportation to various destinations.

4. The petitioner was entitled for the transportation charges at the market rate under the transportation agreement. It is also contended that no transportation charges were payable in case of loss.

5. The agreement between the parties contained an arbitration agreement. On account of alleged breaches by the petitioner and the claimant disputes arose and in view of the arbitration agreement between the parties an arbitration panel was appointed. The presiding arbitrator was appointed by this Court which gave an award dated 12th February, 2006.

6. Before the arbitration panel, besides the claims of the respondent/claimant the petitioner also raised counter claims and in respect of the counter claims the following issues were framed by the arbitration panel:

1. Whether the letter dated 28.12.99 issued by the claimant company was received and acted upon by the respondent, if so its effects? OPP

2. Whether the counter claim of the respondent is barred by limitation and is not maintainable? OPP

3. Whether the claimant is entitled to the amount as claimed in the claim petition? OPP

4. Whether the respondent is entitled to the amount as claimed in the counter claim? OPP

5. What would be rate of interest pendente lite and future interest on the amount awarded? OPP

6. Whether the reply and the counter claim is properly signed and verified, if not its effect? OPP

7. Relief.

7. While dealing with the issues No. 2 & 4 the arbitration panel has held that the agreement between the parties was of 29th January, 1999 for transportation of the cement bags and the dispute relates back to the period till 31st March, 2000. The counter claims were first raised by the petitioner before the Arbitration Panel when the counter claims were filed. The counter claims which were preferred for the first time in October, 2004 are therefore, barred by limitation. The contention of the counsel for the petitioner that the period of limitation would run from the date of filing of the claim petition or it would be from the date of demand notice sent by the respondent was rejected by the arbitration panel.

8. Against the award dated 12.2.2006 given by Arbitration Panel, though a number of objections have been filed by the petitioner u/s 34 of the Arbitration and Conciliation Act, 1994, however, the learned Counsel for the petitioner has pressed objection only against rejection of the counter claim of the petitioner being barred by time. The learned Counsel for the petitioner has challenged only the findings of the arbitration panel pertaining to issue No. 2 "whether the

counter claim of the respondent is barred by the limitation and is not maintainable."

9. The learned Counsel for the petitioner has contended that though the last transaction between the parties was on 20th May, 2000 when an amount of Rs. 18,200/- was debited in the account of the respondent on account of transportation charges on account of invoice No. 337 which was for transportation of goods to Agra and a balance amount of Rs. 2,03,979.05/- was due on that date, however, the learned Counsel has contended that since there were negotiations going on between the parties and the amount due to the petitioner had not crystallized on 20th May, 2000 when the last invoice was raised, therefore the cause of action will lastly arise on the date when the amounts became payable after negotiation and when the dispute in terms of the arbitration agreement were raised by the respondent/claimant. The learned Counsel for the petitioner has also contended that the ratio of Calicut-Wynad Motor Service Private Ltd., Calicut Vs. The Industrial Tribunal, Calicut and Another, . is not applicable to the facts and circumstances of the present case and the Arbitration panel could not have relied on the same.

10. The learned Counsel for the respondent has refuted the plea raised by the learned Counsel for the petitioners that the cause of action will arise when the arbitration agreement was invoked by the respondent or on the date when the negotiations between the parties had ended. The learned Counsel has categorically contended that a notice dated 6th June, 2002 was given on behalf of the respondent. A reply dated 25th June, 2002 was received from the petitioner, however, no counter claims were raised. It is also contended that in reply to the petition filed for appointment of a presiding arbitrator, no counter claims were raised by the petitioner. It is contended that the counter claims were raised for the first time when the counter claims were filed by the petitioner before the arbitration panel. It is contended in the facts and circumstances that for the purpose of computation whether the claims are within time or not, the date on which the counter claims were first raised has to be considered. The learned Counsel for the respondent further contended that the view taken by the arbitration panel is a plausible view and this Court while dealing with the objections to the award will not sit in appeal over the findings recorded by the arbitrators nor would examine correctness of the award by reappraisal of fact and law. The learned Counsel very emphatically submitted that the cause of action in the facts and circumstances will not arise on account of receipt of notice from the respondent raising claims against the petitioner for the purpose of alleged counterclaims of the petitioner which were first raised before the arbitration panel when the counterclaims were filed. It is also asserted that the period of limitation will not be extended on account of alleged negotiations between the parties unless there had been acknowledgement of the counter claim by the respondent in writing. In the circumstances it is contended that the cause of action last arose on 20th May, 2000 when the last invoice was raised by the petitioner.

11. This cannot be disputed that the counter claim was filed by the petitioner on 30th October, 2004 and in the counter claim dated 9th October, 2004 in paras 14 to 17 an amount of Rs. 2,03,979.05/- has been claimed with interest at 18% per annum. Perusal of the statement of account of Chetanya Road Carriers, Nasirabad of M/s.DLF Cement Ltd. shows that the invoice No. 337 dated 20th May, 2000 was debited on 20th May, 2000 for transportation of goods to Agra for an amount of Rs. 18,200/-. With the debiting of the said amount, the amount which became due from the claimant/respondent to the petitioner was Rs. 2,03,979.05/-.

12. The agreement between the petitioner and the respondent was for transportation of the goods and consequently for the price of work done by the petitioner at the request of the claimant/respondent the period of limitation would be three years from when the work is done as under the agreement and in the invoices raised by the petitioner no time had been fixed for payment. In case the last invoice was raised on 20th May, 2000, the amounts due to the petitioner on account of invoices raised for the work done on behalf of respondent will be three years from the last invoice of 20th May, 2000 and consequently the period of limitation to claim the said amount will expire on 20th May, 2003.

13. Under the Limitation Act the limitation for preferring a claim gets extended on account of acknowledgement of the liability in writing or on account of part payment within the period of limitation. Section 18 of the Limitation Act contemplates that where before the expiry of the period of suit, an acknowledgement of liability in respect of such claim or right is made in writing by the party against whom such a right is claimed, then a fresh period of limitation has to be computed from the time when the acknowledgement was so signed. u/s 19 of the Limitation Act the period of limitation is also extended, if a part payment is made on account of the liability of the opposite party.

14. Apparently in the present case neither there has been an acknowledgement in writing nor has there been a part payment of the amount due from the claimant/respondent to the petitioner. Consequently, the period of limitation which was to expire on 20th May, 2003 will not be extended. The learned arbitration panel although has referred to the decision of the Kerala High Court in Govindji Jevat (Supra) however, it has held that since the agreement between the parties is of 29th January, 1999 and cement bags were transported till the period 31st March, 2000 and, therefore, the counter claim having been preferred in October, 2004 is barred by limitation, therefore, does not suffer any illegality so as to entail interference by this Court nor the findings of the arbitrator is contrary to any law.

15. The objections have been filed by the petitioner u/s 34 of the Arbitration and Conciliation Act, 1996. The only ground to which the petitioner can possibly refer in support of its challenge is Section 34(2)(b)(ii) that the award is in conflict with the public policy of India. As to what is public policy of India has been explained by the Supreme Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes

Ltd., in the following words:

From the judgments discussed above, it can be held that the terms "public policy of India" is required to be interpreted in the context of the jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the Court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under the CPC that once the decree has attained finality, in an execution proceedings, it may be challenged only on limited grounds such as the decree being without jurisdiction or a nullity. But in a case where the judgment and decree is challenged before the appellate Court or the Court exercising revisional jurisdiction, the jurisdiction of such Court would be wider. Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term public policy of India. On the contrary, wider meaning is required to be given so that the patently illegal award passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned Senior Counsel Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that Arbitral Tribunal shall decide in accordance with the terms of the contract. Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of Sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that the arbitrator shall decide *ex aequo et bono* (according to what is just and good) only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided u/s 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of patent illegality.

16. The petitioner has contended that the award rejecting the counter claim as barred by time is contrary to the Limitation Act. However, the learned Counsel for the petitioner is unable to show that the claim on the basis of the cause of action which last arose on 20th May, 2000 could be raised for the first time on 30th October, 2004. The cause of action in the present facts and circumstances would not arise on account of disputes being raised by the respondent/claimant by giving a notice nor will the cause of action arise on account of alleged negotiation

between the parties as during the negotiation or afterwards, there had not been any acknowledgment of liability by the respondent nor any part payment was made by the respondent towards the alleged liability of the respondent to the petitioner. This has also not been disputed that prior to 30th October, 2004, the counter claim for recovery of Rs. 2,03,979.05 with interest at the rate of 18% per annum was not raised by the petitioner. Thus it cannot be inferred that the counter claim of the respondent was within time and consequently the award dismissing the counter claim of the petitioner as being barred by time cannot be interfered with.

17. The award has not been challenged by the counsel for the petitioner on any other grounds as only this ground was pressed by the Learned Counsel for the petitioner. Therefore the objections raised by the petitioner are without any merit and they are dismissed. Parties are however, left to bear their own costs.