

(2009) 09 DEL CK 0352
In the Delhi High Court
Case No : CS (OS) No. 2481 of 1993

Union of India (UOI)

APPELLANT

Vs

Karnataka Implements and Machineries Co. Ltd.

RESPONDENT

Date of Decision : 01-09-2009

Acts Referred:

Arbitration Act, 1940 — Section 29, 30, 33, 37(1), 37(3)
Constitution of India, 1950 — Article 131
Contract Act, 1872 — Section 56
Limitation Act, 1963 — Article 112, 137, 55, 3

Citation : (2009) 09 DEL CK 0352

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Geeta Sharma, Maneesha Dhir and Preeti Dala, for the Appellant;
Naveen R. Nath, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The suit was registered on filing of an arbitral award dated 10th August, 1993 by the arbitrator in this court. Notice of the filing of the award was ordered to be issued to the parties thereto. The petitioner Union of India has not preferred any objections to the award. The respondent M/s Karnataka Implements & Machineries Co. Ltd. which, vide application filed in the year 2002, was informed to have been taken over by the Karnataka Road Transport Corporation vide orders of the Government of Karnataka, filed IA No. 3881/1994 under Sections 30 & 33 of the Arbitration Act, 1940 objecting to the award. Pleadings in the said application were completed and usual issues framed on 8th November, 1995 and again on 8th July, 1999. The counsels made statement that no evidence is required to be produced and the parties would be relying upon the arbitration record only.

2. The Counsel for the respondent/objector, at the outset, informed that the respondent is a company of the Government of the State of Karnataka. On inquiry, as to why the disputes were not referred to the Cabinet Secretary for

resolution by the Committee of Disputes, as directed to be set-up vide judgment in Oil and Natural Gas Commission and Another Vs. Collector of Central Excise, , the Counsel for the respondent stated that since the disputes are of a period prior to that judgment, the same were not referred and even after the said judgment no attempt was made for reference thereof to the Committee of Disputes. The matter having remained pending in this court for the last 16 years, at this stage it is not deemed appropriate to defer the hearing by referring the parties to the said Committee of Disputes.

3. The Counsel for the respondent/objector has stated that he is urging only two points for consideration before the court. He has further fairly stated that neither of the same was taken up before the arbitrator. The first point urged is, of the claims of the petitioner Union of India allowed by the arbitrator, as well as the invocation of arbitration being barred by limitation. The other contention urged is of the contract having stood frustrated u/s 56 of the Contract Act and the petitioner being thus not been entitled to any claims for breach thereof against the respondent.

4. The petitioner Union of India had placed an order for supply of "Beaters" made of steel and for use by the Railways, on the respondent. The Counsel for the respondent/objector admits that the entire agreed quantity was not supplied by the respondent to the petitioner; it is stated that there was an unusual increase in price of steel during the term of the contract; there was no clause in the agreement for escalation of price on such increase in price of steel; that the respondent requested the petitioner to consider increase in price but the petitioner rejected the said request; that the respondent was unable to complete the supplies at the agreed rate; the same resulted in termination of agreement by the petitioner. The agreement provided for Risk Purchase by the petitioner; the said Risk Purchase is stated to have been affected by the petitioner in the year 1981. The Counsel for the respondent contends that thus the cause of action for the petitioner Union of India to make claim against the respondent arose in 1981 but the arbitration was invoked after more than three years in 1984. It is thus averred that the claims of the petitioner Union of India against the respondent for Rs. 25,18,047/- allowed by the arbitrator was barred by time. The Counsel for the respondent/objector has argued that even though the respondent did not set-up the plea of limitation before the arbitrator but the same can always be set-up in as much as it was incumbent upon the arbitrator to consider whether the claims had been made within time or not and even in the absence of a plea in this regard. Reliance in this regard is placed on Binod Bihari Singh Vs. Union of India, .

5. The Counsel for the respondent/objector has further argued that the Article of the Schedule to the Limitation Act applicable in such case would be Article 55 providing for compensation for breach of any contract and the limitation for preferring such claim is three years from the date when the contract is broken; it is contended that even if the cause of action is counted from the date of Risk

Purchase, the claims were preferred after more than three years therefrom also.

6. At this stage, the contention of the Counsel for the petitioner Union of India may be noted. It is argued that the plea of limitation cannot be made by a bold statement without setting out the details and in the absence whereof it is difficult to appreciate such a plea. Reliance is placed on Oil and Natural Gas Commission Vs. M.C. Clelland Engineers S.A., where the plea of limitation was not permitted to be raised in these circumstances. It is also urged that since this plea was not taken before the arbitrator, it cannot be raised in objections under Sections 30 & 33 of the Act. Reliance in this regard is placed on Bharat M.N v. Satish Ashok Sabni 2003 (3) Arb. LR 472 Bom and M/s. Naraindas R. Israni Vs. Union of India, .

7. Though I respectfully concur with the view aforesaid that a plea not taken before the Arbitral Tribunal cannot be permitted to be taken for the first time in objections against the award but in view of Section 3 of Limitation Act and so as to adjudicate all pleas raised, arguments were heard on and finding is returned on the merits of the plea of limitation also.

8. It was put to the Counsel for the respondent/objector during the course of hearing that the Article of the Schedule of the Limitation Act applicable should be Article 112 applicable to "any suit by or on behalf of Central Government" since the petitioner is the Central Government/Union of India. Section 37(1) of the Arbitration Act, 1940 provides for the provisions of Limitation Act to apply to arbitrations as if they apply to proceedings before court. The Counsel for the respondent/objector however contended that since a special provision relating to breach of contract had been made in Article 55, the same will override Article 112. That is not the correct position in law. Article 112 overrides other articles in the Limitation Act so far as suits by the Government are concerned, irrespective of whatever be the nature of the suit. The Counsel for the respondent/objector had also sought to suggest that the said Article would not apply because the respondent also is a Government Company. However, no such restriction is contained in Article 112. A suit by or on behalf of Central Government does not cease to be so solely because it is against the State Government (even though the respondent is not a State Government but a company owned by the State Government). Article 112 applies whenever the suit is by or on behalf of a Government, whosoever may be the defendant, whether any other Government or a private citizen, unless the suit is covered by the provisions of Article 131 of the Constitution. The law of limitation debars the remedy and not a right; the legislature thought it fit for larger period to be provided to the State to enforce its right. The law gives a special facility to the State. Taking into consideration the rationale behind the specific article providing special limitation in case of State as compared to the individual, the argument of the Counsel for the respondent of the non-applicability of the said article because of the existence of Article 55 or because of the claim being against a company owned by the State Government cannot be accepted.

9. Thus, in my view, the limitation for the petitioner to prefer the claim against the respondent was 30 years and not three years as contended by the Counsel for the respondent. The plea of the claim being barred by time thus does not lie. Faced with the aforesaid, the Counsel for the respondent urged that even if the prescribed period of limitation was 30 years, the limitation for seeking reference to arbitration was three years only. It is stated that it has been held by the Courts that Article 137 of the Limitation Act applies to an application invoking arbitration and thus the arbitration ought to have been commenced within three years. On inquiry, as to whether there can be separate period of limitation for preferring a claim in a civil suit and in arbitration, the Counsel for the respondent contends that that would be the effect of the law as laid down in State of Orissa and another etc. Vs. Sri Damodar Das, making Article 137 applicable for commencing arbitration.

10. At this stage, it may be noted that the Counsel for the petitioner has contended that the argument is fallacious; she points out that u/s 37(3) of the 1940 Act, arbitration commences when the notice requiring appointment of arbitrator is given or when the disputes/differences are required to be so submitted; she has further pointed out that the petitioner had given the notice dated 7th October, 1983, existing on the arbitral record, to the respondent and even if the dates orally argued by the respondent are to be believed, the said notice is within the period of three years. A perusal of the said notice shows that the same is by the petitioner Union of India to the respondent demanding the aforesaid sum of Rs. 25,18,047/- and further stating that if the amounts are not paid, further action as per the terms and conditions of the contract shall be taken. Though neither of the counsels has drawn attention to the arbitration clause and from the award also it cannot be deciphered, as to when the arbitration proceedings commenced but I may state that I am even otherwise not convinced by the legal proposition propounded by the respondent. There cannot be in law two periods of limitation prescribed for the same relief, one for preferring the claim before the courts and the other for preferring the same before the arbitrator. There cannot be a shorter period of limitation for preferring the claim before the arbitrator. If the limitation for the claim is 30 years under Article 112, it cannot be shortened by applying the limitation of three years for invoking arbitration. Such an interpretation would result in barring the claim in spite of the same being within limitation.

11. Thus, it cannot be said that the claim or the invocation of arbitration was barred by time.

12. Though the Counsel for the respondent/objector had initially also sought to contend that the claim was barred by Section 56 of the Contract Act but in view of the judgments aforesaid, did not make any submissions thereon. Even otherwise the plea of frustration of contract and discharge of liabilities thereunder is a plea of fact and having admittedly not been taken before the arbitrator, cannot be permitted to be taken before this court. The Counsel for the

petitioner Union of India has also contended that under the arbitration agreement there was no requirement for giving reasons and the award in the present case is a non-speaking one and no objections lie there against .

13. Before concluding, it may also be noted that the respondent had also preferred counter claim before the arbitrator which were dismissed by the Arbitral Tribunal.

14. The award does not give any interest to the petitioner on the amount awarded. The proceedings for making the award rule of the court have remained pending in this court for long as aforesaid. In the circumstances, u/s 29 of the 1940 Act, simple interest @ 9% per annum on the awarded amount is allowed to the petitioner against the respondent from the date of institution of the proceedings in this court and till the date of payment.

15. The objections being IA No. 3881/1994 are accordingly dismissed. The award is made a rule of the court. The decree in terms of the award and with interest as aforesaid is passed in favour of the petitioner and against the respondent. The petitioner is also awarded costs of Rs. 22,000/- of these proceedings.