(2009) 03 DEL CK 0267

In the Delhi High Court

Case No : Arbitration Petition 115 of 2008

Vishal Maleeables Ltd. APPELLANT

Vs

Government of India and Others RESPONDENT

Date of Decision : 03-03-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2009) 03 DEL CK 0267

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Rishi Agarwala and Ankit Jain, for the Appellant; Ashwani Bhardwaj, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Narayan Dhingra, J.—The petitioner made this petition u/s 11 of the Arbitration & Conciliation Act, 1996 ("the said Act" for short) for referring its claims to the Arbitrator. The petitioner''s claim is that the petitioner was awarded a contract for supply of 34.10 lac MCI Inserts to the respondent. The petitioner had been supplying this material as per the schedule and raising invoices. The invoices were raised from 29th October 1997 till 17th November 1997. The material receipt note was duly signed by the authorized persons after receiving the material. However, the petitioner received a letter dated 15th May 1998 informing the petitioner that the MCI Inserts to the extent of 75040 numbers were defective. Vide letter dated 18.05.1998, these MCI Inserts were rejected being defective. Upon receipt of this letter petitioner requested for a joint inspection which came to be granted and the petitioner found that a negligible numbers of MCI Inserts of the controversial consignment of 75040 were oversized due to improper finish and petitioner agreed to accept the return of such MCI Inserts and agreed to offer the replacement of the entire lot as it was difficult to segregate defective MCIs from non defective pieces. The petitioner, therefore, requested authorities to return this defective lot and promptly replaced the material vide invoice number 299,300 and 301 dated 9th June 1998. The petitioner on 16th March 1999 made a specific request to release the payment of pending bills of different consignment. In response to this letter, the respondent wrote a letter dated 24th March 1999 informing the petitioner that a payment of Rs. 33,92,055/- out of the total amount was withheld because of non supply/defective supply of 75040 MCI Inserts. It is submitted by the petitioner that the decision to withhold this amount was illegal since supply after rectification of the defect had already been made. Petitioner also suffered a loss of interest of this amount and loss of profit due to the balance quantity of MCI Inserts not having been called from the petitioner as the respondent took a decision of blacklisting the petitioner. The petitioner claimed that it was entitled to recover Rs. 85,71,162/- from the respondent against the withheld amount and interest as well as against loss of profits due to the wrongful decision of the respondent of blacklisting the petitioner. It is submitted by the petitioner that the claim made by it was not barred by time because the amount withheld was deemed to be held in trust with the respondent. The cause of action arose when a letter was received by the petitioner from M/s Usha Prestressed Sleeper Udyog Limited, Godhra showing that 75040 number of MCI Inserts were actually lying with this company which received material on behalf of the respondent and the claim of the respondent of not receiving this material was baseless. The petitioner has sought reference of this dispute to the Arbitrator in view of the arbitration clause in the contract on the ground that the despite notice of the petitioner dated 24th October 2007, the respondent has not appointed an arbitrator in terms of the arbitration clause in the contract.

2. The respondent has taken the stand that no live and valid claim of the petitioner was there which could be referred to the Arbitrator. The amount of the petitioner was withheld in the year 1999. The petitioner was also blacklisted by the respondent due to misconduct and corruption charges. The petitioner did not raise dispute regarding this amount for years together. Hence the claim of the petitioner has become stale and dead claim and was therefore hopelessly barred by limitation and it was not a live dispute which could be referred to the Arbitrator. The other ground taken by the respondent is that the claim even otherwise was barred by principle of res judicata. The petitioner had filed a regular suit being No. 28 of 2001 before the Civil Judge, Baharuch, Gujarat seeking an injunction against the show cause notice issued by the respondent for blacklisting the petitioner. While filing the said suit, the petitioner did not raise any other claim. The cause of action was available to the petitioner in 1999 for recovery of this amount and the petitioner could have asked the recovery of this amount while filing the suit. Since the petitioner did not file a suit for recovery of this amount nor invoked the arbitration clause, the matter has become res judicata. It is also submitted that the suit filed by the petitioner before Baharuch Court, Gujarat, came to be dismissed and an appeal filed by the petitioner before the High Court of Gujarat was also dismissed on 28th February 2003. It is submitted by the respondent that a CBI case was registered against the

petitioner and some of the employees of the respondent who were in collusion with the petitioner, in playing fraud upon the respondent. The investigation done pursuant thereto showed involvement of the petitioner and some of the employees of the respondent in defrauding the respondent. This case was still going on against the petitioner.

3. It is settled law that while considering a petition u/s 11 of the Act, the Court can refer only those disputes to the Arbitrator which are live disputes and still survives at the time of making the application/petition u/s 11 of the said Act. The disputes which have become stale or dead or time barred or fall under the category of excepted matters, cannot be referred to the Arbitrator.

4. It is the case of the petitioner that payment was withheld in 1999 and the petitioner was also blacklisted by the respondent due to allegations of fraud at the same time. The petitioner could have raised the dispute qua withholding the amount within three years or arising of cause of action which, in the instant case, arose in 1999. The petitioner could have asked for reference of those disputes latest by 2002 i.e. before the expiry of three years period. The petitioner has filed this petition in 2007. The plea of the petitioner that the amount was lying in trust with the respondent has no force. In fact, the respondent has made it clear that bill of this amount was not being paid because of non supply of the material and the respondent had also got an FIR registered against the petitioner for playing fraud upon the respondent in receiving the payment for the goods not actually supplied. Some of the employees of the respondent were involved and the respondent took action against those employees and some of them were terminated. Thus, it cannot be said that the amount was lying with the respondent in a trust. The period of limitation thus would be three years. The claim raised by the petitioner is thus barred by limitation. No reference of this claim can be referred to the Arbitrator. The petition is hereby dismissed. No orders as to costs.