

Technofab Engineering Ltd. Vs. Union of India

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SooperKanoon Citation : sooperkanoon.com/948949

Court : Delhi

Decided On : Feb-17-2012

Judge : S. Muralidhar

Appeal No. : OMP No. 327 of 2005

Appellant : Technofab Engineering Ltd.

Respondent : Union of India

Advocate for Pet/Ap. : Mr. D. Moitra

Judgement :

1. A short question arises for consideration in this petition filed by Technofab Engineering Ltd. against an Award dated 13th May 2005 of the sole Arbitrator by which the Petitioner has been directed to pay the Respondent a sum of Rs.11,16,492 together with simple interest at 15% per annum from 23rd January 1981 till the date of payment or the date of making the Award a rule of the court, whichever is earlier. By the impugned Award all the counter claims of the Petitioner were rejected.

2. The disputes which were referred to arbitration arose out of a supply order placed by the Director General of Supplies and Disposals ('DGSandD') on the Petitioner on 10th August 1979 for the supply of three heat exchanger systems for the Gun Carriage Factory at Jabalpur required for cooling oil of furnaces. The scope of the work of the Petitioner in terms of supply was defined in Clause 4 of

the contract which reads as under:

“4.1 Description of Stores Ordered: Supply of Complete Head Transfer System generally conforming to DGOF Specification No.663/PM/IFG/GCF36(i) as under:-

- a) Pipes, Valves and Fittings for the entire job.
- b) Pumps
- c) Heat Exchangers
- d) Cooling Towers
- e) Water Softeners
- f) Instruments including pressure gauges, temperature gauges etc.
- g) Electricals including MCC's
- h) Filters
- i) Flanges

4.2 Lumpsum charges for civil works required including Cooling Tower Basin, Pipe, Pedestals, Supports etc.”

3. It is stated by the Petitioner that the supply of the materials was completed on 22nd December 1981. The tests were carried out from 15th June 1982 to 7th August 1982 and the system was handed over on 10th August 1982. According to the Petitioner, the Respondent sent a rejection note seven years later, on 16th January 1989. Ten years later, on 11th November 1999, the Respondent issued a demand note. Thereafter, the Respondent invoked the arbitration clause in the contract and by an order dated 30th October 2000 referred the disputes to the sole Arbitrator.

4. The Petitioner raised a preliminary objection before the learned Arbitrator as to the claim of the Respondent being barred by limitation. By the impugned Award it was held that in terms of Article 112 of the Limitation Act, 1963, the claim of the

Respondent was within limitation as it was raised within 30 years. It was further held that the Petitioner failed to prove that the plant had ever been commissioned and accepted by the consignee, the Respondent, and, therefore, the warranty period had not even commenced. The plea of the Petitioner that notice of rejection of the stores under Clause 12 of the DGSandD-17 had not been given was rejected. It was held that under the inspection note (U-60) dated 16th January 1989 and the notice (U-78) dated 23rd March 1987, it was apparent that rejection notice had been given to the Petitioner.

5. Turning to the merits, the learned Arbitrator allowed the claim of the Respondent under Claim No.1 for a sum of Rs.11,16,492 towards 90% cost of the subject stores. The learned Arbitrator accepted the case of the Respondent that the Petitioners had failed to complete the delivery of the stores; that the Petitioner failed to complete the contract even by the extended delivery period i.e. 22nd February 1986 and the stores were finally rejected by the Respondent an inspection note dated 16th January 1989. No other claim of the Respondent was entertained. All the counter claims of the Petitioner were rejected.

6. The principal submission on behalf of the Petitioner is that the claims raised by the Respondent before the learned Arbitrator were time barred. It is submitted that limitation in a contract for supply of goods would not be saved by Article 112 of the Limitation Act. It was denied that the Petitioner ever received the demand notice dated 11th November 1999. The notice itself did not anywhere mention the mode of mailing/communication and there was no acknowledgement card signed by the Petitioner that was produced by the Respondent. The serial number on the file of the Respondent was also not visible on the top of the letter dated 11th November 1999. It did not have the serial number and pagination and the said document was a departure from all other similar documents emanating from the office of the DGSandD. Further, the said copy of the demand notice was served on the Petitioner only on 20th March 2002 during the course of the arbitral proceedings. A separate application filed by the Petitioner questioning the genuineness of the said letter was disposed of on the ground that it was filed after submitting the counter claims. It is submitted that the impugned Award insofar as it has rejected the said plea is based on no evidence and therefore suffers from a patent illegality.

7. It is next submitted that the warrantee period expired on 21st June 1984, 18 months after the delivery, i.e., 22nd December 1982. After the said date, the Petitioners were not responsible for any defects. The Petitioner questioned the tests carried out by the Respondent from 15th June 1982 on various dates since the conditions under which the tests were to be carried out were not ensured. The Petitioners raised an objection by a letter dated 5th November 1985 but this was not replied to by the Respondent.

8. In reply to the notice issued in the present petition, the Respondent maintains that the limitation under Article 112 of the Limitation Act, 1963 is 30 years. It is simply stated that after the rejection note was issued on 16th January 1989 the Respondent had “no option but to issue the demand notice on 11.11.1999.” No attempt is made to explain why it took more than seven years after the delivery of the stores to issue a rejection note and more than 10 years thereafter to issue the demand notice. It is maintained that the said demand note was sent by registered post and that the name of the Petitioner appears in the dispatch register.

9. In the rejoinder filed, the Petitioner has reiterated that Article 112 of the Limitation Act is applicable only in the case of civil suits whereas the claim of the Respondent arose out of a contract for supply of goods. In the written submissions, the Petitioner has pointed out that although the Respondent had produced a copy of the relevant page of the dispatch register, it did not indicate whether the demand notice dated 11th November 1999 was actually delivered to the Petitioner. Subsequent attempts made by the Petitioner to obtain information and copies of the postal receipts etc. under the Right to Information Act, 2005 were refused on the ground that old records were not available. Further, the said demand notice was not referred in the letter dated 30th October 2000 by which the Respondent invoked the arbitration clause. The said letter also did not spell out the details of the disputes and differences which required to be adjudicated. Consequently, it is contended that there was, in fact, no dispute which existed on the date that a reference was made to the Arbitrator. In the written submissions, it was further pointed out by the Petitioner that there were clauses in the contract that enabled the Respondents to reject the consignment, require the supplier to remove the stores after issuing a notice and replace them. No such action was

however taken. Moreover, in the event there was any defect, the Respondent could have replaced the equipment and debited the costs to the Petitioner. The Respondent was in any event withholding payment of Rs.2,89,708 against the total value of the order of Rs.13.21 lakhs. The Respondent also held a security bank guarantee for Rs.26,820. On the other hand, since the equipment was functioning satisfactorily, the bank guarantee for the sum of Rs.26,820 was discharged and sent back to the Petitioner. It was only during the audit of the Respondent by the CAG that some objection was raised and in order to justify the query, a rejection note was issued after seven years. It is submitted that in terms of Section 42 of the Sale of Goods Act, 1930 the rejection of the goods after retaining it for all these years was unjustified. In the additional written submissions, the Petitioner has referred to the decision in ***Shree Krishna Woolen Mills Private Limited v. Union of India, 2008 Indlaw Del. 1284, ONGC v. Amtec Geophysical Private Limited, 2004 (3) Arb LR 260*** and ***Smt. Krishna Mittal v. Municipal Corporation of Delhi, 2010 (2) Arb LR 439***.

10. This Court has heard the submissions of Mr. D. Moitra, learned counsel for the Petitioner. None has appeared for the Respondent. The reply filed by the Respondent has, therefore, been considered.

11. The first issue to be considered is whether the learned Arbitrator was justified in rejecting the plea of the Petitioner that the claims of the Respondent were barred by limitation.

12. A perusal of the statement of claim filed by the Respondent on 16th February 2001 before the learned Arbitrator shows that a reference is made to the fact that on 27th January 1986 a notice had been issued by the Respondent to the Petitioner that the plant failed to give the requisite performance as per the A/T requirements in respect of cooling capacity. Reference is made to the reply of the Petitioner given on 12th June 1986 requesting the Respondents to accept the system as it is. The Respondent does not appear to have replied to the said letter. In fact nothing appears to have happened thereafter till 16th January 1989 when a formal rejection note was issued to the Petitioner by the Respondent. In the reply filed to the statement of claim before the learned Arbitrator, the Petitioner raised

the plea of limitation and specific to the above averments pointed out that the system had been operational since March 1982. The rejection note dated 16th January 1989 was well beyond the warrantee period and much after the plant had been in operation. It in fact proved that the system had already been in operation since March 1982 and that, in any event, such notice was not valid. As regards the assertion in para 9 of the statement of claim that a demand notice was issued on 11th November 1999, it was denied that any such notice had, in fact, been received by the Petitioner.

13. A number of proceedings took place before the Arbitrator as regards the demand notice dated 11th November 1999. The Petitioner had filed applications asking the Respondent to produce documentary proof of the dispatch of the letter dated 11th November 1999. It appears that a copy of the dispatch register for postal *dak* was produced. While the letter dated 11th November 1999 was marked C-7, the photocopy of the proof of the dispatch was marked as C-14. Before the Arbitrator, an Application No.5 was filed by the Petitioner in which it was pointed out that by a letter dated 30th October 2000 the Respondent had invoked Clause 24 of the DGSandD-68(R), but the said letter made no reference to the demand notice dated 11th November 1999. The letter dated 11th November 1999 marked C-7 had neither any acknowledgement on its body nor reflected the mode of despatch. The serial number of the file was also not available. It was essential for the Arbitrator to have decided this application. It could not have been rejected by simply stating that it was filed after the filing of the counter-claim by the Respondent. The fact remains that a copy of the aforementioned letter dated 11th November 1999 was given to the Petitioner only during the pendency of the arbitral proceedings on 20th March 2002.

14. Further, the letter dated 30th October 2000 invoking the arbitration clause and referring the disputes to arbitration makes no reference to the demand notice dated 11th November 1999. No explanation is also forthcoming why the said demand notice was issued ten years after the rejection note dated 16th January 1989 which itself was issued more than seven years after the equipment was first tested. In response to the RTI application filed by the Petitioner on 3rd May 2007 the DGSandD replied on 21st June 2007 confirming that "information/documents

such as postal receipts etc. are very old and records are not available now, it is not possible to make them available.” There is no satisfactory explanation why the DGSandD would wait till 11th November 1999 to issue a demand notice in respect of a rejection note of 16th January 1989. It is this huge gap of over ten years that made it imperative for the learned Arbitrator to enquire if indeed the said letter had been delivered to the Petitioner. As pointed out by the Petitioner the absence of a file number on the copy of the letter dated 11th November 1999 is unusual. This is evident when compared with other letters that have been sent to the Petitioner. There is also no reference in the demand note dated 11th November 1999 to the rejection note dated 16th January 1989. In the circumstances, it was not safe to place reliance only on a copy of a page of the dispatch register to conclude that the demand letter dated 11th November 1999 was in fact delivered to the Petitioner.

15. The absence of acceptable evidence to show delivery of the letter dated 11th November 1999 to the Petitioner had a direct bearing on the existence of an arbitrable dispute. Throughout, the Petitioner was contending that there was no arbitrable dispute that existed between the parties which could be referred for arbitration. The silence of the Respondent for well over ten years, between 16th January 1989 and 11th November 1999, with there being no correspondence in between regarding the performance of the plant or otherwise, does lend credence to the submission of the Petitioner that after issuing the rejection note dated 16th January 19989, the Respondent did not pursue any claim against the Petitioner and therefore there was no dispute between the parties on this score. It appears likely that the Respondent was spurred by an audit objection several years later to rake up a closed issue.

16. A perusal of the arbitral record shows that at one stage the arbitrator did consider the issue concerning the existence of an arbitrable dispute seriously. The proceedings show that the Petitioner had filed an application praying that if Union of India (‘UOI’) wanted to file any further documents, it should be done within fifteen days. Alternatively, it should not be permitted to file any further documents. The learned Arbitrator referred to his order dated 11th April 2001 by which Union of India had been directed to supply authenticated copies of the documents which

had relationship with the claim and had been exchanged between the parties. Yet, those documents were not supplied to the Petitioner. The learned Arbitrator in the proceedings dated 14th May 2001 then recorded as under:

“By not supplying the documents by the UOI will be against the principle of natural justice. Therefore, I again direct the UOI to supply the authenticated copies of the documents within 2 weeks from today. It was submitted last time by Shri Mohar Singh that some of the documents were with the Gun Carriage Factory, Jabalpur which had to be requisitioned by DGSandD for inspection by the contractor. During the submissions Sh. Mohar Singh has stated that the said record has not been received from the Gun Carriage Factory, Jablapur. This aspect of the matter should also be taken care of by the UOI so that the contractor may inspect those documents on receipt from Jabalpur and so get authenticated copies of the documents.”

17. However, at the stage of final hearing the learned Arbitrator does not appear to have dealt with any of the above contentions of the Petitioner. In the circumstances, it was improper on the part of the Arbitrator to have rejected the application of the Petitioner as an afterthought. When a separate application had been filed praying that the Respondent should be asked to produce documents to prove that the demand letter dated 11th November 1999 had been delivered to the Petitioner, it mattered little that it was also not raised in the Petitioner's counter claim. This also was therefore not a valid ground of rejection of the said application. The fact of dispatch of such letter ten years after the rejection note dated 16th January 1989 does not appear to have even been considered by the learned Arbitrator. The issue was dealt with in one line by simply accepting the plea that the claim was within time in terms of Article 112 of the Limitation Act.

18. Learned counsel for the Petitioner is justified in the plea that under Section 42 of the Sale of Goods Act, 1930 the buyer is deemed to have accepted the goods “when after a lapse of reasonable time, he retains the goods without intimating the seller that he has rejected them.” The ‘reasonable’ period in the instant case has to be understood in the light of the period of warranty which in terms of Clause 8 (7) (i) is 18 months from the date of delivery i.e. 22nd December 1982. Further,

under Clause 12 it was open to the DGSandD to reject a defective plant and demand replacement even before it was taken over. On its own showing the Respondent issued a rejection note only on 16th January 1989 nearly seven years after the delivery of the equipment.

19. This was not a mere claim for money raised by the Respondent. It was a claim arising out of a contract for supply of goods and equipments. The specific case of the Respondent was of a defect in the goods resulting in breach of the contract for supply for which the Respondent was claiming damages. The delivery of the stores was completed way back in 1982. The Respondent invoked the arbitration clause only on 30th October 2000. Articles 6 to 55 of the Schedule to the Limitation Act pertain to suits relating to contracts where the period of limitation is three years. Article 112 applies to other kinds of suits. Therefore, the extended period of limitation under Article 112 would not come to the aid of the DGSandD. In ***Shree Krishna Woolen Mills Private Limited v. Union of India*** this Court held that in a contract for supply of goods Section 42 of the Sale of Goods Act, 1930 would become applicable. A claim by the UOI for liquidated damages for breach of warranty was liable to be rejected if the UOI failed to act within a reasonable time after receiving the goods in question. In the instant case, the response of the Respondent to the RTI application of the Petitioner shows that the goods in question are still with the Respondent. In terms of Section 42 of the Sale of Goods Act 1930, the Respondent was expected to raise its claim within a reasonable time. The facts reveal that the Respondent did not act within a reasonable time and its claims were liable to be rejected on that score. Additionally, the Respondent failed to satisfactorily prove that the demand notice dated 11th November 1999 was delivered to the Petitioner which in turn would have substantiated the Respondent's plea that there was a subsisting arbitrable dispute between the parties as of the date it was referred to arbitration.

20. The finding in the impugned Award that the claim of the Respondent was not barred by limitation is untenable in law. The impugned Award dated 13th May 2005 suffers from a patent illegality and is accordingly set aside.

21. The petition is allowed with no order as to costs.

