IN THE HIGH COURT OF DELHI AT NEW DELHI

% ***Judgment delivered on: 07.12.2021***

\+ **O.M.P. (COMM) No.2/2020**

MARSONS ELECTRICAL INDUSTRIES ..... Petitioner

Versus

FEDDERS LLOYD CORPORATION LTD. ..... Respondent

Advocates who appeared in this case:

For the Petitioner :Mr. A.K.Thakur, Mr. Sujeet Kumar and Mr. Tarun Ghai, Advocates.

For the Respondent : Mr. Abhishek Singh, Ms. Aayushi Mishra and Mr. S.S. Ahluwalia, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. MEI Power Pvt. Ltd., a proprietorship of Marsons Electrical Industries, (hereafter '**MEI**'), has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the '**A&C Act**') impugning an arbitral award dated 07.08.2019 (hereafter the '**impugned award**') passed by the Arbitral Tribunal constituted by Justice (Retd.) Manmohan Sarin, former Chief Justice of the Jammu & Kashmir High Court, as the Sole Arbitrator (hereafter the '**Arbitral Tribunal**').

2. MEI's challenge to the impugned award is limited to the extent that its Claim no.1, Claim no.4 and Claim no.6, have been rejected.

3. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with the Purchase Order dated 15.11.2012 (hereafter '**PO-0106**') placed by the respondent Fedders Lloyd Corporation Ltd. (hereafter '**FLCL**') on MEI for the purchase of 4964 numbers of transformers of varying specifications. The PO-0106 was accepted by MEI and it had agreed to supply 4964 numbers of transformers at an aggregate value of ₹98,38,37,700/- (Rupees Ninety-Eight Crores Thirty-Eight Lacs Thirty-Seven Thousand and Seven Hundred Only). The transformers were to be supplied by FLCL for the Public Procurement and Property Disposal Service (PPPDS) in Ethiopia.

4. Subsequently, the PO-0106 was split into twelve separate Purchase Orders; all dated 04.12.2012. Each Purchase Order was for a specified number of transformers and for a specified value. However, cumulatively 4964 numbers of transformers were required to be supplied in terms of the twelve Purchase Orders for an aggregate value of ₹98,38,37,700/-

5. Clause 8 of the PO-0106, *inter alia*, stipulated that the entire payment for transformers would be made through Letters of Credit. 90% payment would be made through the irrevocable Letter of Credit for a period of one hundred and twenty days and the remaining 10% of the payment would be made within thirty days from the date of

acceptance of the transformers by the buyer, within the Letter of Credit validity period.

6. MEI claims that it had supplied 2817 numbers of transformers to FLCL in four lots, as instructed by FLCL from time to time. Against the aforesaid supplies, MEI raised invoices (Invoice nos. 19 to 48) aggregating to an amount of ₹32,29,24,800/- (Rupees Thirty Two Crores Twenty-Nine Lacs Twenty-Four Thousand and Eight Hundred Only). 90% of the invoice value, that is, ₹29,06,32,320/- (Rupees Twenty-Nine Crores Six Lacs Thirty-Two Thousand Three Hundred and Twenty Only) was paid through the Letters of Credit. MEI claims that the balance amount of ₹3,22,92,480/- (Rupees Three Crores Twenty-Two Lacs Ninety-Two Thousand Four Hundred and Eighty Only) remained outstanding and payable against the transformers supplied to FLCL.

7. MEI claims that it had also raised invoices for the fifth lot of transformers (640 in number) for a value of ₹13,86,55,200/- (Rupees Thirteen Crores Eighty-Six Lacs Fifty-Five Thousand and Two Hundred Only). However, FLCL neither opened the Letter of Credit nor issued the necessary instructions for dispatch of the said fifth lot. MEI claims that it was compelled to sell the said transformers as scrap and recovered a sum of ₹5,17,48,930/- (Rupees Five Crores Seventeen Lacs Forty-Eight Thousand Nine Hundred and Thirty Only) from such sale. MEI, accordingly, claimed that FLCL was liable to pay the remaining amount of ₹8,69,06,270/- (Rupees Eight Crores Sixty-Nine

Lacs Six Thousand Two Hundred and Seventy Only) as remaining invoice value.

8. MEI filed its Statement of Claims before the Arbitral Tribunal on 04.10.2017. A tabular statement summarising the claims made by MEI, as set out in the impugned award, is reproduced below:

1.	Amount recoverable towards 10% balance payment for the transformers supplied following inspection	Rs.3,22,92,480/-
2.	Towards recovery of total drawback received by Respondent from the customs authorities and not paid to and the Claimant as per Agreement	Rs.1,55,46,215/-
3.	Towards repair of 227 number of distribution transformers in terms of work order dated 12.12.2012.	Rs.25,55,890/-
4.	The balance recoverable amount after adjustment of scrap value of Rs.5,17,48,930/- towards 5th lot Rs.8,69,of transformers which you have refused to take delivery and had to be sold on scrap value.	Rs.8,69,06,270/-
5.	Towards packing charges	Rs.27,52,500/-
6.	Towards loss of profit and business opportunity, goodwill etc.	Rs.5,00,00,000/-
	Total	Rs.19,00,53,355/-

9. Insofar as MEI's claim towards the Duty Drawback is concerned, the Arbitral Tribunal found that in terms of the PO-0106, MEI was entitled to receive the benefit of the Duty Drawback. FLCL's contention that MEI was not entitled to the Duty Drawback as the

foreign buyer had not accepted the transformers was rejected. The Arbitral Tribunal found that the representative of the foreign buyers had duly inspected the transformers prior to the dispatch and had recorded its satisfaction that the transformers conformed to the requisite specification and quality. Accordingly, the Arbitral Tribunal awarded a sum of ₹1,17,43,773 (Rupees One Crore Seventeen Lacs Forty-Three Thousand Seven Hundred and Seventy Three Only) along with interest at the rate of 9% from the date of filing of the Statement of Claims till the date of the award and further, future interest at the same rate till realization, in favour of MEI. The said figure was computed after excluding the sums of (i) ₹31,32,225/- (Rupees Thirty-One Lacs Thirty-Two Thousand Two Hundred and Twenty-Five Only) received by MEI; and (ii) ₹38,02,442/- (Rupees Thirty-Eight Lacs Two Thousand Four Hundred and Forty-Two Only), which was held to be barred by limitation, from the total amount of ₹1,86,78,440/- (Rupees One Crore Eighty-Six Lacs Seventy-Eight Thousand Four Hundred and Forty Only), which was claimed by MEI as amount due on account of Duty Drawback.

10. The sum of ₹38,02,442/- was found to be barred by limitation as FLCL had issued cheques for the aforesaid amount and the payment of which was stopped in the month of April, 2014. The Arbitral Tribunal found that the same clearly indicated that FLCL had repudiated its liability to pay the aforesaid amount. Although MEI had filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 in respect of dishonour of the said cheques, it had not instituted any

other proceedings for the recovery of the amount within a period of three years from the month of April, 2014.

11. The learned counsel for MEI has not contested the impugned award in respect of Claim no.2 and therefore, it is not necessary for this Court to examine the same any further.

12. Insofar as Claim no.3 and Claim no.5 are concerned, the Arbitral Tribunal found that the same were outside the scope of reference to arbitration as the said claims did not arise from the PO-0106 dated 15.11.2012 or the twelve Purchase Orders dated 04.12.2012 that were issued by splitting the PO-0106 dated 15.11.2012. The learned Sole Arbitrator was appointed to adjudicate the disputes by virtue of an order dated 21.09.2017 passed in a petition [Arbitration Petition No. 466/2017] filed under Section 11 of the A&C Act. The impugned award indicates that the Court had appointed the learned Arbitrator to adjudicate the disputes including the claims and counter-claims emanating from the PO-0106 dated 15.11.2012.

13. Mr. Thakur, learned counsel appearing for MEI, has not assailed the decision of the Arbitral Tribunal to reject Claim no.3 and Claim no.5 as the same were outside the scope of its reference.

14. As noted above, MEI restricted the present petition to assail the impugned award only in respect of Claim no.1, Claim no.4 and Claim no.6. Insofar as Claim no.1 is concerned, the Arbitral Tribunal held that the said claim was barred by limitation as the invoices for the

transformers were dated between the months of August, 2013 and October, 2013 and, MEI had invoked the arbitration by a notice dated 12.06.2017, which was beyond the period of three years from the date of the last invoice. The Letters of Credit issued by FLCL had expired on or prior to 21.11.2013 and the payment terms as agreed under Clause 8 of the PO-0106 required that the balance 10% payment be made within the validity period of the Letter of Credit. Thus, the cause of action for recovering the balance 10% price for the transformers supplied had occurred on or prior to 21.11.2013.

15. MEI's Claim no. 4, Claim of ₹8,69,06,270/- (Rupees Eight Crores Sixty-Nine Lacs Six Thousand Two Hundred and Seventy Only) for the balance consideration of 640 numbers of transformers that were sold as scrap, was also rejected as barred by limitation. According to MEI, it was ready to ship the said transformers between 22.01.2014 to 31.01.2014 but could not do so as FLCL had failed and neglected to open the Letters of Credit and to issue instructions for dispatch of the said transformers.

16. MEI's Claim no.6 for a sum of ₹5,00,00,000/- (Rupees Five Crores Only) towards loss of profit, business opportunity and goodwill was rejected on the ground that it had failed to substantiate the same.

Submissions

17. Mr. Thakur, learned counsel appearing for MEI has contended that the impugned award insofar as it rejects MEI's Claim no.1, Claim

no.4 and Claim no.6 was against the Public Policy of India and gravely unfair towards MEI. He submitted that MEI's Claim no. 1 and Claim no. 4 were dismissed solely on the ground of limitation as the Arbitral Tribunal had erred in not appreciating that the contract to supply 4964 numbers of transformers of varying specifications and ratings was a singular contract and any claim arising from the PO-0106 could be made within a period of three years from the date of last payment received in respect of any supply made under the PO-0106. He submitted that since the last payment against the supply of the transformers was made on 06.04.2015, therefore, the period of limitation of three years was required to be reckoned from that date. He further submitted that the Arbitral Tribunal had grossly erred in not appreciating that the period of limitation would run from the date when FLCL denied its liability to make any further payments. He submitted that prior to the said date, there was no arbitral dispute that could be referred to arbitration. He referred to the decision of the Supreme Court in ***Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority: (1988) 2 SCC 338***, in support of his contention.

18. Insofar as Claim no.6 is concerned, Mr. Thakur submitted that the Arbitral Tribunal had grossly erred in denying MEI's claim for loss solely on the ground that it was not substantiated. He stated that following the principle laid down by the Supreme Court in ***M/s A.T. Brij Paul Singh & Ors. v. State of Gujarat: (1984) 4 SCC 59***, the Arbitral Tribunal was required to award losses at least to the extent of 10% of the value of the unperformed contract.

Reasons and Conclusion

19. The contentions advanced by Mr. Thakur are unmerited. There is no dispute that MEI had raised invoices for supply of 2817 numbers of transformers, which were supplied in four lots, aggregating ₹32,29,24,800/- (Rupees Thirty-two Crores Twenty-nine Lac Twenty-four Thousand and Eight Hundred Only) between the period 14.08.2013 and 17.10.2013. FLCL had pleaded that specific payments were made against the raised invoices. The Arbitral Tribunal found that the payment dated 06.04.2015 was adjusted against certain specified bills as was evident from the extract of the ledger filed by MEI before the Arbitral Tribunal. The said payment was not against any of the invoices raised for the supply of 2817 numbers of transformers (Invoice Nos.19 to 48). The said invoices remained unpaid.

20. It is also relevant to refer to Clause 8 of the PO-0106 and, the same reads as under:

> **"8.0 PAYMENT TERMS**
>
> Fedders Lloyd Corporation limited shall make the 100% payment through LC as follows:
>
> 8.1 90% payment through irrevocable Letter of Credit with USSANCE period of 120 days. The period of first 30 days shall be borne by Marsons Electrical Industries and balance 90 days shall be borne by Fedders Lloyd Corp. Ltd. on Nationalised Bank Prevailing rate of interest.
>
> 8.2 The balance 10% payment shall be made within 30 days from the date of Acceptance of

> Transformers by buyer within LC validity period."

21. It is clear from the above that the entire payment for supply of the transformers was required to be made within the period of validity of the Letter of Credit opened for effecting 90% of the price of the transformers. Thus, the failure on the part of FLCL to pay the remaining 10% of the invoice value within the specified time in respect of 2817 numbers of transformers gave rise to the cause of action in favour of MEI. MEI was required to commence the arbitral proceedings by issuing a notice under Section 21 of the A&C Act within a period of three years from the date of said cause of action. The Arbitral Tribunal found that part payment made on 06.04.2015 was not in respect of the invoices raised for the supply of 2817 numbers of transformers and therefore, such part payment did not extend the period of limitation. This Court finds no infirmity with the said view. Once it is held that FLCL had made payments against specific invoices – which was admitted by MEI – the period of limitation would not stand extended on account of part payment made by FLCL in respect of any other invoices. Mr. Thakur's contention that since it was a singular contract, all payments must be construed as part payments against the same Contract as the parties were maintaining a running account, is also unpersuasive. Once it is found that FLCL had made payments against specific invoices, the question of construing the same as a payment made towards a running account does not arise.

22. In any view of the matter, the decision of the Arbitral Tribunal is final and cannot be interfered with unless this Court finds that it is patently illegal or is contrary to the Public Policy of India. In the facts of the present case, this Court is unable to accept that there is any illegality that vitiates the arbitral award.

23. The decision in the case of ***Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority*** (*supra*) is not applicable in the facts of the present case. In that case, the works were completed in the year 1980 but the final bill had not been prepared as the same was under preparation. In these circumstances, the Court held that the cause of action would arise only once the payment was denied [or not included in the final bill]. The decision in ***Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority*** (*supra*) is not an authority in the proposition that the period of limitation for bringing a claim on an unpaid invoice would arise three years after such payment has been expressly denied. The cause of action would clearly arise when payments become due. Unless the period is extended by acknowledgment or by part payment, it would expire on expiry of a period of three years of the date of cause of action.

24. MEI's claim for ₹8,69,06,290/- (Rupees Eight Crores Sixty-nine Lac Six Thousand Two Hundred and Ninety Only) being invoice value of 640 numbers of transformers less the scrap value realized to mitigate the loss [₹13,86,55,200/- – ₹5,17,48,930/-] was also rejected by the Arbitral Tribunal as barred by limitation. It was MEI's case that the said

transformers were ready to be shipped between 22.01.2014 to 30.01.2014 but MEI could not do so on account of failure on the part of FLCL to open the Letters of Credit and to give the necessary instructions. The Arbitral Tribunal found that on the basis of the averments made in its Statement of Claims, the cause of action would have arisen in favour of MEI in the month of January, 2014 or at best in the month of May, 2014. However, MEI had not commenced the arbitral proceedings within the period of three years from that date. MEI's claim that the period of limitation was extended on account of part payment made on 06.04.2015 was rejected on the ground that the said payments were not made by FLCL against the specific invoices raised. As discussed above, this Court finds no infirmity with the said view.

25. The last question to be considered is whether the Arbitral Tribunal's decision to reject MEI's claim of ₹5,00,00,000/- (Rupees Five Crores Only) towards loss of profit, business opportunity, goodwill etc. can be faulted. The Arbitral Tribunal had rejected the said claims as MEI had failed to substantiate the same. Clearly, the impugned award cannot be faulted as there is no material to substantiate MEI's claim. The contention that the Arbitral Tribunal was required to assess the same on an ad-hoc basis, is without any merit.

26. The reliance placed by Mr. Thakur on the decision of ***M/s A.T. Brij Paul Singh & Ors. v. State of Gujarat*** (*supra*) is wholly misplaced. The said decision is not an authority for the proposition that a claim for

loss of profit is required to be allowed without any evidence. In that case, the High Court had found that the respondent had committed a breach of the contract and the appellant had established that it was entitled to claim damages for loss of profit. However, the High Court denied the same as the appellant had not produced strict proof and primary documents for establishing the quantum of loss of profits. The appellant had relied upon the decision of the same High Court in another connected proceeding, where the High Court had found that loss of profit computed at the rate of 15% of the value of remaining work of the contract was not unreasonable and had allowed the same. However, the High Court did not accept the assessment as done in the other case, which was a case of a similar contract between the same parties. In this context, the Supreme Court allowed the appeal as it held that the view of the High Court was too technical. Paragraph 11 of the said decision is relevant and is set out below:

> "11. Now if it is well-established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured."

27. This Court is of the view that contrary to the submissions made by Mr. Thakur, the award of damages without the claimant establishing

the same by cogent evidence would be patently illegal and also fall foul of the Public Policy of India.

28. The petition is unmerited and, is accordingly, dismissed.

VIBHU BAKHRU, J

DECEMBER 07, 2021
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