

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 16.11.2021

+ **O.M.P. (COMM) 524/2019**

**M/S RENEWABLE ENERGY SYSTEMS
LIMITED**

..... Petitioner

versus

M/S BHARAT SANCHAR NIGAM LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Shashank Garg, Advocate.

For the Respondent : Mr Samdarshi Sanjay, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') challenging the Arbitral Award dated 07.09.2019 (hereinafter 'the impugned award'). In terms of the impugned award, the claims made by the petitioner were rejected as barred by limitation. The petitioner claims that the said view is *ex facie* erroneous and the impugned award is vitiated by patent illegality on the face of the record.

Factual Matrix

2. The petitioner is a company incorporated under the Companies Act, 1956 and is, *inter alia*, engaged in manufacturing and dealing with Solar Photovoltaic Power Sources and other renewable energy technologies.

3. On 20.12.1994, the Department of Telecommunications (DoT), Government of India had invited tenders [Tender Enquiry No. 11-12/94-MMT(RN)] for taking on lease 6380 numbers of Solar Photovoltaic Power Sources (SPPS). The respondent is a government company and is a successor of the Department of Telecommunications.

4. The petitioner submitted its bid pursuant to the aforesaid notice for supplying the SPPS. The petitioner's bid was accepted and, on 20.10.1995, the respondent issued an Advance Purchase Order for the SPPS with the basic invoice price of ₹11,25,24,060/- (Rupees Eleven crores, twenty five lacs, twenty four thousand and sixty). The SPPS were required to be provided in two packages – Package A and Package B. Under Package A, the petitioner was required to supply 1600 numbers of SPPS for Andhra Pradesh Circle; 750 numbers of SPPS for Maharashtra Circle; and 840 numbers of SPPS for Rajasthan Circle. The unit price for such supply was fixed at ₹18,202/- per unit. The petitioner was required to supply a similar quantity of SPPS to the three circles under Package B as well, albeit at the unit price of ₹17,072/-.

5. Thereafter, on 20.11.1995, the parties entered into a Lease Agreement (hereinafter the 'Lease Agreement') whereby the

respondent agreed to lease the SPPS (which was referred to as 'Equipment') from the petitioner. In terms of the Lease Agreement, the petitioner was to supply the agreed number of SPPS as a package within a period of three months from the date of the said agreement.

6. In terms of the Lease Agreement, it was agreed that the term of the lease was for fixed period of five years to be computed from the end of the three months period within which the entire delivery of the SPPS was required to be made at the sites. The respondent agreed to pay the quarterly lease rentals (hereinafter referred to as 'QLR') at the rate of ₹59.5 per ₹1000 of the basic invoice value. The QLR was required to be paid within seven days after the completion of each quarter. It was also agreed that the QLRs would be variable and linked to the prime lending rate of the State Bank of India (SBI). The aforesaid QLRs were pegged at the then prevailing prime lending rate of 15.5% per annum. It was agreed that for every 1% increase or decrease in the prime lending rate of SBI, the QLR would be correspondingly increased or decreased at the rate of ₹1.5 per ₹1000 of the basic invoice value.

7. It was agreed that the ownership of the SPPS would continue to vest with the petitioner but the respondent shall have the right to retain the possession of the SPPS for the full term of the lease period.

8. It was agreed that upon completion of the lease term, the respondent would make a one-time payment to the Lessor (the petitioner) as transfer sale price at the rate of 1% of the invoice value. In the alternative, the lessee (the respondent) could make a payment to

the petitioner as advance lease rentals not exceeding 1% of the invoice value for all the future lease rentals.

9. Undisputedly, the Lease Agreement was a financing lease (and not an operational lease) and was entered for financing the acquisition of the SPPS. Thus, the QLRs were computed to pay the price of the SPPS (basic invoice value) as well as the financing cost, which was linked to the prime lending rate of SBI

10. The petitioner claims that the respondent failed to pay the QLRs as agreed. Although the respondent paid the initial QLRs, it defaulted in making the payments for 8.5 quarters for supplies made for the Andhra Pradesh Circles; 8 quarters for the supplies made for the Maharashtra Circle; and 9 quarters for the supplies made for the Rajasthan Circle. The petitioner states that several orders were passed by various High Courts and Tribunals whereby the respondent was directed to pay the due lease rentals directly to the creditors at whose instance the said orders were passed. And, in terms of the said orders, as mentioned in the petition, the respondent paid an aggregate amount of ₹1,52,42,121/- to various creditors of the petitioner.

11. The petitioner claims that the invoice value of the equipment aggregated to an amount of ₹11,25,24,060/-. The petitioner was entitled to receive lease rentals aggregating ₹13,39,03,620/-. However, the respondent had paid an aggregate sum of ₹6,60,45,482/- (Rupees Six crores, sixty lacs, forty five thousand, four hundred and eighty two) directly to the petitioner and had paid a further sum of ₹1,52,42,121/-

to various creditors of the petitioner. Accordingly, the petitioner claims that the balance sum of ₹5,26,16,017/- (Rupees Five crores, twenty six lacs, sixteen thousand and seventeen) is due and payable by the respondent to the petitioner against the outstanding QLRs.

12. The petitioner claims that it pursued with the respondent to pay the outstanding QLRs but, the respondent failed and neglected to do so.

13. The petitioner states that in the statutory audit report of the respondent for the year 2005-06, it was observed that “*BSNL cannot pay its dues to RES without leave from BIFR, consequently has to face the court order for payment or otherwise.*” This indicates that the respondent had withheld the payments due to the petitioner. The petitioner contends that the aforesaid premise on which the payments were withheld was *ex facie* erroneous as the respondent was not prohibited from making payments of the amounts due to the petitioner on account of its reference to the Board for Industrial and Financial Reconstruction (BIFR).

14. The petitioner states that it continued to pursue the respondent for payment of the outstanding dues but the same were not settled. It is also stated that in the year 2011, a Committee was formed to resolve the claims of the petitioner. However, despite the request made by the petitioner, the respondent neither settled the claims of the petitioner nor informed them regarding the report submitted by the Committee.

15. On 01.09.2015, the BIFR discharged the reference filed by the petitioner consequent to implementation of the rehabilitation scheme sanctioned by the BIFR in terms of its order dated 15.06.2009.

16. In view of the above disputes, the petitioner issued a legal notice dated 17.08.2016 seeking the appointment of a Sole Arbitrator and reference of the disputes to arbitration in terms of Clause 31.1 of the Lease Agreement.

17. The respondent did not take any steps for the appointment of an arbitrator and consequently, the petitioner filed a petition under Section 11 of the A&C Act (ARB.P. 823/2016) before this Court. The said petition was disposed of by an order dated 05.09.2017, whereby this Court appointed the learned Arbitrator and further, directed that the arbitration would be conducted under the aegis of Delhi International Arbitration Centre (DIAC).

18. The Arbitral Tribunal rendered the impugned award. Being aggrieved by the same, the petitioner has filed the present petition.

Reasons and Conclusion

19. The principal controversy involved in the present case is whether the claims made by the petitioner were barred by limitation. It is relevant to note that the petitioner had made seven claims in its Statement of Claims filed before the Arbitral Tribunal. The petitioner had claimed a sum of ₹5,26,16,017/- as the balance amount of QLRs payable in terms of the Lease Agreement (Claim No. 1). The petitioner

had also claimed a sum of ₹7,89,240/- as additional fee at the rate of 0.5% for each completed month of delay for the first three months (Claim No. 2) and further, a sum of ₹11,52,89,574/- as additional fee for delay beyond the period of three months computed at the rate of 18% per annum (Claim No. 3). In addition, the petitioner also claimed a sum of ₹11,25,241/- on the transfer sale price in terms of Clause 12.8 of the Lease Agreement along with interest at the rate of 18% per annum, which was quantified at ₹32,86,265/- (Claim No.4). The petitioner also claimed ₹5 lacs on account of damages for the non-payment of the QLRs towards the opportunity cost (Claim No. 5). Further, the petitioner also claimed *pendente lite* and future interest at the rate of 18% per annum and all costs of arbitration (Claim nos. 6 and 7).

20. It is seen from the above that the petitioner's claims against the respondent were monetary claims. The petitioner had not sought return of the SPPS.

21. As noticed above, the Lease Agreement was essentially in the nature of a financing lease. The petitioner had agreed to supply the SPPS at an agreed invoice value. The QLRs were based on the said invoice value and also linked with the SBI prime lending rate.

22. In terms of Clause 12.8 of the Lease Agreement, it was agreed that the respondent would pay a transfer sale price at the rate of 1% of the invoice value. Clause 12.8 of the Lease Agreement is set out below:

“12.8 Upon completion of the lease term, the Lessee shall make one-time payment to the Lessor as Transfer Sale Price @ 1% of invoice value for transfer of leased assets to Lessee given more fully in Annexure-I. Alternately, the Lessee shall make one-time payment to the Lessor as advance Lease Rentals @ not exceeding 1% of the invoice value for all future lease rentals, for the extended lease term, if any.”

23. The Lease Agreement was for a fixed term of five years and it was agreed that the QLRs would be paid within seven days at the end of each quarter. In this view, it is indisputable that any failure on the part of the respondent to pay the QLRs would give rise to a cause of action at the end of seven days from the end of each quarter. Insofar as the petitioner's claim for the transfer sale price is concerned, the cause of action for recovering the same arose at the end of the term of the lease. Thus, *ex facie*, the claims made by the petitioner are barred by limitation.

24. Mr Garg, learned counsel appearing for the petitioner contended that the cause of action is a continuing one, essentially, for two reasons. First, that the Lease Agreement provided for interest on the delayed payments and second, that the SPPS continued to be owned by the petitioner as the respondent had not paid the transfer sale price.

25. The aforesaid contentions are unmerited.

26. As noticed above, the petitioner's claim is for a quantified amount, which according to the petitioner was due and payable during the term of the Lease Agreement and latest, by the end of the Lease Agreement. The petitioner had also claimed interest for the said period.

The contention that since the amounts remained outstanding, the petitioner's cause of action continued is, plainly, unsustainable. The fact that a debt has remained outstanding, does not extend the period of limitation. It is established that the statute of limitation extinguishes recourse to the remedy and not the debt. (See: *Bombay Dyeing & Manufacturing Co Ltd v State of Bombay and Ors: AIR 1958 SC 328*]

27. The contention that the petitioner had repeatedly sent reminders to the respondent for making the said payment would not in any manner extend the period of limitation. The Supreme Court in *Geo Miller & Co Pvt Ltd v Rajasthan Vidyut Utpadan Nigam Ltd: 2019 SCC OnLine SC 1137* observed as under:

“21...Mere correspondence of the appellant by way of writing letters/reminders to the respondent subsequent to this date would not extend the time of limitation....

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29.....once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. It does not lie to the applicant to plead that it waited for an unreasonably long period to refer the dispute to arbitration merely on account of the respondent's failure to settle their claim and because they were writing representations and reminders to the respondent in the meanwhile.”

28. It is also relevant to note that before the Arbitral Tribunal, it was contended that the Lease Agreement was not financially closed and

therefore, continues to survive. It was also contended that the respondent had acknowledged that an amount of ₹5,26,00,000/- (Rupees Five crores, twenty six lacs) was due and payable to the petitioner in the counter affidavit filed in another proceedings. In addition, it was submitted that in view of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, the proceedings and contracts with the petitioner were suspended. The Arbitral Tribunal had examined the aforesaid contention and had found that there was no acknowledgement of debt as claimed by the respondent. The Arbitral Tribunal also held that Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 did not proscribe the petitioner from pursuing its claim against the respondent.

29. This Court finds no infirmity with the aforesaid findings. The claims made by the petitioner are, *ex facie*, barred by limitation. Further, the petitioner has not placed on record any document issued by the respondent within the period of limitation, acknowledging the debt claimed by the petitioner.

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

VIBHU BAKHRU, J

NOVEMBER 16, 2021
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