

(2001) 05 DEL CK 0176

In the Delhi High Court

Case No : IA. 4765/97 and Suit No. 3016-A/96

Essban Paints Pvt. Ltd.

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 23-05-2001

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (2001) 05 DEL CK 0176

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. Shiv Khorana, for the Appellant; Mr. Harish Chander and Mr. Rajinder Nischal, for the Respondent

Judgement

A.K. Sikri, J.—By means of this application objections have been filed by the respondent u/s 30 and 33 of the Arbitration Act, 1940 against the Award dated 31-10-1996 passed by Shri Ram Bahadur, Sole Arbitrator. Objections are only in respect of Claim No.1. This claim was preferred by the petitioner for refund of Security Deposit amounting to Rs. 75,000/-. The learned Arbitrator in the Award, while allowing this claim gave the following reasons:

1. Security amount cannot be forfeited as penalty.
2. It is admitted by Union of India in para (3) of counter-claim that Bank Guarantee was submitted.
3. Late submission of Bank Guarantee was condoned by Union of India.
2. Learned counsel for the objector has submitted that the Arbitrator took wrong view in holding that the forfeiture of security deposit by the respondent was in the nature of penalty. He relies upon following observations from the judgment of Supreme Court in the case of Maula Bux Vs. Union of India (UOI), :

"Forfeiture of earnest money under a contract for sale of property-movable or immovable-if "the amount is reasonable, does not fall within s.74. That has been

decided in several cases: Kunwar Chiranjit Singh Vs. Har Swarup AIR 1926 P.C.1.; Roshan Las Vs. The Delhi Cloth and General Mills Company Ltd., Delhi ILR 33 All.166; Muhammad Habibullah Vs. Muhammad Shafi ILR 41 All. 324; Bishan Chand Vs. Radha Kishan Das I.D.19 All.490. These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, s.74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty".

3. While there is no quarrel about the aforesaid proposition, what is to be examined in each case is as to whether forfeiture of earnest money is a reasonable pre-estimation of loss in the event of breach or it is in the nature of penalty. In the instant case it is not the case of the objector that the petitioner completely failed to perform the contract which lead the respondent-objector to forfeit the money. As per the averments of the respondent petitioner had partly performed the contract but since he did not complete the execution of the contract, the contract was cancelled and security deposit which was in the form of bank guarantee was forfeited. In the same judgment Supreme Court has held that if a party alleges loss because of breach of contract on the part of other party, it has to prove the said loss. Here, in the objections itself the case of the objector is that the petitioner had committed breach of contract because of which the respondent suffered loss. According to the respondent-objector the petitioner did not perform the contract fully. This is borne out from the counter-claims filed by the respondent before the Arbitrator also. When that is the case it was the respondent's obligation to prove the extent of damages suffered because of the alleged breach. The security was furnished by the petitioner for due fulfillment of the contract. If the contract was not performed and there was breach thereof by the petitioner, it was for the respondent to prove the loss/damage suffered because of such breach and to forfeit the security only to the extent of the loss. By failing the same to prove, the petitioner could not justify withholding/forfeiting the security amount. This is the consistent view taken in various cases including in the case of Maula Bux Vs. Union of India (supra) as well as in the case of State of U.P. Vs. Chandra Gupta and Co., . I, Therefore, do not find any merit in the objections. This application is accordingly dismissed. Judgment in terms of the Award is pronounced. The Award of the Arbitrator is made a rule of the Court. If the amount as awarded is not paid within three months from today, the petitioner shall also be entitled to interest from the date of decree at the rate of 12% P. A. Decree-sheet be prepared accordingly.