(1998) 05 DEL CK 0047

In the Delhi High Court

Case No : OMP 71/98

Parmali Wallace Limited APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 29-05-1998

Acts Referred:

Citation : (1998) 5 AD 335 : (1998) 75 DLT 413 : (1999) 49 DRJ 41

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

Bench : Single Bench

Advocate : Mr. B. Dutta and Ms. Neeraja Kapoor, for the Appellant; Ms. Jyoti Singh, for the Respondent

Judgement

S.N. Kapoor, J.—By this petition u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter called the ''Act'' for short), the petitioner company seeks (i) declaration that the respondent Railways cannot withhold, adjust and/or recover the petitioner/claimant''s dues in other contracts vide their letter No. AS/S/O/ Recovery dated 9th July, 1996, (ii) an injunction re-straining respondent Railways not to effect recovery and (iii) a mandatory injunction directing the respondent Railways to forthwith pay the amounts due to the petitioner/claimant in certain bills, of course, in other con-tracts.

2. According to the petitioner, two purchase orders dated 10th June, 1991 and 2nd July, 1991 were placed on petitioner. The first order was for the supply of 1030 Nos. FRP Glass Shutter arrangement for BEML Coaches to item 1 to 12 except item 8 of RDSO SK No. 85166 alt.(1) Mat. & Specn. as per drg. and part drg. mentioned thereon conforming to RDSO schedule of requirement No. C-8411 and C-8409 @ 259/- each D.P. up to 15.3.92 against P.O. No. 07901931-102422 dated 10.6.91. Second order was for supply of 18081 Nos. of FRP Glass Shutters Arrangement from items 1 to 8 to 13 RDSO SK No. 85166 alt. (a) Mat. & Specn. as per drg./pt. drg. mentioned thereon to RDSO Schedule of Tech. Ref. C-8411 @ 247/- at a total value of Rs. 53,76,179/- with D.P. up to 305.92 against P.O. No. 07901812-102934 dated 2.7.1991.

3. The petitioner failed to supply the material. On 9th July, 1996, letter of withholding the amount was issued on failure of the petitioner company to pay the loss suffered by the Railways on account of non-supply of shutters under the risk purchase orders.

4. Mr. B. Dutta, learned senior counsel appearing on behalf of the petitioner, submits that this Court has got ample power u/s 9(b) of the Arbitration and Conciliation Act, 1996 to secure the amount in dispute in the arbitration and consequently, in order to secure the amount in dispute in arbitration, the petitioner is ready and willing to furnish a bank guarantee.

5.1 Ms. Jyoti Singh, learned counsel for the respondent/UOI opposed the petition and submits that the petitioner cannot claim the relief sought for in this case in view of clause 12 of the ''Terms and Conditions of Contract'' and clauses 2400, 2401, 2402 and 2403 of ''Instructions to Tenderers''. She further points out that insofar as the purchase order dated 10th June, 1991 is concerned, final risk purchase notice was sent to the petition on 13th March, 1992.

5.2 On 24th October, 1992, the purchase order was cancelled. On 12th April, 1992, fresh risk purchase order was placed on M/s. J.K. Fibre Glass at the rate of Rs.345/- each + E.D. + C.S.T. for the same quantity. Respondent/UOI suffered loss on account of risk purchase to the tune of Rs.93,110/-.

5.3 Ms.Jyoti Singh also submits that insofar as the purchase order dated 2nd July, 1991 is concerned, on 18th August, 1992 on account of failure to supply the material final risk purchase notice was sent to the petitioner. On 7th October, 1992, the purchase order was cancelled. On 6th April, 1993, fresh risk purchase order was placed on M/s. J.K. Fibre Glass. The respondent/UOI suffered a loss of Rs.18,59,661/-.

5.4 On 16th April, 1993, in respect of both the purchase orders dated 10th June, 1991 and 2nd July, 1991, demand notice was sent. On 9th July, 1996, letter of withholding the amount due in respect of other purchase orders was sent.

5.5 In respect of purchase order dated 10th June, 1991 by letter dated 8th January, 1998, arbitrator was appointed and on 9th January, 1998, the arbitrator entered into reference. Similarly, in respect of purchase order dated 2nd July, 1991, arbitrator was appointed on 15th September, 1997 and the arbitrator entered into reference on 15th December, 997.

6. Having heard learned counsel for the parties, following points arise for consideration:

(i) Whether the respondent could make recoveries by not paying the amount in respect of any other contract under the Terms and Conditions of Contract and the Instructions to Tenderers?

(ii) If issue No.1 is decided against the respondent whether this Court can grant relief as prayed for in the petition?

7. Before proceeding further for proper appreciation of respective contentions of the learned counsel for the arties, it would be useful here to reproduce clause 12 of the Terms and Conditions of Contract and clauses 2400 to 2403 of the Instructions to Tenderers. They read as under:-

12. "In the event of any delay in supply of material the Administration reserves the right either to purchase material from elsewhere at the risk and cost of the contractor(s) or penalise the contractor(s) for each such default for the undelivered portion of any supply in terms of IRS conditions of Contract and those supplemented in Pamphlet No.1 ''Instructions to Tenderers''.

2400. Withholding and Lien in respect of sums claimed.

2401. Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the Contractor, the Purchaser shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by the Contractor and for the purpose aforesaid, the Purchaser shall be entitled to withhold the said cash security deposit or the security, if any, furnished as the case may be and also have a lien over the same pending finalisation or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the Contractor, the Purchaser shall be entitled to withhold and have lien to retain to the extent of the such claimed amount or amounts referred to supra, from any sum or sums found payable or which at any time thereafter may become payable to the Contractor under the same contract or any other contract with the Purchaser or the Government pending finalisation or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above, by the Purchaser will be kept withheld or retained as such by the Purchaser till the claim arising out of or under the contract is determined by the Arbitrator (if the contract is governed by the arbitration clause) or by the competent court as prescribed under Clause 2703 hereinafter provided, as the case may be, and that the Contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the Contractor.

2402. For the purpose of Clause 2401, where the Contractor is a partnership firm or a limited company, the Purchaser shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found/payable to any partner/limited company, as the case may be, whether in his individual capacity or otherwise.

2403. Lien in respect of other contracts. _ Any sum of money due and payable to the Contractor (including the security deposit returnable to him) under the contract may withhold or retain by way of lien by the Purchaser or Government against any claim of the Purchaser or Government in respect of payment of a sum of money arising out of or under any other contract made by the Contractor with the Purchaser or Government.

It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the Purchaser or Government will be kept withheld or retained as such by the Purchaser or Government till his claim arising out of in the same con-tract or any other contract is either mutually settled or deter-mined by the arbitrator, if the contract is governed by the arbitration clause or by the competent court under Clause 2703 hereinafter provided, as the case may be, and that the Contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the Contractor."

8. A perusal of the Terms and Conditions of Contract gives two options to the concerned Railways either to purchase the material from other suppliers at the risk and cost of the contractor or penalise the contractor for default for the undelivered portion of any supply in terms of IRS conditions of Contract and those supplemented in Instructions to Tenderers. The respondent Railways, it appears, have opted for the first option. It is apparent that clauses 2400 and 2403 overlap each other to a certain extent. Clause 2400 would not apply, for in the two contracts supplies were not made and consequently, no payment was due to the petitioner. Insofar as clause 2403 is concerned, two options have been given to the Railways either to withhold or retain by way of lien by the Purchaser or Government against any claim of the Purchaser or Government in respect of payment of a sum of money arising out of or under any other contract made by the con-tractor with the Purchaser or Government and this amount could remain withheld or retained till the claim of the Purchaser or Government as the case may be arising out of the same contract or any other contract is either mutually settled or determined by an arbitrator or by a competent court as the case may be.

9. It may be made clear that withholding and retaining the amount and recovery are totally three different concepts. It is apparent by letter dated 9th July, 1996. What the respondent sought was neither withholding nor retaining the amount by way of lien. It is outright recovery. The word ''Recover'' has a technical meaning in law whereby it signifies to recover by action or by judgment of the Court. But it could be used in larger and more popular sense by any legal means which would include distress. Where there is successful set off, the plaintiff/the party could be said to have recovered the balance due to him. Recovery does not have any tentative character. It is for good. While the terms ''Withholding'' and ''Retaining'', as provided in clause 2403 may or may not be a step towards recovery but certainly not actual recovery, for it is only tentative decision to with-hold and retain the money. So long the money is just withheld or retained, the action of the respondent would not be questionable. But the moment the purchaser claims that he has recovered the amount, the purchaser exceeds the

limit of the option two of Terms and Conditions of Contract. From this point of view, it has to be held that the letter dated 9th July, 1996 (Annexure P. 1) cannot be justified, for it refers to recovery and does not indicate any withholding or retaining the amount till the claim of the purchaser arising out of the same contract or any other contract is either mutually settled or determined either by the arbitrator or by the competent court. It is not the case of the respondent that the arbitrator or the contractor has to decide the dispute in between the parties either in these contracts or any other contracts relating to other purchase orders. As such, the letter dated 9th July, 1996 cannot be justified by any stretch of imagination.

10. Insofar as the second point is concerned, there cannot be any doubt that Section 9(ii)(b) of the Act provides that a party before or during the arbitration proceedings or at any time after making of the arbitration award but before its enforcement in accordance with Section 36 may apply to a court for interim protection in respect of securing the amount in dispute in the arbitration. Ld. Senior counsel for the petitioner submits that the petitioner is ready and willing to furnish a bank guarantee for the amount in order to secure the amount in dispute in the arbitration to the tune of Rs.18,59,661/- plus Rs. 93,110/- total amounting to Rs.19,52,771/-. There is no dispute in between the parties that in both the matters arbitrator has been appointed.

11. Section 9(ii)(b) has to be read in consonance and tune with the agreement between the parties. It is submitted that the court ordinarily could not ignore the terms of the contract unless and until it appears that instead of following spirit of the terms of the contract is throttled by enforcing the letter of the contract and thereby putting the supplier in extraordinary hardship. In this regard, it is submitted that a sum of Rs.19,52,771/- has been unnecessarily retained by the respondent claiming recovery after a period of more than 3 years from the date of cancellation of purchase order dated 7th October, 1992 and 24th October, 1992. The alleged loss was suffered in April and July, 1993. Letter of recovery was sent on 9th July, 1996 and the arbitrators were appointed on 16th September ,1997 and 18th January, 1998. During this long gap of over 3 years huge amount of Rs.19,52,771/- of the petitioner remained blocked and even the petitioner would not get any interest thereon. It is submitted by Shri Dutta that in such circumstances it would be appropriate to release the amount on furnishing bank guarantee so long at least the petitioner would be able to get interest.

12. The aforesaid submissions are refuted by learned counsel for the respondent/ UOI on the basis of not one but numerous authorities. In M/s. H.M.K. Ansari and Co. Vs. Union of India, (1983) 4 S 418, the Supreme Court in respect of similar clause though differently worded but incorporating the spirit of the same clause and dealing with similar prayers referred to above observed in paragraph 31 as under:

"31. We are clearly of the view that an injunction order re-straining the respondents from withholding the amount due under other pending bills to the contractor virtually amounts to a direction to pay the amount to the contractor-appellant. Such an order was clearly beyond the purview of clause (b) of Section 41 of the Arbitration Act. The Union of India has no objection to the grant of an injunction restraining it from recovering or appropriating the amount lying with it in respect of other claims of the contractor towards its claim for damages. But certainly Clause 18 of the standard contract confers ample power upon the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount."

In this case the earlier decision in Union of India (UOI) Vs. Raman Iron Foundry, was considered. That decision was partly approved and partly disapproved. It was observed in paragraph 13 as under:

"13. "As some doubt was raised in the Delhi High Court as to the exact scope of the ratio of the Union of India (UOI) Vs. Raman Iron Foundry, , the matter was referred to a full Bench apparently to reconsider the earlier Division Bench judgments in Marwar Tent Factory Vs. Union of India and Another, and Air Foam Industries Pvt. Ltd. Vs. Union of India, . The full Bench in Mohan Meakin Breweries Limited Vs. Union of India and Others, took the view that though an injunction could be granted in those matters restraining the Union of India from adjusting or recovering any damages claimed by it from other pending bills of the contractor no order of injunction restraining the Union of India from withholding the payments due to the contractor under other pending bills could be issued."

In paragraph 22, further following observations were made:

"22. ...Once this Court came to the conclusion that the court has power u/s 41(b) read with Second Schedule to issue interim injunction but such interim injunction can only be for the purpose of land in relation to arbitration proceedings and further that the question whether any amounts were payable by the appellant to the respondent under other contracts, was not the subject matter of the arbitration proceedings and, Therefore, the court obviously could not make any interim order which, though ostensibly in form an order of interim injunction, in substance amounts to a direction to the appellant to pay the amounts due to the respondent under other contracts, and such an order would clearly be not for the purpose of and in relation the arbitration proceedings."

In regard to the second observation of the Court (in Raman Iron Found-ry'' case) that the order of injunction being negative in form and sub-stance, there was no direction to the respondent to pay the amount due to the appellant under pending bills of other contracts, was held to be "manifestly inconsistent with the proposition of law laid down by this Court in the same case." Thus, Raman Iron Foundry (supra) was clarified.

The Supreme Court further took the view that the earlier decision of the Supreme Court in Raman Iron Foundry (supra) is right in so far as the Court cannot pass any interim injunction against the Purchaser restraining it from withholding the payment under the other contracts since they were not the subject matter of the arbitration proceedings before the Court.

13. Learned counsel appearing on behalf of respondents submits that in terms of judgment in M/s. Sant Ram and Company Vs. State of Rajasthan and others, and in H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others, . The petitioner is not entitled to reliefs sought for. In M/s. H.M. Kamaluddin Ansari (supra), Section 41 of the Arbitration Act, 1940 was considered and it was ultimately held that court cannot pass interim injunction against purchase restraining it from with-holding payments to the supplier under other contracts which are not the subject matter of arbitration proceedings before the court. Such an injunction would amount to direction to pay such other amounts to the supplier. However in this case it was further held that whenever any claim for the payment of a sum of money arises including a claim for damages Disputed by the contractor - Union of India can withhold the amounts under other bills of the contract. But it further clarifies that Union of India can, however, be injuncted from recovering or appropriating it to the damages claimed u/s 41(b) of the Arbitration Act pending the arbitration proceedings.

14. It is notable that in this case also so far as other purchase orders, namely, purchase order No. 69412, 00713, 00205, 00993, 00893 are concerned, it is not the case of either of the parties that arbitration proceedings have been initiated in respect of those purchase orders nor it is a case of either of the parties that one or both intend to refer the matter to the arbitration. Therefore, in the light of foregoing, it would not be appropriate to pass any order, for clause 9(ii)(b) of the Act also relates to the amount in dispute in the arbitration and the amount which has been withheld is not in arbitration in absence of any reference to arbitration or any intention to do so.

15. However, since learned counsel for the Union of India herself submits that the amount which is said to have been recovered shall remain withheld and retained in terms of the relevant clause 12(ii) (b) read with Clause 2403 of the Instructions to Tenderers, there is no necessity to pass any further order. The petition is disposed of accordingly. Parties are left to bear their own costs.

