(2015) 03 DEL CK 0320

In the Delhi High Court

Case No : FAO(OS) 128/2015 and CM No. 5252 of 2015

Shree Krishna Paper Mils and Industries Ltd. APPELLANT

Vs

GAIL (India) Ltd. and Others RESPONDENT

Date of Decision : 20-03-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2015) 149 DRJ 189 : (2015) 178 PLR 28

Hon'ble Judges : Badar Durrez Ahmed, J;Sanjeev Sachdeva, J

Bench : Division Bench

Advocate : Sudhir Nandrajog, Senior Advocate, Ankit Jain and Sarvesh Rai, for the Appellant; Sanjay Jain, Additional Solicitor General, Poornima Maheshwari and Shreya Sinha, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Sanjeev Sachdeva, J.

1. The appellant has filed the present appeal impugning the judgment dated 18.03.2015, whereby the learned Single Judge has been pleased to dismissed the petition filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said "Act").

2. The appellant had filed the said petition seeking, inter-alia, the following reliefs:-

"(a) Restrain the respondent No. 1 from invoking the Letters of Credit bearing Nos. 6011ILCRE 140001 and 6011ILCRE30001 for an amount of Rs. 18,08,000/- and Rs. 25,00,000/- respectively, issued by Respondent No. 2, till the time the disputes are finally adjudicated by an Arbitrator;

(b) Restrain the respondent No. 2 from making any payment to respondent No. 1 towards invocation of the ''Letters of Credit'' bearing Nos. 6011ILCRE140001 and 6011 ILCRE130001 for an amount of Rs. 18,08,000/- and Rs. 25,00,000/-

respectively, till the time the disputes are finally adjudicated by an Arbitrator;

(c) Pass an ex-parte interim order in terms of prayers (a) and (b) above; And/or

Pass such other orders which this Hon''ble Court may deem fit any proper in the facts and circumstances of the case in favour of the Petitioner."

3. The contention of the appellant is that the appellant being engaged in the business of paper coating at its unit at Jhajjar, Haryana required Regasified Liquid Natural Gas (RLNG) for its business and, accordingly, entered into an agreement dated 25.12.2008 with respondent No. 1 for supply of the same. In terms of the agreement, the appellant provided two Letters of Credit, subject matter of the present appeal, totalling a sum of Rs 43,08,000/-.

4. As per the appellant, the agreement stipulated a monthly allotment of gas to the appellant for which a minimum guaranteed amount was payable. Since the appellant did not require the minimum monthly allotment of gas, the appellant requested the respondent to reduce the monthly allotment with effect from 01.09.2013. It is contended that the respondent failed to accede to the request of the appellant to reduce the monthly allotment of gas. It is contended that as the request for reduction of allotment of gas was under consideration, the respondent could not have invoked the Letters of Credit and the invocation amounted to a fraud.

5. Per contra, Mr. Sanjay Jain, the learned Additional Solicitor General, appearing on behalf of the respondents contended that the agreement between the parties stipulated that, in the beginning of the year the purchaser must commit the amount of gas it would take from the respondent No. 1 because the gas is imported and there is a back to back agreement with the original supplier and the commitment made by the purchaser has to be adhered to. He further contended that the Letters of Credit was an irrevocable letter of credit and was an independent contract, independent of the main contract between the parties. He further contended that the invocation was strictly in terms of the Letters of Credit and that there was no fraud which would vitiate the contract covered by the Letters of Credit.

6. The learned Single Judge by the impugned order has noticed that the only allegation of fraud averred by the appellant was that the demand made by the respondent No. 1, without taking the decision on the request made by the appellant to reduce the monthly allotment, was fraudulent and mala fide The learned Single Judge was of the view, and in our view rightly so, that the said action would not constitute a fraud so as to vitiate the contract of letter of credit. The learned Single Judge in the impugned order has noticed that the petitioner has neither pleaded irreparable damage or special equities nor it was the case of the petitioner that the invocation was not in terms of the Letters of Credit. The learned Single Judge has noted that the Letters of Credit are irrevocable and covers delayed payment, penalty, over drawl, taxes, duties and changes therein. The learned Single Judge, accordingly, declined to grant any relief to the

appellant and has dismissed the petition under Section 9 of the said Act.

7. The two Letters of Credit, subject matter of the present appeal, are in identical terms. The relevant terms are as under:

"STANDARD TERMS and CONDITIONS OF LETTER OF CREDIT FOR GAIL

1. XXXXXXX

2. This is a STANDBY IRREVOCABLE REVOLVING LETTER OF CREDIT(IVC) which revolves automatically for the L/c amount for the next set of documents as soon as the negotiation of present set of document is over and is valid up to 31-03-2015 for submission of documents for negotiation to the bank.

3. This L/C is raised under the Gas Supply Contract (GSC) Dated 05-02-2004 and will be valid for all invoices/Debit Notes etc. raised under the GSC as well as supplementary agreements, amendments and other addenda thereof.

4. This L/C covers supply of Regasified Liquefied Natural GAS (RLNG) by GAIL to the buyer through pipeline as well as Minimum Guaranteed Offtake (MGO) take of pay amount Interest on delayed payments, Penalty, over drawl Taxes, duties and changes therein, Difference in price, transportation charges, marketing margin etc.

5. Documents can be presented at any time after raising of invoices/debit notes etc. but within the validity period of the L/C.

6. XXXXXX

7. XXXXXX

8. Payment against the L/C shall be released immediately on presentation of photocopies of invoices/debit notes along with the draft in duplicate by Gail (India) Limited. L/C shall also cover requests against part payments.

9. Debit notes shall include payment against minimum Guaranteed Offtake (MGO), Interest on delayed payments penalty, over drawl Taxes Duties and changes therein Difference in price etc.

10. XXXXXX

11. XXXXXX

12. XXXXXX

13. The L/C value shall be for 48 Days supply of gas at maximum contracted quantity with coverage of value of gas for a period of three fortnights and validity of LC for a period of one year. The L/C will automatically be reinstated after invocation."

8. Perusal of the terms of the two Letters of Credit shows that same are an irrevocable Letters of Credit. The contention of the appellant that a request made

for reduction of the monthly allotment of gas not having been considered amounts to a fraud is not sustainable. The contention of the appellant that it was entitled to reduction of the monthly allotment of gas is not an issue which arises out of the contract of Letters of Credit but is an issue that may be covered by the main contract between the parties and would be the subject matter of arbitration proceedings. The contract of letter of credit is independent of the underlying contract and there is no circumstance pointed out to show that the Letters of Credit are vitiated on account of fraud. Even before us nothing has been pointed out to show as to how payment under the two Letters of Credit could be injuncted.

9. No case is made out for restraining the respondents from seeking payment against the irrevocable, unconditional Letters of Credit. We do not find any infirmity in the impugned order. In view of the above, the appeal is dismissed leaving the parties to bear their own costs.