(2000) 05 MP CK 0079

In the Madhya Pradesh High Court

Case No : C.R. No. 1117 of 1999 (J)

State of M.P. and Another APPELLANT

Vs

Ellora Paper Mills Ltd., Nagpur RESPONDENT

Date of Decision : 03-05-2000

Acts Referred:

Arbitration Act, 1940 — Section 34
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (2001) 2 MPJR 59

Hon'ble Judges : Dipak Misra, J

Bench : Single Bench

Advocate : G.S. Ahluwalia, Govt, for the Appellant; H.B. Agarwal, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Dipak Misra, J.

Invoking the revisional jurisdiction of this Court u/s 115 of the Code of CPC the State of M.P. and its functionaries have called in question the sustainability of the order dt. 27.2.99 passed by the 10th Additional District Judge, Bhopal in C.S. No. 2-B/98.

The facts as have been unfolded are that the non applicant, Ellora Paper Mills Limited a Company registered under the Companies Act, 1956 filed a civil suit for recovery of Rs. 95,32,103.00. The case of the non-applicant before the court below was that it is engaged in the business of production of paper used for printing and writing purposes. In the year 1993-94 tender were invited for cream wove paper and duplicating paper. The tender submitted by the non-applicant was accepted and he was required to deposit 5% of the security amount of the total bid. In the tender it was stipulated that 90% of the value of the paper would be paid by the State at the time of delivery of material and the remaining amount would be paid after due verification. The Petitioner in pursuance of the agreement supplied the paper. The present Petitioners was paid 90% of the value of the material supplied was not paid the balance 10% on the ground that the material was different from the sample which was initially given. On this basis the balance supply which was to be supplied in terms of the tender was also cancelled. It was alleged in the plaint that the tender of the non-applicant was for 1748 M. Ton but the applicants placed the order for 1090 M. Ton. When the non-applicant came to know that the applicants are bent upon to issue work orders in favour of the other persons he filed a suit for permanent injunction. Alongwith the prayer for permanent injunction a prayer for temporary injunction was made which was not entertained by the learned Trial Judge. The State issued three orders in favour of other contractors. Thereafter as the facts unfold the non-applicant issued notice to the State to invoke the Arbitration Clause and appoint an Arbitrator or pay the amount in question. As the same was not paid he filed the present suit for realisation/recovery of the amount. The present applicants entered appearance on 9.11.98 and on the same day filed an application u/s 34 of the Arbitration Act, 1940 for Stay of the suit on the ground there is an Arbitration clause in the contract and it covers the dispute and, therefore, the suit should be stayed and the Arbitration would continue. The learned Trial Judge by impugned order dt. 27.2.99 rejected the application on the ground that there is no dispute between the parties and hence, the question of staying the proceeding did not arise. The said order is the cause of grievance of the present revisionists.

Mr. G.S. Ahluwalia, learned G.A. appearing for the State has contended that when there is demand for a particular sum and there is denial of the same it amounts to dispute and, therefore, the orders passed by the learned Trial Judge is vulnarable.

Combatting the aforesaid submission Mr. H.B. Agarawal has submitted that when notice was issued to the officers of the State and no Arbitrator was appointed it to be presumed that there was no dispute and, therefore, the Petitioner had no other alternative but to file the suit for realisation of the amount. It is also his submission that by its conduct the State Government has waived its right to appoint Arbitrator.

To appreciate the rival submission raised at the Bar, I have perused the conditions of the contract. Clause 7 of the contract deals with Arbitration, It reads as under -

Arbitration. -If any dispute arises between the parties, hereto in respect of this contract, or any of the provisions herein contained, or any matter in relation thereto except in respect of matters hereunder declared to be conclusive, every such dispute shall be referred to the Stationery Purchase Committee of the Government, Madhya Pradesh Bhopal for arbitration, whose decision thereon shall be final conclusive and binding on the parties.

In view of the aforesaid stipulation there remains no iota of doubt dispute with regard to purchase of paper and payment for the same it is Arbitrable. The learned Trial Judge has held that no dispute existed between the parties and, therefore, Section 34 was not invocable. It is well settled in law that existence of a dispute is an essential condition for arbitration in the case of Uttam Chand Saligram v. Jewa Mamooji, AIR 1920 Cal. 143, Rankin, J., observed that the existence of a dispute is an essential condition and if there is no dispute, there can be, no reference.

In the case of London & North Western and Great Western Joint Rly Companies v. J.H. Billington, (1899) AC 79 (HL), Lord Halsbury ruled thus -

A condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have ariesn; and I think that must mean a difference of opinion before the action is launched.

Similar view has been expressed in the case of Ladha Singh Bedi Vs. Raja Sree Sree Jyoti Prosad Singha Deo Bahadur, .

In this context I may profitably refer to a Division Bench judgment of this Court rendered in the case of Dilip Construction Company Vs. Hindustan Steel Ltd., wherein the Bench expressed thus:

A failure to pay is not a difference, and the mere fact that a party could not or would not pay does not in itself amount to a dispute unless the party who chooses not to pay raises a point of controversy regarding, for instance, the basis of payment or the time or manner of payment.

In the case of Nandram Hanutram Vs. Raghunath and sons Ltd., , Bachawat, J. held as under:

The repudiation by the other party may be either express or implied and may be by words or by conduct. Failure to Perform the contract land to pay the amount claimed may take place under such circumstances as may justly lead to the inference of repudiation and denial of the right of the other party. Coupled with other circumstances a failure to pay a claim may constitute aq difference between the parties. Failure to pay under a claim of right is certainly a dispute.

From the aforesaid enunciation of law it is graphically clear that if a demand is made by one party and the other party maintains a sphinx like silence that would amount to implied repudiation. In the present case the applicants did not reply to the notice of the Petitioners nor did they ever admit the dues but they are failing to pay for some reason or the other. It is not a mere failure. Their inaction does amount to implied repudiation. That apart the notice can be taken of the fact that the Petitioner filed a suit for permanent injunction and sought for temporary injunction but the same was refused and thereafter the State and its functionaries cancelled the order placed with the Petitioner and went for further tender. Cancellation of the order which was placed with the Petitioner, in my considered opinion thus constituted a repudiation amounting to dispute and therefore, in the present case a dispute does exist. Hence, finding of the Trial Judge, that there is no dispute in existence is absolutely vulnerable and that makes his order sensitively susceptible. Resultantly, the order is set aside and it is directed that the further proceeding in the suit shall be stayed u/s 34 of the Arbitration Act and the Arbitrator, as per the contract, shall proceed in accordance with law.

The Civil Revision is accordingly allowed. In the facts and circumstances of the case there shall be no order as to costs.

