
(2009) 05 KL CK 0114
In the High Court Of Kerala
Case No : AS. No. 193 of 1999 (C)

The Aluminium Industrieis Limited

APPELLANT

Vs

The F.A.C.T.

RESPONDENT

Date of Decision : 21-05-2009

Acts Referred:

Citation : (2009) 05 KL CK 0114

Hon'ble Judges : P.S. Gopinathan, J;A.K. Basheer, J

Bench : Division Bench

Advocate : V.P. Sukumar, for the Appellant;

Final Decision : Dismissed

Judgement

A.K. Basheer, J.—Appellant is the plaintiff in a suit, which was initially instituted for a declaration that the defendants were not entitled to recover any damages for the delayed supply of goods, and also for a consequential injunction restraining the defendants from enforcing the bank guarantee. Later, when the defendants enforced the bank guarantee to the tune of Rs. 7,51,936.05/-, the appellants had amended the plaint and sought recovery of the said sum from the defendants with interest at the rate of 21.75% per annum. The trial court dismissed the suit holding that the defendants were entitled to recover damages in view of Article 9 of the terms and conditions of Ext.B1, Purchase Order.

2. Assailing the decree and judgment of the court below, it is contended by learned Counsel for the appellant that Article 9 of Ext.B1 purchase order being penal in nature, the court below ought to have examined its enforceability more cautiously. It is further contended that some other suppliers had also caused delay in delivering the certain components which cumulatively resulted in the delay of commissioning the project. Therefore, the Court below was not justified in allowing the defendants to enforce the bank guarantee, it is contended.

3. Relevant facts as discernible from the pleadings of the parties may be briefly noticed.

4. Plaintiff is a company incorporated under the Companies Act. It is engaged in the manufacture and sale of Switch gears and allied accessories. It is an undertaking of the Government of Kerala. Defendant No. 1 which is also a company with its registered office at Udyogamandal in Cochin, is engaged in the manufacture and sale of fertilizers and chemicals. Defendant No. 2 is the Engineering Division of the first defendant company, engaged in construction and erection of plant, machineries etc. On March 10, 1986, defendant No. 1 had placed a purchase order with the plaintiff, through defendant No. 2, for supply of 11 KV/3.3KV Switch gears and accessories worth Rs. 1,00,23,634/-. The date of delivery was fixed as January, 20, 1987. The Switch gear and accessories were meant for the Caprolactum Project proposed to be set up by defendant No. 1.

5. Admittedly the plaintiff agreed to execute the order and communicated acceptance of the terms and conditions for supply of the materials to defendant No. 2. But the plaintiff could not fulfill its commitment within the stipulated time. In other words, switch gears and other accessories ordered by the defendants were supplied by the plaintiff only in August 1988, 19 months after the deadline fixed for their delivery. The defendants, while making payment under the purchase bills, wanted to adjust a sum of Rs. 7,51,936.05 towards damages for the delayed delivery. However the entire amount was released by the defendants, since the plaintiff agreed to furnish sufficient security. Accordingly, the plaintiff executed a bank guarantee for a sum of Rs. 8 lakhs. 6. But later, the plaintiff raised a contention that the defendants would not be entitled to claim any damages on the ground of delayed delivery. Appellant/plaintiff instituted the suit thereafter, praying for a decree of injunction restraining the defendants from enforcing the Bank Guarantee. But during the pendency of the suit, defendants enforced the bank guarantee. Therefore, the plaintiff amended the suit and sought recovery of the amount adjusted by the defendants towards damages.

7. The trial court framed the following issues:

- i) Whether the dispute between the parties are liable to be referred to an Arbitration?
- ii) Whether there was delay in delivering the equipments by the plaintiffs and whether the defendants have suffered any damages and loss?
- iii) Whether the plaintiff was ready to perform its part of the purchase order?
- iv) Whether the defendants are entitled to encash the bank guarantee?
- v) Whether the plaintiff is entitled to realise any amount from the defendants?
- vi) To what reliefs and costs?

8. The evidence on the side of the plaintiff consisted of oral testimony of PW1 and documentary evidence comprising Exts.A1 to A6. On the side of the defendants, DW1 was examined and Exts.B1 and B2 were marked.

9. The trial court, after considering the oral and documentary evidence on

record, held that going by Article 9 of the terms and conditions of the Purchase Order, the defendants were justified in effecting recovery of liquidated damages on account of delayed supply. The other contentions raised by the appellants were also repelled.

10. At the outset, it may be noticed that the essential facts are not in dispute. It is admitted by the plaintiff that there was delay of 19 months in effecting delivery of switch gear and other accessories ordered by the defendants. But according to the plaintiff, there was no willful laches on its part. The delay occurred because of lay off declared in the company due to power cut, shortly after the order was placed by the defendants.

11. Since the dispute in this case revolves around Article 9 of the purchase order, the said article may be noticed:

If SELLER fails to deliver the equipment and materials covered under PURCHASE ORDER within the delivery time stipulated therein, liquidated damages at the rate of half of one percent (= % of the price of PURCHASE ORDER shall be payable by SELLER. Such liquidated damages shall be deducted from SELLERS invoices.

12. It is not in dispute that the plaintiff had to supply the materials, namely, switch gears and other accessories to the defendant on or before January 20, 1987. It is beyond controversy that the materials were supplied by the appellant 19 months after the due delivery date. Thus, indisputably Article 9 came into play, since there was delay in delivery. It is conceded by the appellant that Article 9 of Ext.B1 provided for payment of liquidated damages to the purchaser in case of delay. But the only contention raised by the appellant is that there was no willful delay or laches on its part. The delay had occurred only because of lay off in the company due to power cut during the relevant period. It is further contended that the stipulation in Article 9 being penal in nature, the defendants were not justified in demanding liquidated damages.

13. In our view, the above contentions are wholly untenable. Admittedly, time was the essence of the contract. It was stipulated in the purchase order itself that equipment and materials would have to be supplied before the specified date itself. That being the position, it would be futile for the appellant to contend that delay was immaterial.

14. As mentioned earlier, the equipments and materials were to be utilized for the Caprolactum Project being set up by the defendants. The commissioning of the project depended entirely on the timely supply/delivery.

15. The next contention raised by the appellant is that some other suppliers/contractors had also caused delay in supply of other components or materials for erection of the Plant in question. Therefore, the defendants were not justified in demanding liquidated damages from the appellant alone, since the delay in commissioning the Plant was as a result of the cumulative effect of timely non delivery by all the contractors. Yet again, we are unable to agree with the

appellant. Even assuming there was delay on the part of some other suppliers to deliver the materials as is now contended by the appellant (there is nothing on record to substantiate the above contention) it is for the defendant to decide as to from whom the damages, if any, has to be recovered. The appellant is bound by Article 9 in the purchase order. So long as the said Clause in the purchase order is enforceable and valid, the appellant cannot be heard to say that the defendants were not justified in demanding the liquidated damages in terms of the said clause. The appellant had agreed to supply the materials to the defendants knowing the implication of Article 9 in the purchase order. There is nothing on record to show that the appellant had raised any objection about the said clause at any point of time. The appellant had also not sought for enlargement of time for delivery of the equipments. In that view of the matter, the appellant cannot be heard to say that the defendants were not justified in claiming liquidated damages.

16. The other contention raised before us is that the defendants had quantified the damages without any notice to the appellant. DW1, Deputy Chief Materials Manager, who was examined on behalf of the defendants had deposed before the court that the commissioning of the plant was delayed because of the delay in supply of switch gears and other materials by the appellant. Resultantly, the company had sustained a loss to the tune of Rs. 46 crores. This aspect was never disputed seriously. The defendants contended that if only the appellant had supplied the materials in time, the off site facilities could have been commissioned and the Plant could have started the manufacturing process much earlier. According to the defendants, the damages that had been recovered by enforcement of bank guarantee was much less as compared to the huge loss sustained by them. In our view, so long as Article 9 in Ext.B1 purchase order governed the contract between the parties, the stand taken by the defendants cannot be accepted.

17. The other point raised by the learned Counsel is that the appellant company was in a very bad financial condition and therefore it was declared as a sick industrial unit. The matter was pending before the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act 1985. It is also pointed out by the learned Counsel that the BIFR had in fact passed an order in November 1990 declaring the company as a sick unit in December 1987 and a scheme for rehabilitation was sanctioned in October 1989. The Board had passed an order in November 1990 to the effect that all the accrued penalties/liquidated damages arising out of delay/default in delivery schedules etc. should be waived by the Central and State undertakings like NTPC, K.S.E. Board, etc. It is the contention of the learned Counsel that the defendant company being a Central Government undertaking, the order passed by the Board was binding on it also. Therefore, the defendants ought to have refrained from claiming any damages from the appellant.

18. Yet again we are unable to agree with the above contention raised by the

learned Counsel. It may be noticed that the appellant had not produced the order passed by the Board before the Court below. Further, the appellant did not have a case that the order passed by the Board was either served on the defendants or that it was brought to the notice of the defendants at any point of time. The defendants had rightly claimed damages in view of Article 9 of the purchase order. This could not have been faulted in any manner going by the stipulation in Article 9 of Ext.B1 order, particularly since time was the essence of the agreement between the parties.

Having carefully gone through the entire materials available on record, we do not find any material illegality or error in the decree and judgment passed by the Court below. No interference is warranted with the above decree and judgment. There is no merit in any of the contentions raised by the appellant. The appeal fails and it is accordingly dismissed. No costs.