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(2011) 09 DEL CK 0323

In the Delhi High Court

Case No : FAO No. 222 of 2010

Vardhman Cables India Pvt. Ltd. APPELLANT

Vs

Mahanagar Telephone Nigam Ltd. and Another RESPONDENT

Date of Decision : 29-09-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 39, 73, 74
Civil Procedure Code, 1908 (CPC) — Section 34
Contract Act, 1872 — Section 75

Citation : (2011) 09 DEL CK 0323

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : S.K. Gupta and Mr. Manish Gupta, for the Appellant; R.K. Sanghi, Advocate and Mr. Aditya, for the Respondent

Final Decision : Disposed Off

Judgement

Valmiki J Mehta, J.—The challenge by means of this first appeal u/s 39 of the Arbitration & Conciliation Act, 1996 is to the impugned order dated 8.12.2009 passed by the Court below whereby the objections filed by the Appellant u/s 34 of the Act were dismissed.

2. The facts of the case are that a contract of supply was entered into between the parties with the Appellant as the seller and the Respondent No. 1 as the buyer for self supporting PVC drop wire with fibre glass. The letter of intent was issued in favour of the Appellant on 18.7.2001 for supply of 4690 kms of the drop wire. The Appellant accepting the tender furnished a performance bank guarantee dated 22.1.2002 for an amount of Rs. 2,69,000/-. The Appellant/ petitioner though had failed to supply the entire quantity of the material, however it supplied a substantial part of the same after extensions and a total supply of 3,500 kms out of 4,690 kms was made. When the Appellant failed to supply the balance quantity of 190 kms in spite of extensions the Respondent No. 1 terminated the contract and encashed the bank guarantee. Disputes and

differences arose between the parties resulting in arbitration proceedings and passing of the Award dated 29.12.2008 by the Arbitrator.

3. Two issues have been argued before me. First is with respect to the denial by the Arbitrator of the claim of the Appellant for the amount of bank guarantee encashed by the Respondent No. 1. The second issue is denial of pendente lite interest by the Arbitrator.

4. A reference to the arbitration proceedings shows that both the parties were ambivalent in their cases as put up before the Arbitrator or if I can say so they were quite clearly unaware of what is the legal position. This I can say so because the Appellant/claimant claimed refund of the amount of the bank guarantee which was encahsed by the Respondent No. 1 without making any allegation that the Respondent No. 1 could not retain the amount of bank guarantee because neither loss was caused and proved as per Section 75 of the Contract Act, 1872 (hereinafter referred to as ''the Act'') and nor was there any entitlement u/s 74 of the Act, of the Respondent No. 1 to retain the amount of bank guarantee as there was no clause of liquidated damages entitling retention of such amount because taken with the fact that no loss was caused. The Respondent No. 1 also did not plead a case that the amount of the bank guarantee could be retained because loss had been caused, which was pleaded and proved, or that there was a clause of liquidated damages and the amount of bank guarantee could be retained because loss was caused. I am also pained to note that during the hearing of the present appeal I really received no assistance whatsoever from the respective counsel because neither of them had any pleading of the arbitration proceedings and nor were the relevant issues argued. I have therefore on my own gone through the pleadings for the purpose of passing the present judgment.

5. A reference to the arbitration proceedings show that though it was not so pleaded by any of the parties, yet, actually the real issue was whether the amount of bank guarantee could be retained by the Respondent No. 1 because loss had been caused in terms of Section 73 of the Act or that because of a clause of liquidated damages taken with the fact that loss has been caused for such amount of loss to be adjusted by encashing of the bank guarantee in terms of Section 74 of the Act. The Respondent No. 1 seems to have gone on a tangent in the arbitration proceedings by contending that as per the judgment of the Supreme Court encashment of the bank guarantee cannot be prevented by the Courts, however, this was not an issue because no doubt encashment of bank guarantee cannot be interdicted by the Court, however, entitlement to retain the amount with respect to the bank guarantee encashed can only be if loss is pleaded and proved in terms of Section 73 or if loss is otherwise caused and the amount is retained because of the clause of liquidated damages u/s 74 of the Act. I have already stated above that the pleadings of the Appellant were also equally vague in the arbitration proceedings because it was not the case of the Appellant that Respondent No. 1 did not suffer any loss and therefore was not

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entitled to forfeit the amount of the bank guarantee in terms of Section 73 of the Act or because that there was no clause of liquidated damages entitling forfeiture u/s 74 of the Act and that no loss had been caused.

6. In view of the above, it is quite clear that both the parties, as also the Arbitrator (respondent No. 2), have failed to address themselves to the real issue applicable i.e. as to whether the amount encashed by the Respondent No. 1 under the bank guarantee could be retained by the Respondent No. 1 either because loss had actually been caused and which could have been pleaded and proved u/s 73 of the Act or because there was a clause of liquidated damages and the bank guarantee amount was adjusted against this clause of liquidated damages u/s 74.

7. The net effect of the above is that actually there is required that there should be such necessary pleadings in view of aforesaid observations by both the parties before it is held as to whether the retention of the amount by the Respondent No. 1 is illegal as per the case of the Appellant or whether the Respondent No. 1 could retain the amount of bank guarantee on account of loss which has been pleaded and proved in terms of Section 73 of the Act or because of loss having been caused and there is a clause of liquidated damages entitling retention of the amount of the bank guarantee as per Section 74 of the Act. It is therefore necessary that the Award so far as this aspect is concerned be set aside and the matter be referred back to the Arbitrator for fresh decision in accordance with law. The parties are also at liberty to file additional pleadings with respect to this aspect before the Arbitrator and they may also choose to lead such evidence as they so think fit. This Court has power under the Arbitration & Conciliation Act, 1996 to remand the case back for a fresh decision in accordance with law and this has been so held by a Division Bench of this Court in the case of BSNL v. Canara Bank and Anr. 169 (2010) DLT 253.

8. Since, I am remanding the matter with respect to the issue of entitlement of the Respondent No. 1 to retain the bank guarantee amount I would also remand the matter back to the Arbitrator for reconsidering the issue of pendente lite interest inasmuch as ordinarily the pendente lite interest is always granted because otherwise it would mean that guilty party can retain an amount of another person causing loss of return/interest to the person who is entitled to the amount. The principle of Section 34 of Code of Civil Procedure, 1908 (Code of Civil Procedure) has been held applicable to arbitration proceedings so as to entitle the Arbitrator to Award pendente lite interest. No legal reasoning has been given by the Arbitrator to deny the grant of pendente lite interest.

9. Accordingly, the appeal is disposed of by remanding the matter back to the Arbitrator for deciding the two issues of the entitlement of the Respondent No. 1 to retain the bank guarantee amount or entitlement of the Appellant to refund of the same and also as to whether the Appellant should be granted or denied the pendente lite interest with respect to the amount of the bank guarantee if awarded in favour of the Appellant in accordance with law.

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10. With the aforesaid observations, the appeal stands disposed of. The record of arbitration be given in a sealed cover to the counsel for the Respondents for being given to the Arbitrator. Trial court record be sent back.

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