(2001) 07 DEL CK 0023

In the Delhi High Court

Case No : IA No. 2904 of 2000 in OMP No. 196/97

VHEL Industries Ltd. — APPELLANT

Vs

The Dept. of Telecommunication and Another — RESPONDENT

Date of Decision : 11-07-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 17, 22, 22(1), 22(3)

Citation : (2001) 07 DEL CK 0023

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. Rajiv Garg, for the Appellant; Mr. Rajiv Aneja, for the Respondent

Judgement

A. K. Sikri, J.—The petitioner company has filed this OMP, Which is a petition u/s 9 of the Arbitration and Conciliation Act, 1996 (for short ''act''). The petitioner has prayed for grant of an injunction against invocation and encashment of the bank guarantee. The respondent No.1 had published a Notice Inviting Tender on 6th June, 1994 for procurement of various items of optical fibre test instruments and accessories. The petitioner submitted its bid. Vide letter dated 16th June, 1995 the respondent No.1 issued as Advanced Purchase Order(for short `APO'') of Rs.1,48,08,660/-. The petitioner company sent its acceptance of the said APO by letter dated 5th July, 1995 which was accompanied by performance of bank guarantee equivalent to 5 per cent of the value of the APO. Thereafter, Firm Purchase Order (for short `FPO'') dated 3rd November, 1995 was placed upon the petitioner company.The petitioner company alleges that the prices mentioned in the FPO were significantly reduced at which the equipment was to be supplied and this downward revision of the prices amounted to committing fraud upon the petitioner company by the respondent No. 1. It was not commercially viable to accept the terms contained in FPO which amounts to counter offer, and Therefore, the petitioner company rejected the said offer, and called upon the respondent No.1 to return the bank guarantee.Instead of doing so, the respondent No.1 to return the bank guarantee.Instead of doing so,the respondent No.1 to return the bank guarantee.Instead of doing so, the respondent No.1 vide letter dated 6th October, 1997 invoked the bank guarantee and in these circumstances, the present OMP has been filed, seeking injunction against the encashment of the said bank guarantee.The State Ban of India which have given the bank guarantee is imp leaded as respondent No.2. Notice of this OMP was issued. The respondent No.1. entered appearance through counsel on 6th November, 1997, and sought time to field the reply and further undertook that in case the bank guarantee is question has not been encased by the department, the department will not encash it till the next date. This undertaking has been continued from time to time. During the pendency of this OMP, the petitioner company became sick industrial company and it moved an application before BIFR, under the provisions of Sick Industrial Companies (Special Provisions)Act, 1985 (hereinafter referred to as `SICA''), for revival of the company and BIFR registered the reference being No.361/99 and enquiry under Sections 16 and 17 of SICA is pending.On the registration of this reference, the petitioner company has filed the instant is No.2904/2000 for stay/suspension of the proceedings in view of the provisions of Section 22 of SICA.

2. There is no dispute about the registration and pendency of the reference before BIFR.The question is as to whether proceedings in this OMP, which is u/s 9 of the Act, are to be suspended and stayed inasmuch as the objection of the respondent No.1 is that the proceedings in this OMP are not the proceedings in a `Suit'' as per Section 22 of SICA, ti is , inter alia, proceedings in a `suit'' which are to be stayed.Learned counsel relied upon the judgment of the Supreme Court in the case of Agio Countertrade Pte. Ltd. Vs. Punjab Iron and Steel Co. Ltd., as well as Division Bench judgment of this court in the case of M/s Lloyd Insulations (India) Ltd. Vs. Cement Corporation of India Ltd. reported as 2001 2 AD 567 DELHI. He also relied upon the judgment of Madhya Pradesh in the case of AVN Tubes Limited Vs. Steel Authority of India Limited and Others, . On the other hand, learned counsel for the petitioner in support of this application submitted that it is the spirit behind Section 22 which to be seen and as per which no guarantee is even encashable without the permission of the BIFR. He also relied upon another judgment of the Supreme Court in the case of M/S Patheja Bros. Forgings and Stamping and Another Vs. I.C.I.C.I. Ltd. and Others, to contend that no suit for enforcement of a bank guarantee is respect of a loan or advance granted to industrial company concern will lie or be proceeded with, without the sanction of the Board or the appellate authority under the Act.As per this judgment, it was contended that it is not necessary that such a suit for enforcement of the guarantee should be against the company and for this reference was made to paras 7 and 8 of the judgment which reads as under:

"Para 7: The Words in the square brackets above were inserted into Section 22 by Act 12 of 1994 and it is these words which are relevant for our purposes. As we reads them, they provided that no suit

(i) for the recovery of money, or

(ii) of any guarantee in respect of any loans or advance granted to the industrial company.

Shall lie or be proceeded with except with the consent of the Board or the appellate authority under the said Act. For our purposes, Therefore, the relevant words are: "no suit...for the enforcement...of any guarantee in respect of any loans or advance granted to the industrial company" shall lie without the consent of the Board or the appellate authority.The words are crystal clear. There is no ambiguity therein. It must, Therefore, by held that no suit for the enforcement of a guarantee in respect of a loan or advance granted to the industrial company concerned will lie or can be proceeded with, without the sanction of the Board or the appellate authority under the said Act.

Para 8: It is not possible to read the relevant words in Section 22 as meaning that only a suit against the industrial company will not lie without such consent. There is no requirement in Section 22, as analysed above, that, to be covered thereby,a suit for the enforcement of a guarantee in respect of a loan or advance to the industrial company should be against the industrial company".

3. In the Division Bench judgment of this court in the case of M/s Lloyd Insulations (India) Ltd.(supra), this court had in detail discussed this aspect as to whether arbitration proceedings would amount to suit and answered the same negative. While taking the aforesaid view, the judgment of the Supreme Court in AGIO Counter Trade Pvt.Ltd.(supra) was also relied upon. Moreover, the judgment of Madhya Pradesh High Court in the case of M/s AVN Tubes Limited (supra) directly deals with the issue at hand wherein it was held that protection is available if there is an action against the company which is before BIFR.

4. The judgment in the case of ICICI(supra), would not be applicable in this case. That was a case where proceedings were sought to be continued against the guarantor.The court, held when there was a specific bar of a suit against the company which has gone before the BIFR and in view of Section 22 a suit for enforcement of the guarantee in respect of loan or advance to the company cannot be proceeded with,it would include a guarantor also and in this context the observations were made that there was no requirement in Section 22 that the proceedings should be against an industrial company meaning thereby a guarantor would also be included.That is not the case here.We are dealing with a totally different situations.Here the company has filed as petitioner, proceedings u/s 9 of the Act. These proceedings are in the nature of interim application in contemplation of and during the pendency of the main case i.e. arbitration proceedings before the arbitral tribunal.Such application for interim protection cannot be treated as `suit''. Further more if the interpretation suggested by the petitioner is to be accepted, it would lead to incongruous results.This would permit the persons like the petitioner to come to the court obtain the injunction and then pray for stay of such proceedings thereby perpetuating the injunction

without any decision on merits.This cannot be permitted.

5. It may be stated that by taking this view, the intendment of SICA is not defeated. afterall, the moment reference is registered, the petitioner gets secured by virtue of sub-section (3) of Section 22 of SICA in so far as encashment of this bank guarantee is concerned.Even if no OMP is filed or pending and even it there is no stay, the respondent No.1 now cannot invoke/ encash the said bank guarantee without the specific permission of the BIFR.In view of such a protection available to the petitioner company and the legislature having taken care to these kinds of situations, sub-section (1) of Section 22 shall not apply.

6. This application is accordingly dismissed.

OMP No.196/97

7. To come up for arguments on 27th November, 2001.

