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Electronic Enterprises Vs. Union of India

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Court : Delhi

Decided On : Sep-17-1999

Reported in : 1999VIAD(Delhi)777; AIR2000Delhi55; 83(2000)DLT47; 1999(51)DRJ485

Judge : Vikramajit Sen, J.

Acts : Code of Civil Procedure (CPC), 1908

Appeal No. : I.A. No. 9519/97 & Suito. 1155A of 1996

Appellant : Electronic Enterprises

Respondent : Union of India

Advocate for Def. : Mr. B.P. Aggarwal, Adv.

Advocate for Pet/Ap. : Mr. Sudheesh C. Anand, Adv

Judgement :
ORDER

Vikramajit Sen, J.

1. The facts which has led the parties into this litigation are that on 11.4.1989 the Tender of the petitioner in respect of supply of Multimeters together with its 'Carrying Cases' was accepted by the respondents. As envisaged by the

Acceptance of Tender (A.T.) the Security Deposit for a sum of Rs. 11,220 was duly furnished. The receipt of this sum stands admitted in terms of the letter of Respondent No. 1 dated 4.1.1990 The terms of payment are contained in Clause 18(c) of the A.T. dated 11.4.1989 and this was in two stages - 95 per cent payment at the time of Inspection and Despatch and the remaining 5 per cent balance thereafter. It has been admitted that 88 Multimeters at the rate of Rs. 2400/-, valued at Rs. 2,11,200/- together with their Carrying Cases at the rate of Rs. 150/-, valued at Rs. 13,200/- thereby aggregating the total of Rs. 2,24,400/- were dispatched on 26.10.1989. The delivery of these goods is not in dispute, but it is the case of the Respondent that this delivery was effected beyond the date envisaged in the A.T.

2. The claims which fall for determination at this juncture were detailed in para 10 of the Statement of Claim before the Sole Arbitrator together with the reply filed thereto on behalf of respondent. Paragraph 10 reads as under :

3. The claimant thereforee is entitled for the following sums :-

S. Particulars Amount

No.

(i) Towards 95% as claimed

vide Bill No.250/89-90,

dated 6.11.89. 2,20,640-00

(ii) Towards 5% as claimed

vide Bill No. 254/89-90

and 255/89 both dated

2.5.90. 23,760-00

(iii) Refund of Security

Deposited as per F.D.R.

No. 070322/213, dated

21.5.89. 11,220-00

(iv) Interest @ 20% from the

due date till actual

realisation, calculated

up to 31.10.94. 2,76,000-00

(v) Damages suffered by the

claimant including of

non refund of samples. 1,00,00-00

Total Rs. 6,15,620-00

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4. Respondents demurrer to this claim appears to be based on the Petitioner's/Claimant's letter dated 21.11.1989 wherein a change of inspection site had been requested for by the latter to the consignee's premises where the goods had in fact already been delivered.

5. Having once accepted the goods contemplated by the A/T. I fail to appreciate any justification for the Respondent withholding the payment of their price. I have perused the counter statement filed on behalf of Respondents. It does not contain any claim on account of damages incurred by them as a consequence of the alleged late supply of the goods. The party preferring a claim for damages, must first prove that these damages have actually been suffered it. Even in those cases where damages have been liquidated under the contract, the burden of proving

that these liquidated damages reflect a realistic pre-estimate of the damages that have actually been suffered, lies on the party claiming damages. In this case, it is obvious that no damages have occurred to the respondents since none have been claimed.

CLAIM NO. 1.

6. As is clear from the Award itself, the claim was for a sum of Rs. 2,20,640/- towards 95 per cent of the bill dated 6.11.1989. It is cryptically dealt with in the Award as follows :

'Award- Claim No. 1 of the Claimant/Contractor :

It is disallowed on the following grounds :

1. As per letter dated 21.11.1989 of the Contractor/Claimant the contract is not complete up to 21.11.1980. They have not filed any letter of amendment of A/T. by Union of India.

2. Respondents/Union of India have been under clause 18 and 18-A to withhold the amount from other A/Ts. also. As per their letter dated 21.8.1990 the deduction was made under E.I.-7/1214.'

7. I have already adverted to letter dated 26.11.1989. A perusal thereof will disclose that it was never the case of the Claimant that the contract was not complete in the sense that an amendment to the A.T. was required. All that was asked for was the change of the venue of the inspection, that too for the 'Carrying Cases' only. I can only understand the first paragraph/sentence to be a statement of the contention raised and not the finding of the Arbitrator. It should have been specifically stated by the Arbitrator then the claim was rejected. Even if it is assumed that the Arbitrator had arrived at the conclusion that the A/T was not complete, presumably meaning thereby that no contract had come into effect, this factor would not be an obstacle for the payment of the price of goods admittedly supplied to and used by the Respondents.

8. The findings of the Arbitrator, in fact, have to be extracted from the second paragraph/sentence and can logically only be that, having found that the price of the Multimeters as well as its 'Carrying Cases' was due and payable by the respondents to the petitioner, an Award in terms thereof was not passed as these amounts were, in the opinion of the Arbitrator, liable to be withheld against other claims of the respondent i.e. in respect of E.I.-7/1214. If the Claim had been rejected by the Arbitrator, reference to clauses 18 and 18A was clearly otiose.

9. On the date of the passing of the Award impugned in these proceedings, the adjudication of claims of the respondent in respect of E.I.-7/1214 had not been completed, but now an Award has been passed in favor of the Claimants even in those Arbitral Proceedings. It is not disputed at the Bar that, as on date, an Award has been published in favor of the Claimant in the contract under E.I.-7/1214. The contention of the learned counsel for the respondents is that this Award has not been made Rule of the Court.

10. The question that next arises is, assuming that the Arbitrator had awarded Claim No. 1 in favor of the Petitioner, was it proper to withhold or postpone payment by resorting to Clauses 18 and 18A. The learned counsel for the Claimant has drawn my attention to a decision of this Court in Suit No. 1373/83 entitled Panipat Foods Ltd. v. Union of India, delivered on June 4, 1986. Clause 18 and 18-A had to be interpreted in that case also. These clauses are reproduced herein for ready reference since the decision in the former case appears not to have been reported :

'18. WITHHOLDING AND LIEN IN RESPECT OF SUMS CLAIMED

Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by the contractor and for the purpose aforesaid, the purchaser shall be entitled to withhold the said cash security, deposit or the security, if any, furnished as the case may be and also have a lien over the same pending finalisation or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has

been taken from the contractor, the purchaser shall be entitled to withhold and have a lien to retain to the extent of the such claimed amount or amounts referred to supra, from any sum or sums found payable or which at any time thereafter may become payable to the contractor under the same contract or any other contract with the purchaser or the Government or any person contracting through the Secretary pending finalisation or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or monies so withheld or retained under the lien referred to above, by the purchaser will be kept withheld or retained as such by the purchaser till the claim arising out of or under the contract is determined by the arbitrator (if the contract is governed by the arbitration clause) or by the competent court as prescribed under clause 20 hereinafter provided, as the case may be, and that contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the contractor. For the purpose of this clause, where the contractor is a partnership firm or a limited company, the purchaser shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found payable to any partner/limited company, as the case may be whether in his individual capacity or otherwise.'

'18-A. LIEN IN RESPECT OF CLAIMS IN OTHER CONTRACTS

Any sum of money due and payable to the contractor (including the security deposit returnable to him) under the contract may be withheld or retained by way of lien by the purchaser or Government or any other person or persons contracting through the Secretary against any claim of the purchaser or Government or such other person or persons in respect of payment of a sum of money arising out of or under any other contract made by the contractor with the purchaser or Government or with such other person or persons.

It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the purchaser or Government will be kept withheld or retained as such by the purchaser or Government or till his claim arising out of in the same contract or any other contract in either mutually settled or determined by the

arbitrator, if the contract is governed by arbitration clause or by the competent court under clause 20 hereinafter provided, as the case may be, and that the contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the contractor.'

11. Jagdish Chandra, J. who delivered the judgment in Panipat Foods Ltd. case (supra) construed the words 'determined by the arbitrator' in the following words :

'Admittedly the claims of the defendant Union of India made at items 2 and 3 of para 21(h) of the written statement have already been determined by the arbitrator and, thus, the claimed amounts therein up to the extent of Rs.47,306/- and Rs. 96,739/- cannot be withheld by the defendant Union of India any longer as clauses 18 and 18-A already set out above clearly go to terminate the remedy of withholding by the Government as soon as the claim of the Government is determined by the arbitrator if the contract is governed by the arbitration clause, and this has happened in respect of these two amounts and consequently the plaintiff is entitled to the passing of an executable decree for the amount of Rs. 1,44,045 (Rs.47,306 plus Rs. 96,739). In respect of the remaining amounts claimed under the five A.Ts. in suit which are admittedly due by the defendant to the plaintiff, the same can be withheld by the defendant till such time the awards are made by the arbitrator in respect of the claims of the defendant against the plaintiff.'

12. I am in respectful agreement with the pronouncements in the Panipat Foods Ltd. case (supra). Applying the facts of this precedent to the controversy at hand, there would be substance in the arguments of Shri B.P. Aggarwal, learned counsel for the Union of India, that till such time as the Award is given, it cannot be held that there had been a 'determination' by the Arbitrator. I cannot, however, accept his further argument that merely because the Award in respect of E.I.-7/1214 had not been made Rule of the Court, these disputes could not be treated to have been 'determined by the arbitrator' as envisaged in Clauses 18 and 18-A reproduced above. In fact the learned Judge in Panipat Foods Ltd. case (supra) has squarely dealt with this Objection also, and in my humble opinion, correctly so.

The learned Judge opined that a 'non-executable decree can be passed in respect of the balance amount under the A.Ts. which decree would become executable as soon as remaining claims of the Defendant/UOI are determined by means of award/awards by the Arbitrator and the executability thereof would not be barred by reason of objections having been preferred against the awarded amount or that the award has still to be made rule of the court'.

13. In this analysis, on a fair reading of the Award there can be no other conclusion then that the Arbitrator had declined to award the sum claimed by the Plaintiff in respect of the value of the Multimeters and their Carrying Cases, for the reason that he had relied on Clauses 18 and 18-A to justify the withholding of these sums by the Union of India. If he had rejected the petitioner's claim for the value of the goods supplied there would have been no occasion or reason whatsoever for him to mention Clauses 18 and 18-A since then no amounts would have been payable to the Claimants and, thereforee, no amounts would have been available to be withheld for the benefit of the respondent. A pedantic approach should be eschewed : instead, even if some forensic engineering is needed to be employed for bringing about comprehensive and complete justice, such as the understanding I have given to the Award, it must be endeavoured for.

14. As stated above the delivery of the goods, which are the subject matter of these disputes, was accepted by the Union of India without demur, Reliance has been incorrectly and unfairly placed on a letter of the Claimant dated 21.11.1989 totally out of context, and in my view and with mala fides to unfairly deny the Claimant payment of the price of goods received by the Union of India. The goods were supplied in November 1989. almost a decade ago, and there is no complaint whatsoever in respect of the quality thereof. The principles of quatum meruit and unjust enrichment must apply with full rigour against the Union of India and in favor of its citizens.

15. Shri B.P. Aggarwal, learned Counsel for the Respondent has submitted that if the Court is of the opinion that the Award is invalid on the ground that there is an error apparent on the face of the Award, it could only set it aside. The consequence of traversing this path would result in a denial of justice, after a

decade of litigation. The same consequence would follow if under Section 16, the Award is remitted. It is likely that the Arbitrator would not be available after this long passage of time. With considerable trepidation I would consider it my duty to draw upon the powers adumbrated in Section 15 (b) of the Act and modify the Award. This was what was done by the Supreme Court in the case of The Upper Ganges Valley Electricity Supply Co. Ltd., Vs . The U.P. Electricity Board : [1973]3SCR107 , albeit with expressed caution.

16. In the Statement of Claim, in fact in para 10 which has been extracted hereinabove, payment of interest at the rate of 20 per cent per annum from the due date till actual realisation had been made. the Arbitrator has declined to grant interest. In para 9 of the Statement of Claim The statute 'The Interest on Delayed Payments to Small Scale and ancillary Industrial Undertaking Act, 1993' (hereinafter referred to as 'the Act'.) has been specifically relied on. Section 10 of the Act reads as under :

'10. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.'

17. This obviously renders ineffective any Clauses in any Agreement which may be in opposition to the provisions of the Act. Sections 4 & 5 of the Act reads as under :

'4. Where any buyer fails to make payment of the amount to the supplier, as required under Section 3, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay interest to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at such rate which is five per cent points above the floor rate for comparable lending.

Explanationn _ For the purposes of this section,'floor rate for comparable lending' means the highest of the minimum lending rates charged by scheduled banks (not being co- operative banks) on credit limits in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the

Banking Regulation Act. 1949.'

'5 Notwithstanding anything contained in any agreement between a supplier and a buyer or in any law for the time being in force, the buyer shall be liable to pay compound interest (with monthly interest) at the rate mentioned in Section 4 on the amount due to the supplier.'

18. Inasmuch as Section 4 stipulates that the rate at which interest would be granted would be 5 per cent points above the floor rate for comparable lending, and Section 5 permits monthly rests, the interest awardable in this case by virtue of the provisions of the Act. would be approximately 23-24 per cent per annum. However, in the circumstances of the present case I grant simple interest on the outstanding sum at the rate of 12 per cent per annum.

19. In the light of the above discussion the Award is made Rule of the Court but on the interpretation given to it above. The petitioner will be entitled to a sum of Rs. 2,24,400/-, being the price of goods supplied to the RespondentUnion of India together with the security deposit of Rs. 11,220/-. Simple interest at the rate of 12 per cent per annum will be calculated with effect from 1.12.1989 by which date the supply of goods contemplated under the A.T. had admittedly been effected.

20. Learned counsel for the petitioner has stated that the amount claimed in these proceedings are not included in the claims in respect of E.I.-7/1214 where the Award is pending for being made Rule of the Court.

21. I was inclined to award costs against Respondent-Union of India but in view of the assistance rendered by its learned counsel. I am declining to do so. The parties shall bear their own costs.

22. The application and the suit stand disposed of.

23. Decree-sheet be drawn up accordingly.

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