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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision: 8th December, 2015**

\+ O.M.P. 201/2011

MEI POWER PVT LTD ..... Petitioner
Through: Mr. T.K. Ganju, Senior Advocate with Mr. Abhishek Bhardwaj and Mr. Manik Ahluwalia, Advocates

versus

M.M.T.C LIMITED ..... Respondent
Through: Mr. Sanat Kumar, Ms. Puja Kashyap, Mr. Yashwardhan S. Soam and Ms. Usha Pant, Advocates

\+ O.M.P. 202/2011

MMTC LIMITED ..... Petitioner
Through: Mr. Sanat Kumar, Ms. Puja Kashyap, Mr. Yashwardhan S. Soam and Ms. Usha Pant, Advocates

versus

MARSON'S ELECTRICAL INDUSTRIES(MEI) ..... Respondent
Through: Mr. T.K. Ganju, Senior Advocate with Mr. Abhishek Bhardwaj and Mr. Manik Ahluwalia, Advocates

CORAM:
HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT (ORAL)

1. Both the parties have filed objections to the award dated 03rd November, 2010 passed by the learned arbitral tribunal.

Factual Matrix

2. PEDEEE, a Syrian government establishment, floated a tender for procurement of transformers. MEI Power Private Limited (hereafter referred to as 'MEI') and MMTC Limited (hereinafter referred to 'MMTC') agreed to participate in the tender vide MoU dated 21st June, 2001. The parties agreed that upon award of the contract to MMTC, a contract on back to back basis will be signed between the parties. MEI agreed to execute back to back guarantee in favour of MMTC. The payment terms were also agreed to be on back to back basis. MMTC agreed to release the payment to MEI within 1 to 3 working days of receipt of the payment from PEDEEE. MMTC agreed to charge commission of 1% to the total value of the shipped transformers from MEI.

3. Pursuant to the aforesaid MoU, the parties participated in the tender, which was accepted. On 28th October, 2001, PEDEEE awarded the contract for supply 500 of 400 KVA and 100 of 1600 KVA transformers.

4. On 07th January, 2002, MEI and MMTC entered into a back to back contract on the terms mentioned in the MoU dated 21st June, 2001. PEDEEE opened an irrevocable L/C for US$ 23,96,798 in favour of MMTC. MMTC thereafter furnished two bank guarantees totalling to US$ 2,39,679.15 (US$ 1,49,150.15 + US$ 90,529/-). MEI executed a bank guarantee for Rs.1,25,00,000/- in favour of MMTC on back to back basis.

5. MEI shipped 50% of the agreed quantity of transformers to PEDEEE in July and August, 2002 whereupon M/s PEDEEE raised an issue as to the quality of the transformers being not according to the specifications. MMTC notified MEI not to supply the balance 50% quantity to PEDEEE on the ground that PEDEEE has cancelled the contract for supply of the balance 50% quantity.

6. MMTC invoked the performance bank guarantee for Rs.1,25,00,000/- given by MEI to MMTC. MMTC invoked the arbitration in terms of the agreement dated 07th January, 2002 whereupon an arbitral tribunal was constituted.

7. The summary of the award passed by the arbitral tribunal is reproduced hereunder:

> "*In view of the findings recorded above, we summarise the award as under:*
>
> *a) MEI shall discharge and satisfy any decree which might have been or may be passed against MMTC by Syrian Court of law arising out of the contract agreement between PEDEEE and MMTC. However, MEI, if so elects, may contest such decree in competent Court in accordance with Law on behalf of MMTC.*
>
> *b) If in any eventuality MMTC satisfy and discharge such decree of Syrian Court arising out of contract between MMTC and PEDEEE, subject matter of the arbitration, the MMTC shall be entitled to the reimbursement of the amount of such decree along with the cost from MEI without any further reference and MEI shall pay such amount within 30 days of demand made by MMTC. If MEI fails to pay such decretal amount to MMTC, then MMTC shall be entitled to recover the amount of decree and cost, along with interest @ 12% per annum from the date of payment of decretal amount by MMTC to PEDEEE till the amount is paid by MEI to MMTC. For all purposes it will be deemed to be award of this tribunal which shall be executable forthwith without any further reference.*
>
> *c) An award of Rs.12,60,641/- in favour of MEI and against MMTC along with interest at 12% per annum from the date of filing of the counter claim till the making of the award and at 15% per annum from the date of award till the date of payment.*
>
> *d) An award of Rs.1,26,18,750/- in favour of MEI and against MMTC with interest at 12% per annum from the date of encashment of bank guarantee i.e. 22.07.2003 till the date of this award and at 15% per annum from the date of*

award till the date of payment."

Submissions on behalf of MEI

8. Mr. T.K. Ganju, learned senior counsel on behalf of MEI has urged following submissions at the time of hearing of the objections:

8.1. The contract between MEI and MMTC was on back to back basis. MMTC had furnished bank guarantee to PEDEEE and MEI furnished the bank guarantee for Rs.1,25,00,000/- to MMTC on back to back basis. Admittedly, PEDEEE has not invoked the bank guarantee given by MMTC and consequently, MMTC had no cause of action to invoke the bank guarantee given by MEI to MMTC.

8.2. MMTC has not suffered any loss or damage due to the alleged supply of sub-standard transformers to PEDEEE.

8.3. The invocation of the bank guarantee for Rs.1,25,00,000/- by MMTC is in violation of the well settled principles of unjust enrichment and special equities. Since PEDEEE has not invoked the bank guarantee given by MMTC, the invocation of the bank guarantee by MMTC has resulted in unjust enrichment and is also against the principle of special equities.

8.4. The bank guarantee given by MMTC in favour of PEDEEE has expired as back as on 27th August, 2002 whereas MMTC invoked the MEI's bank guarantee long thereafter on 17th July, 2003.

8.5. MMTC claims to have received a notice from Syrian Court as back as in the year 2006 but MMTC has chosen not to contest the case. No decree has been received from the Syrian Court and more than 10 years have passed since then and as such, there is no liability of MMTC to pay any amount whatsoever to PEDEEE as on date.

Submissions of MMTC

9. Mr. Sanat Kumar, learned counsel for the MMTC has made following submissions at the time of hearing of the objections:

9.1. MEI committed breach of the contract between the parties and, therefore, the MMTC has rightly invoked bank guarantee for Rs.1,25,00,0000/-.

9.2. The bank guarantee is an independent contract and the invocation of the bank guarantee cannot be interfered with.

9.3. MMTC was entitled to commission of 1% of the contract value from MEI. Total value of the transformers agreed to be purchased by M/s PEDEEE was US$ 11,92,500 on which MMTC was entitled to US$ 11,925.

9.4. Since the contract was cancelled after the supply of 50% of the transformers, MMTC suffered loss to the tune of Rs.5,39,280/- which MMTC would have earned if the total quantity of transformers agreed to have been supplied by MEI. Claim No.2 has been wrongly rejected by the learned arbitral tribunal. MMTC claims Rs.5,39,280/- along with interest from MEI.

9.5. MMTC also suffered loss of reputation and further contracts which would have been procured by MMTC but for the breach of the contract by MEI.

9.6. Learned counsel for the MMTC does not dispute that no decree or award has been received from any Court in respect of the contract between the parties. It is also not disputed that PEDEEE has not invoked the bank guarantee given by MMTC to PEDEEE and the said bank guarantee lapsed as back as in August 2002 much before the invocation of bank guarantee by MMTC on 17th July, 2003. It is however submitted that PEDEEE has not returned back the bank guarantee to MMTC.

Findings

10. MEI supplied the transformers to PEDEEE in July-August, 2002. In 2006, MMTC received a notice from the Syrian Court. However, MMTC chose not to contest the said proceedings. Admittedly, no decree or award has been received by any of the parties till date. However, since MMTC chose not to contest the said proceedings, the decree/award at a later point of time cannot be ruled out. Clauses (a) and (b) of the award, therefore, fairly protect MMTC from any such award that may be passed in future. MEI's apprehension that MMTC may satisfy the award without notice to MEI is mis-founded. Clause (b) of the award has to be read with clause (a) and, therefore, the liability of MMTC to discharge the decree of the Syrian Court would arise only in the event of MEI's failure to contest the decree in a competent Court. There is no infirmity insofar clause (a) and (b) of the award are concerned. Needless to say that MMTC is liable to inform MEI upon receipt of any decree/order from Syrian Court to enable MEI to contest the same before a competent Court in accordance with law.

11. MMTC had made claim for Rs.5,39,280/- with respect to the amount of commission which it would have earned if PEDEEE had taken the total number of transformers under the contract. There is merit in the contention of MMTC. This Court is of the view that MMTC is entitled to Rs.5,39,280/- towards 1% of the commission if the balance 50% of the transformers had also been supplied by MEI to PEDEEE. The finding of the arbitral tribunal with respect to claim No.2 of MMTC is perverse. MMTC's claim for Rs.5,39,280/- is valid and therefore, the clause (c) of the award is corrected as Rs.7,21,361/- (Rs.12,60,641/- - Rs.5,39,280/-) instead of Rs.12,60,641/-.

12. Though PEDEEE raised a dispute with respect to the quality of the

transformers supplied by MEI, PEDEEE made full payment of MMTC in respect of the transformers supplied by MEI. It is not disputed that PEDEEE did not invoke the bank guarantee given by MMTC to PEDEEE. In that view of the matter, MMTC had no occasion to invoke the bank guarantee given by MEI on back to back basis to MMTC. It is clear that the bank guarantee was given by MEI to MMTC to indemnify them for any loss that may be occasioned by invocation of the bank guarantee given by MMTC to M/s PEDEEE. It is not disputed that there was no direct financial loss occasioned to MMTC due to the alleged substandard quantity of transformers. In this view of the matter, the invocation of the bank guarantee given by MEI to MMTC is in clear violation of the well settled principles of unjust enrichment and special equities. There is no infirmity in clause (d) of the award directing MMTC to refund the bank guarantee amount to MEI.

Conclusion

13. The objections of MEI are hereby dismissed. The objections of MMTC are partly allowed to the extent of claim No.2 and correction of amount in clause (c) of the award in terms of para 11 above. The remaining objections are dismissed.

14. Copy of this judgment be given *dasti* to counsels for the parties under the signatures of the Court Master.

15. Pending applications are disposed of.

J.R. MIDHA, J.

DECEMBER 08, 2015
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