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

% Judgment delivered on: 28.02.2017

+ **FAO (OS) 54/2017 & CM 7509-10/2017**

BHARAT SANCHAR NIGAM LIMITED Appellant

versus

CMI LIMITED Respondent

Advocates who appeared in this case:

For the Appellant : Mr Sanjeev Narula, Advocate.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. The present appeal is directed against the order dated 06.01.2017 passed by the learned single Judge of this court in OMP No.304/2009 which was a petition under Section 34 of the Arbitration & Conciliation Act, 1996 filed by the present appellant. The said OMP No. 304/2009 was directed against the award dated 27.01.2009 made by the sole Arbitrator in a dispute between the parties arising out of the purchase orders placed on the respondent for procurement of PIJF Telecom Cables. We need not go into the details of the purchase orders but wish to set out Clause 17.1 of Section III of the General (Commercial) Conditions of

Contract which was recorded as a Force Majeure Clause. The same reads as under:-

“If, at any time, during the continuance of this contract, the performance in whole or in part by either party of any obligation under this contract is prevented or delayed by reasons of any war or hostility, acts of public, enemy, civil commotion, sabotage, fires, floods, explosions, epidemics, quarantine restrictions, strikes, lock outs or act of God (hereinafter referred to as events) provided notice of happenings of any such eventuality is given by either party to the other within 21 days from the dates of occurrence thereof, neither party shall by reasons of such event be entitled to terminate this contract nor shall either party have any claim for damages against other in respect of such non-performance or delay in performance, and deliveries under the contract shall be resumed as soon as practicable after such even come to an end or cease to exist and the decision of the purchaser as to whether the deliveries have been so resumed or not shall be final and conclusive. Further that if the performance in whole or party of any obligation under this contract is prevented or delayed by reasons or any such event for a period exceeding 60 days either party may, at its option, terminate the contract”.

2. The entire controversy in the present appeal and in the petition under Section 34 centred around the finding of the learned Arbitrator that the above force majeure clause had been triggered as a result of which the respondent was entitled to terminate the contract. The learned single Judge, after examining the said clause and the findings in the award, came to the conclusion that the view taken by the learned Arbitrator on facts was a plausible one. Learned single Judge also noted that the force

majeure clause in the present case was not limited to natural calamities or accidents but also included sabotages, strikes and lockouts. He therefore held that the decision of the Bombay High Court in **Esjay International Private Limited vs. Union of India & Ors.: 2011 (6) MHLJ 750** was clearly distinguishable. In that decision, first of all, there was no clear force majeure condition but it has been accepted that the force majeure exemption would apply to a situation of power cuts in terms of Clause 9 of the Government Entitlement Policy, 1994-1996. The situation in the present case as rightly observed by the learned single Judge was clearly different inasmuch as the Clause 17.1 which has been extracted above was a very wide force majeure clause which not only included natural calamities but also sabotages, strikes and lockouts.

3. Since the learned counsel stressed upon the point that the force majeure clause was actually not attracted on the facts of the case and that there was no strike or lockout or sabotage and that the finding of the learned Arbitrator was perverse, we also examined in detail the award on this aspect of the matter. We find that the learned Arbitrator, after quoting the said Clause 17.1, noted the contentions of the claimant and

the non-claimant and gave his reasons for agreeing with the claimant.

The same are set out herein below:-

“The counsel for the Claimant has stated in the written submissions that the Claimant was experiencing labour problems in its factory in December, 2002. The situation, however, deteriorated and workers in the telecom plant stopped working since 2.4.2003. This was intimated to the Non-claimant vide Claimant’s letter dated 10.4.2003 for invoking the Force Majeure clause and also requesting Non-claimant to make alternative arrangements. Further, letter was issued by the Claimant on 9.5.2003 informing the Non-claimant about the continuation of Force Majeure conditions. The Non-claimant vide their letter dated 29.5.2003 rejected the invocation of Force Majeure clause and also threatened for encashment of bank guarantee furnished by the Claimant. The counsel has further submitted that the stoppage of work by the workers constituted strike and he has cited the judgment of Hon’ble Supreme Court in the case of M/s Dhanrajmal Gobindram vs. M/s Shamji Kalidas & Co. Reported in 1961(3) SCR 1020 where the Court had held that strike and break down and sabotage of machinery etc. would constitute Force Majeure.

The Non-claimant in their replies to claim has submitted that the acceptance of Letter of Intent (LOI) dated 16.1.2003 was given on 22.1.2003 while the alleged labour problem started on 22.12.2002 i.e. one month prior to the date of acceptance of LOI. In spite of the fact that the labour problem was in existence, the Claimant gave its acceptance for supplies of PIJF Cable. Also the request of the Claimant for invocation of Force Majeure clause was rejected by Non-claimant as the Claimant has simply given an application without any supporting documents justifying the existence of Force Majeure condition in Claimant’s factory. The Claimant was also requested vide letter 15.7.2003 to submit the documents of conciliation proceedings before the Labour Court but

instead of submitting the documents, the Claimant filed a petition before the Hon'ble High Court of Delhi.

After carefully examining the arguments and counter arguments put forth by both the parties, I am of the view that the Claimant has all the intentions to manufacture and supply the PIJF cable to Non-claimant but for the strike by the workers in the form of go slow and stoppage of work on the shop floor and also the damage caused to the vital machinery required to manufacture the cables. Also as soon as the stoppage of work occurred on 2.4.2003, the Claimant informed the situation to Non-claimant vide their letter dated 10.4.2003 i.e. within 21 days of the occurrence of the Force Majeure conditions, as stipulated in clause 17.1 of section III of the bid documents. In support of the strike in the form of stoppage of work, Claimant has submitted the minutes of the conciliation proceedings held on 9.6.2003 in the presence of Shri Paramjit Singh, Labour-cum-Conciliation Officer, Ballabhgarh, Faridabad. The plea taken by the Non-claimant that Force Majeure conditions did not exist in the Claimant's factory and also no such intimation as given to them within 21 days of its occurrence and also QA personnel posted in the Claimant's factory did not intimate so, does not hold ground, and hence rejected."

4. We note that the learned single Judge also examined the plea with regard to the latter part of the said Clause 17.1 which indicated that if the performance in whole or in part of any obligation under the contract was prevented or delayed by reasons of any such event (i.e. force majeure clause) for a period exceeding 60 days either party would, at its option, terminate the contract. This aspect was also considered by the learned Arbitrator in paragraph 8.2 of the award which reads as under:-

“8.2 In regard to the issue No.2 pertaining to whether the contract stood discharged due to continuance of Force Majeure for more than 60 days and non-rescheduling of the delivery after the Force Majeure period, the counsel for the Claimant, in his written submission, has submitted that the Non-claimant had unjustly refused extension of delivery period without giving any reasons whatsoever. Analysing the chain of events in the Claimant’s factory, it is observed that the workers stopped working on 2.4.2003 and the conciliation proceedings were held on 9.6.2003, it is evident that the strike continued for more than 60 days. Moreover, the Claimant approached Non-claimant vide their letter dated 4.7.2003 with a request to reschedule the monthly delivery without liquidated damages by 120 days from the date where the original delivery period exists and from the date where it has expired for each purchase order issued against each Advance Purchase Order. Considering these facts as well as taking into account the provisions under the clause 17.1 section III of the bid document, it is quite evident that either party may, at its option, terminate the contract if the performance in whole or part of any obligation is prevented by reasons of any such event for a period of 60 days. Accordingly, I am of the view that the contract stood discharged due to continuance of Force majeure conditions for more than 60 days in the Claimant’s factory and the Claimant is fully justified to terminate the contract in the event of denial of Non-Claimant to extend the delivery period.”

5. From the above discussion, it is evident that the learned Arbitrator after examining the record and also the minutes of the conciliation proceedings and the communication exchanged between the respondent and the Labour Inspector as also between the parties has concluded that the workers stopped working on 02.04.2003 and the conciliation

proceedings which ultimately succeeded in some sort of settlement was arrived at only on 09.06.2003. Therefore, the learned Arbitrator concluded that the strike continued for more than 60 days and consequently, the respondent/claimant was entitled to and invoked the latter part of Clause 17.1 and terminated the contract.

6. We are of the view that the learned single Judge was correct in holding that the decision taken by the learned Arbitrator was a plausible one. That being the case, since the scope of judicial review under Section 34 is not akin to an appeal and is a very limited one, there is no case for interference by this court. In view of the foregoing, we do not find any merit in the present appeal. The same is dismissed.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

FEBRUARY 28, 2017

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