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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
R. 242
\+ **O.M.P. 304/2009**

BHARAT SANCHAR NIGAM LTD. ..... Petitioner
Through: Mr. Sanjeev Narula, Mr. Kanen Gupta Advocates.

versus

CMI LTD & ANR. ..... Respondents
Through: None.

CORAM: JUSTICE S.MURALIDHAR

<u>O R D E R</u>
% **06.01.2017**

1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 is to an Award dated 27th January, 2009 passed by the sole Arbitrator in a dispute between the Petitioner and the Respondent No.1 arising out of the purchase orders placed on the Respondent for procurement of PIJF Telecom Cables.

2. There were advance purchase orders placed by the Petitioner on the Respondent for supply of 12.040 Lacs Conductor Kilometers ('LCKM') of PIJF cables on 8th November, 2002, of which Respondent No.1 submitted its acceptance for supply of the entire order of 12.04 LCKM of PIJF cables on 22nd November, 2002 and furnished a bank guarantee ('BG') on the same date for a sum of Rs. 1 crore.

3. In reply to the Petitioner's letter dated 26th November, 2002 requesting to convey the additional quantity of cables the Respondent could supply, the Respondent vide its letter dated 2nd December, 2002 informed that it could accept another order for supply of 16.00 LCKM of PIJF cables in addition to the 4.00 LCKM cables already supplied.

4. On 16th January, 2003, the Petitioner placed advance purchase order for purchase of 11.40 LCKM of PIJF cables. By a letter dated 22nd January, 2003, Respondent No.1 gave an unconditional acceptance for supply of 4.00 LCKM of PIJF cables. On 29th January, 2003, the Petitioner issued yet another purchase order for additional 4.0 LCKM of PIJF cables.

5. In the meanwhile, it appears that Respondent No.1 kept writing to the Labour Inspector stating that the workers had commenced a slow down. On 28th December, 2002, Respondent No.1 wrote to the Labour Inspector stating that the workers were indulging in 'malpractices' and 'unethical work' and that some of the major machines were not functioning properly because of sabotage. Another letter dated 6th January, 2003 stated that the workers were engaged in slow down/tool down strike. On 14th March, 2003, Respondent No. 1 informed the Labour Inspector that some of the workers were still engaged in making unjustified demands and provoking other workers to go on a tool down strike which resulted in a complete slow down of work. Another letter was written on 10th April, 2003 to the Labour Inspector stating that workers were still making unjustified demands which resulted in complete slow down in work. On the same date, Respondent No.1 wrote to the Petitioner apprising it of the "apathetic condition through

which we are passing which have been unforeseen and Force Majeure condition". It was stated *inter alia* that the workers had stopped working since 2nd April, 2003 and were not ready to resolve the issues. Respondent No.1 stated that it had tried its level best and did not foresee any concrete solution and hence was "forced to communicate" regarding the Force Majeure condition created in its organisation due to which it was not in a position to "continue the production against purchase orders issued...".

6. The Petitioner sought to invoke the BG. The Respondent sought arbitration. The arbitration took place before the sole Arbitrator who in the impugned Award accepted the case of Respondent No. 1 that the above circumstances of '*force majeure* condition' which justified the Respondent No.1 in failing to fulfil its obligations under the various purchase orders discharged the contract of Advance Purchase Orders ('PO').

7. Mr. Sanjeev Narula, learned counsel for the Petitioner pointed out that if indeed there was labour problem, even in the last week of December 2002, there was no occasion for Respondent No.1 to have accepted the offer of the Petitioner to supply the PIJF cables pursuant to the PO dated 16th January, 2003 and 22nd January, 2003. Secondly, it is pointed out that the *force majeure* condition is something which is unforeseen, whereas, in this case, the labour problem persisted for several months. Thirdly, it is pointed out that it was certainly not unforeseen and there was no justification for continuing to accept the PO. The real reason for failure to supply was not strike by the workers and, therefore, the said explanation offered by Respondent No. 1 should not have been accepted by the sole Arbitrator.

Reliance is placed on the decision of the High Court of Bombay in ***Esjay International Pvt. Ltd., Mumbai v. Union of India 2011(6) MhLj 750***, as regards what would be a 'force majeure condition'.

8. The Court finds that the relevant clause in the PO does not amount to force majeure which only talks of acts of God or natural calamity. Clause 17.1 of Section III of the General (Commercial) Conditions of Contract which is the *force majeure* clause 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 event 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".

9. Thus, it is seen that force majeure clause itself envisages "strikes" and "lock outs".

10. Before the learned Arbitrator, Respondent No.1 was able to produce the minutes of conciliation proceedings held on 9th June, 2003 before the

Conciliation Officer. The fact that the workers really stopped working on 2nd April, 2003 and that the situation continued also stood established by Respondent No. 1. It was, accordingly, held that the "contract stood discharged due to continuance of *Force Majeure* conditions for more than 60 days in the Claimant's factory". The view that the learned Arbitrator has taken is certainly a plausible one. The *force majeure* clause in the instant case does not limit the events only to natural calamities or accidents but also includes lock out and strikes. These events need not necessarily happen suddenly that was sought to be contended by the counsel for the Petitioner. The *force majeure* clause in the case of ***Esjay International Pvt. Ltd., Mumbai v. Union of India*** *(supra)* was not similar to the clause in the instant case and, therefore, the said decision is distinguishable on facts.

11. In that view of the matter, the Court is not satisfied that the impugned Award calls for interference on any grounds under Section 34 of the Act.

12. The petition is, accordingly, dismissed.

S. MURALIDHAR, J

JANUARY 06, 2017
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