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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 27th November, 2017
Pronounced on: 5th December, 2017**

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ARB. A. (COMM.) 23/2017, IA No. 10003/2017

ADIGEAR INTERNATIONAL & ANR.

..... Petitioners

Through : Mr.Hrishikesh Baruah, Mr.Pranav
Jha, Ms.Radhika Gupta,
Mr.Siddhant Kaushik, Advocates.

versus

SUBHASH AGGARWAL & ORS.

..... Respondents

Through : Mr.Siddharth Vaid, Ms.Soumya
Sai Kumar, Ms.Madhurima
Ghosh, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The petitioner has filed this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 against the orders dated 07.05.2017 and 08.05.2017 passed by the Learned Sole Arbitrator wherein the appellants have been directed to furnish bank guarantee of Rs. 6.5 Crores in favour of the Respondents to be kept alive for a period of six months from the date of the order or disposal of the arbitral proceedings by an award whichever is earlier and that the respondent

shall not enforce or encash the bank guarantee without the orders of the tribunal.

2. Further vide order dated 8th May, 2017 the tribunal directed the bank guarantee shall be furnished within a period of three weeks from the date of the said order.

3. In appeal the learned counsel for appellants has alleged the respondents were in fact the investors in its business and to this extent the learned arbitrator is on its side. The appellant is aggrieved only to the extent of the findings on record that prima facie there being a delay on the part of the appellant in executing the contract for the supply of goods to DGOS and hence have directed the appellant to furnish bank guarantee(s) of ₹ 6.5 crores. The learned counsel for the appellant alleges the claimant no.1 being known to the appellant on or about 5.5.2014 had agreed to grant financial assistance of ₹ 5 crores to the appellant within a period of 30 days as per oral and mutually agreed terms and conditions for the purpose of executing a supply order and that the respondent would have a share in the profits earned as well as the loss suffered by the appellants in the supply of the goods to defence on pro-rata basis.

4. The learned counsel for the appellant says as per condition of the contract; the bank guarantees were to be submitted with the Ministry of Defence on or before 31.05.2014 but in fact could only be submitted on 09.07.2014 as the money was not made available by the respondent in time and it led to delay in submitting the guarantees and consequently the termination of the contract.

5. On the other hand the respondent refers to a letter dated 08.10.2013 of the DGOS sent to the appellant herein, intimating the placement of order dated 06.06.2013 for the supply of goods with a condition the supply be completed within seven months i.e. by 31.05.2014. The respondent also refers to a letter dated 22.05.2014 written by the appellant to the DGOS referring to an earlier letter dated 12.05.2014 intimating the Ministry of Defence the raw material has been procured by the appellant and the appellant is in the process of manufacturing the goods at the earliest and hope to complete the order as early as possible but yet sought a minimum of 3 to 4 months time and a revalidation of the delivery period for 120 days enabling the appellant to deliver the goods within such delivery period. This letter dated 22.05.2014 was written by the appellant to the Ministry of Defence only after the respondent had paid an amount of ₹3,12,37,500/- to the appellant by 20.05.2014, which sum only was required for furnishing the Bank guarantee(s). Hence the plea of the appellant that the Bank guarantee could not be furnished due to delay in deposit by respondent is factually incorrect.

6. It is now alleged by the appellant the said money was deposited by the respondent in a fixed deposit in Karur Vysya Bank, which Bank was not an approved Bank by the DGOS and hence it led to the delay on the part of the appellant to deposit the Bank Guarantee(s) with the defence and consequently led to the cancellation of the contract.

7. This plea of the appellant is also against the facts on record as the delivery time was extended till 30.09.2014 by the Ministry of

Defence but the appellant failed to supply the goods even till September 2014 which prompted the DGOS to write a letter on 29.09.2014 to the appellant stipulating certain conditions in view of the delayed supply of the goods. Interestingly the reason for delay alleged by the appellant on 30.09.2014 to the DGOS was *natural weather calamity not suitable for manufacture of yarn*. Never did the appellant allege delay in submitting of the bank guarantee(s) by the respondent being a reason for cancellation of his contract as he now argues to be the only reason. In none of the correspondences filed on record the appellant averred financial difficulty faced by it on account of late deposit of ₹5 crores by the respondent or the contract was delayed due to deposit being made in Karur Vysya Bank and not a Bank in the approved list of the DGOS.

8. The appellant though says there was an oral understanding between the parties whereby the respondent was to invest ₹5 crores by 31.05.2014 but the respondent on the other hand had filed an agreement dated 16.05.2014 executed between the parties by which the respondent was obliged to deposit the amount within 35 days and the record reveals the respondent paid ₹5 crores to the appellant within those 35 days. The appellant though denies execution of agreement dated 16.05.2014 but it bears signatures of its partners.

9. I may here refer to various clauses of the said agreement dated 16.05.2014 duly signed by all the partners of the appellant and the respondent, which are relevant for the purpose:

“4.The first party will tender advance payment immediately to the firm to be utilized towards

performance guarantee of Rs.3,12,37,500.00 to be deposited by way of bank guarantee/FDR for the validity as directed by the DGOS, New Delhi and balance amount to be utilized towards advances and purchases of raw material etc. which will be transferred in the Karur Vyasya bank account in tranches by the first party within 35 days from the date of this agreement.

5.The firm will open an ESCROW Account with Karur Vyasya Bank, Ramesh Nagar Branch, New Delhi, with irrevocable instruction to transfer funds as principal amount of investment plus 30% of investment cost within a period of 180 days from the date of investment. (Maximum amount of Rs.6.50 crore including principal amount and investment cost) on receipt of payments in the account from the MOD against execution of Supplies. For every payment received from MOD, 30% of the amount (in tranches) will be transferred to the account of the first party (i.e. maximum amount of upto Rs.6.50 crores) and 70% of the amount received (in tranches) will be transferred to the account of the firm.

The said Bank account will be jointly operated by Sh.Sanjay Khanna on behalf of Second party and Sh.Subhash Aggarwal on behalf of first party for the purpose of supplying only this order.

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8.That in case there is any delay in the investment by the first party which is to be arranged within 35 days from the date of this agreement any loss or losses occurred shall be borne by the first party(i.e. respondent herein).

9. The firm shall ensure compliance of all terms and conditions pertaining to said supply order

with DGOS, New Delhi without any default in supplies and in case of any loss incurred by the firm due to non-compliance, delay in compliance of any terms and conditions of said supply order, or any of the reason the firm will be solely responsible. The first party will not suffer any losses and will be paid back its investment along with return of 30% by the second party. ”

10. Now though the appellant had alleged the respondents to be the investors and not lenders but clause 9 of the agreement dated 16.5.2014 clarifies the respondent being not liable for losses which show the intention was only to lend the money and not to invest, as alleged. The respondents were only obliged to bring the money to the appellant within 35 days of the agreement and such money was to be utilized solely by the appellant in completing the supply order. The respondents had no other role in the business of the appellant except to bring the money and neither the respondents were to suffer any loss but were entitled only to refund of their deposit with interest @ 30% p.a. Clause 4 of the agreement too negates the argument of the appellant the delay was caused as the respondent failed to deposit money in the approved bank. The agreement dated 16.5.2014 do not speak of any other bank except the Karur Vysya Bank. If the respondents were to deposit the money in any other bank it ought to have been stated in the agreement and the respondents would have easily deposited the money in the same since had complied with their obligations in time under agreement dated 16.5.2014.

9. Admittedly, an amount of Rs.3,12,37,500/- came into the bank account of the appellant firm by 20.05.2014 which was sufficient for

submitting the bank guarantee(s), per provisions of the supply contract between the appellant and the DGOS. Admittedly, it was the sole responsibility of the appellant to submit the Bank Guarantee(s) and to comply with all the terms and conditions pertaining to the supply order with DGOS, New Delhi. The role of the respondents was only to provide a corpus fund of ₹ 5 crores which they admittedly provided within 35 days. The appellant by 20.5.2015 had sufficient money to furnish Bank Guarantee in time and hence cannot allege the deposit in Karur Bank in any way had delayed the submission of Bank Guarantee(s) to the defence. The appellant cannot put the blame for delay upon the respondents. Admittedly, the Bank Guarantee(s) was submitted by 09.07.2014 and the appellant was granted time to supply the material till September 2014, but despite receipt of Rs.5 crores within the time frame the appellant could not supply the material to the Ministry of Defence even by 30.09.2014 and it led to cancellation of contract. The facts do reveal the respondents were never at fault and it was the appellant who could not carry forward the agreement and failed miserably. For its own negligence or conduct, the appellant can't blame the poor respondent, when it itself had attributed the delay upon weather conditions.

10. Hence I find no fault with the award passed by learned arbitrator wherein he attributed the delay upon the appellant.

11. Lastly the learned counsel for the appellant urges the appellant are in no position to make payment to the respondent since are facing financial crunch and various actions of recovery from various bank viz.

a caution notice dated 07.09.2014 of the Indian Bank alleging financial irregularities committed by the appellant viz. telling lies for obtaining loan as stated in page 83 of the documents; the name of appellant being including in the willful defaulter's list by Standard Chartered Bank, Punjab National Bank etc and the notice dated 26.04.2014 issued by the Oriental Bank of Commerce, published in newspaper for E-auction of the property belonging to the appellant firm/its partners and hence the appellant is in no position to furnish Bank Guarantee of Rs.6.5 crores as ordered by the Learned Arbitrator and the impugned order be set aside.

12. The above facts are all the more a reason to secure the interest of the respondent, as was held in *Banker Hughes Singapore Pte vs. Shiv-Vani Oil and Gas Exploration Services Ltd*; MANU/MH/2030/2014:-

“62. The respondent themselves have admitted in their affidavit dated 21st April 2014 and disclosing that all the assets of the respondent company are already encumbered with the banks and there are no assets which are encumbered. It is stated in the affidavit that there are no deposits with the bank and the loan is taken from around 26 banks whose names are disclosed in paragraph 2 of the said affidavit. There is no investment made in floating securities except in assets that are plant and equipments and the figures of all the assets mentioned in the balance sheets are owned by the respondent. It is thus clear beyond reasonable doubt that if the petitioner succeeds in the arbitration proceedings against the respondent, petitioner would not be able to recover any amount from the respondent. In the prima facie view, the petitioner good chances of succeeding in the arbitration proceedings. The respondent are

obstructing the legitimate claims of the petitioner, in my prima facie view. In my view if the respondent in this situation is not directed to provide security by way of furnishing a bank guarantee of a nationalized bank in favour of the petitioner so as to secure the claim of the petitioner, petitioner would not be able to obtain the fruits of the arbitration while executing the award.

64. In my view interest of justice would be met with if the respondent is directed to furnish a bank guarantee of a nationalized bank in favour of the Prothonotary and Senior Master of this court in the sum of USD20,00,000 initially for a period of two years and shall be kept alive till the arbitral award is rendered and for a period of three months from the date of the award.”

13. Hence finding no ambiguity in the impugned orders of the learned arbitrator, I dismiss the appeal along with pending application. No orders as to costs.

YOGESH KHANNA, J

DECEMBER 05, 2017

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