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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 10.9.2018

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O.M.P. (COMM) 281/2017 & I.A. No. 8670/2017

M/S PCI LTD.

..... Petitioner

Through Mr. Arun Khatri, Adv.

versus

PARAGON CABLE INDIA

..... Respondent

Through: Mr. Amit Dayal, Adv

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short '1996 Act') seeking to assail the award dated 5.5.2017.
2. A perusal of the award would show that the respondent, i.e. the original claimant, had sought the following reliefs:

“(a) direct respondent to pay the outstanding dues of the Claimant towards the two lots of goods manufactured by the petitioner pursuant to the purchase order of the respondent having contract value of Rs.95,57,382.64 (Rupees Ninety Five Lac Fifty Seven Thousand Three Hundred Eighty Two and Paise Sixty Four Only) (Exclusive of excise duty, CST/VAT and loading-charges for the 1st lot and Rs.24,84,865.35 (Rupees Twenty Four Lac Eighty Four Thousand Eight Hundred Sixty Five and Paise Thirty Five Only) (exclusive of excise duty, CST/VAT and loading Charges) for the 2nd lot aggregating: Rs.1,20,42,247.99 (Rupees One Crore Twenty Lac Forty Two Thousand Two Hundred Forty Seven And Paise Ninety Nine Only); and
(b) direct the Respondent to bear the cost of removal of the goods

in question from the Claimant's premises at 9 Rajasthan Udyog Nagar, G. T. Karnal Road, Delhi 110033 including the excise duty, CST/VAT, loading charges thereon and pay the same to the claimant if the same are paid or become payable by the Claimant; and

(c) direct the Respondent to pay a sum of Rs.1,13,05,850/-. (Rupees One Crore Thirteen Lac Five Thousand Eight Hundred and Fifty Only) to the Claimant as demurrage from 20.01.2014 to 21.03.2015; and

(d) direct the Respondent to pay demurrage to the Claimant from 21.03.2015 till the date of actual removal of the goods from the Claimant's premises at the rate of Rs.100/- per Drum per day of ready-Unarmoured Cables packaged in wooden drums (total. no. of drums -214) and Rs.2-per Coil per day for Twin Flat Cables packaged in coils (total no. of coils -2601); and

(e) direct the Respondent to pay interest of Rs.37,52,578.00 (Rupees Thirty Seven Lac Fifty Two Thousand Five Hundred and Seventy Eight Only) to the claimant from 30.04.2014 to 21.03.2015; and

(f) direct the Respondent to pay pendente-lite and future interest on the sums mentioned in clauses (a) to (e) above from 21.03.2015 till realization @ 30.75% per annum at monthly rests;

(g) direct the Respondent to pay to the Claimant a sum of Rs.1,00,000/- (Rupees One Lac Only) being the aggregate of the amount paid Rs. 50,000/- (Rupees Fifty Thousand Only) and payable Rs.50,000/- (Rupees Fifty Thousand Only) by the Claimant to the Court Commissioner in terms of order dated 06.10.2016 in O.M.P. No. 118 of 2015 passed by the Hon'ble High Court of Delhi at New Delhi; and

(h) direct the Respondent to pay further sum which may be paid and/or become payable by the claimant to the Court Commissioner or any other person in terms of the Order dated 06.10.2016 and/or any subsequent order which may be passed in O.M.P. No. 118 of 2015 by the Hon'ble High Court of Delhi at New Delhi and/or demand raised by the Court Commissioner; and

(i) direct the Respondent to pay to the Claimant costs of this arbitration including fees and expenses of the Arbitral Tribunal

and service tax thereon and the Claimant's Legal fees and service tax thereon and costs:

(j) grant such other and further relief-as this Tribunal may deem just and proper in the facts and circumstances of the matter.”

3. The record would show that the respondent had manufactured cables for the petitioner.
4. The respondent was given a sub-contract, the main contractor being, Dakshin Haryana Bijli Vitran Nigam (DHBVN).
5. The record would also show that despite at least two opportunities being given to the petitioner, i.e. on 17.12.2016 and 28.1.2017, no statement of defence was filed.
6. The petitioner, however, finally filed with the learned Arbitrator, what can only be termed as a reply cum in written submissions.
7. The learned Arbitrator, while passing the impugned award, has allowed the reliefs (a) to (j) sought for by the petitioner. The reasoning of the learned Arbitrator is encapsulated in paragraph 10 of the award.
8. For the sake of convenience, paragraph 10 of the award is extracted hereinafter:

“...10. The reliefs sought in the Claim Petition are supported by the documentary evidence on record. On merits the Claimant has established and proved all the claims supported by the necessary documents. On the other hand the Respondent failed to make out any case to show why the reliefs as prayed for can be denied. Hence it can be held that the reliefs "A" to "J" are decided in favour of the Claimant. Accordingly, there shall be an Award in favour of the Claimant as below:

“(a) The Respondent is directed to pay the outstanding dues of the claimant towards the two lots of goods manufactured by the petitioner pursuant to the purchase order of the respondent having contract value of Rs.95,57,382.64 (Rupees Ninety Five Lacs Fifty Seven Thousand Three Hundred Eighty Two and Paise Sixty Four Only) (Exclusive of excise duty, CST/NAT and loading charges for the 1st lot and Rs.24,84,865.35 (Rupees Twenty Four Lac Eighty Four Thousand Eight Hundred Sixty Five and Paise Thirty Five Only) (exclusive of excise duty, CST/VAT and loading Charges) for the 2nd lot aggregating Rs.1,20,42,247.99 (Rupees One Crore Twenty lac Forty Two Thousand Two Hundred Forty Seven And Paise Ninety Nine Only); and

(b) The Respondent is directed to bear the cost of removal of the goods in question from the Claimant's premises at 9 Rajasthan Udyog Nagar, G. T. Karnal Road, Delhi 110033 including the excise duty CST/VAT, loading charges thereon and pay the same to the claimant if the same are paid or become payable by the claimant; and

(c) The Respondent is directed to pay a sum of Rs.1,13,05,850/- (Rupees One Crore Thirteen Lac Five Thousand Eight Hundred and Fifty Only) to the Claimant as demurrage from 20.01.2014 to 21.03.2015; and

(d) The Respondent is directed to pay demurrage to the Claimant from 21.03.2015 till the date of actual removal of the goods from the Claimant's premises at the rate of Rs. 100/- per Drum per day of ready Unarmoured Cables packaged in wooden drums (total No. Of drums -214) and Rs.2-per Coil per day for Twin Flat Cables packaged in coils (total no. of coils -2601); and

(e) The Respondent is directed to pay interest of Rs.37,52,578.00 (Rupees Thirty Seven Lac Fifty Two Thousand Five Hundred and Seventy Eight Only) to the claimant from 30.04.2014 to 21.03.2015; and

(f) The Respondent is directed to pay pendente-lite and future interest on the sums mentioned in clauses (a) to (e) above from 21.03.2015 till realization @ 30.75% per annum at monthly rests;

(g) The Respondent is directed to pay to the Claimant a sum of Rs.1,00,000/- (Rupees One Lac Only) being the aggregate of the amount paid Rs. 50,000/- (Rupees Fifty Thousand Only) and payable Rs.50,000/- (Rupees Fifty Thousand Only) by the Claimant to the Court Commissioner in terms of Order dated 06.10.2016 in O.M.P. No. 118 of 2015 passed by the Hon'ble High Court of Delhi at New Delhi; and

(h) The Respondent is directed to pay further sum which may be paid and/or become payable by the claimant to the Court Commissioner or any other person in terms of the Order dated 6.10.20.16 and/or any subsequent order which may be passed in O.M.P. No. 118 of 2015 by the Hon'ble High Court of Delhi at New Delhi and/or demand raised by the Court Commissioner; and

(i) The Respondent is directed to pay to the Claimant costs of this arbitration including fees and expenses of the Arbitral Tribunal and service tax thereon and the Claimant's Legal fees and service tax thereon and costs as certified and supported by the documents:

(j) It is hereby declared that the Claimant is entitled to recover from the Respondent all the amounts liable to be paid by the Respondent as per this Award without any objections including the one that the Amount Awarded is to be recovered from "DHBVN" or any other Third Party from whom the Respondent Claims that it has to be recovered."

9. It is not disputed by Mr. Dayal, learned counsel appearing for the respondent, that no affidavit of evidence was filed and given the fact that the petitioner has not denied any of the claims, the learned Arbitrator proceeded to allow the claims in their entirety.

10. On the other hand, Mr. Khatri relies upon Section 25(b) of the 1996 Act and based on the said provision, contends that even if the petitioner had not filed its statement of defence, the learned Arbitrator could not have treated that failure itself as admission of allegations made by the respondent/claimant.

11. Having regard to the record placed before me and the submissions of the counsel, as indicated above, what is clear is that the petitioner was remiss in filing the statement of defence in time.

12. The petitioner, however, filed at the eleventh hour a reply cum written submissions which did not assail the factum of the respondent/claimant having manufactured the subject cables for the petitioner. The written submissions, however, proceed on the basis that drawings and documents and inspection of the cables had to be conducted by DHBVN and, therefore, performance was not complete. However, what is not articulated is how the respondent had failed to seek approval or have the manufactured cables inspected by DHBVN. As a matter of fact, in paragraph 3 of the written submissions, the petitioner adverts to the fact that DHBVN had failed to inspect and test the material i.e. cables manufactured by the respondent despite repeated requests.

13. Therefore, insofar as the relief sought in prayer clause (a) is concerned, Mr. Khatri, rightly, does not dispute the tenability of the same.

14. However, insofar as the remaining reliefs are concerned, Mr. Khatri is right in contending that the respondent/claimant had to tender some evidence and/or proof to establish its entitlement to those claims.

15. In this behalf, my attention has been drawn by Mr. Khatri to the claim made for demurrage in the sum of Rs.1,13,05,850/- by the respondent/claimant.

16. Therefore, having regard to the foregoing award can be confirmed only, *vis-a-vis*, the prayer clause (a).

17. Accordingly, the respondent claimant, in my view, at this juncture, entitled only to a sum of Rs. 1,20, 42,247.99/- in respect of the relief

sought in prayer clause (a).

18. As regards, the remaining reliefs which are set out in the prayer clause (b) to (j), the respondent/claimant would have to prove the same. The initial onus in that behalf, would be on the respondent/claimant.

19. As alluded to above, the award cannot be sustained with regard to claims (b) to (j). The learned Arbitrator has given no reasoning, whatsoever, as to why the claims have been allowed.

19.1 In fact, the concerned claims not even been quantified.

20. Therefore, I am of the view that insofar as the relief sought qua claims (b) to (j) are concerned, the matter would have to be remitted to the learned Arbitrator for a *de novo* hearing, to remove the grounds for setting aside the award, in consonance with the mandate of Section 34(4) of the 1996 Act.

21. The award to the extent it allows reliefs claimed in prayer clause (b) to (j) is set aside.

22. The matter is remanded to the learned Arbitrator, as indicated above for the said purpose.

23. The parties and their counsel will appear before the learned Arbitrator on 24.9.2018 at 3.00 p.m. In case, the said date is not convenient to the learned Arbitrator, he will fix another date, which is proximate to the date fixed by the Court.

24. Having regard to what has been indicated above, the Registry will release a sum of Rs.49,50,000/-, which is available with it, alongwith accrued interest and also liquidate the bank guarantee in the sum of Rs.50 lacs and pay the amount received, to the authorised representative of the respondent/claimant.

25. In case, the arbitration record has been received by this Court, the

Registry will dispatch the same to the learned Arbitrator to enable him to continue with the arbitration proceedings.

26. The petition is disposed of in the aforesaid terms.

27. The pending application is disposed of accordingly.

28. The Registry will dispatch a copy of this order via a special messenger to the learned Arbitrator.

RAJIV SHAKDHER, J

SEPTEMBER 10, 2018

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