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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 26th November, 2021

+ **FAO (COMM) 190/2021 & CM APPL. 42165-66/2021**
VARDHMAN CABLES INDIA PVT. LTD. Appellant
Through: Mr.S.K. Gupta & Mr.Manish
Gupta, Advs.

versus

MAHANAGAR TELEPHONE NIGAM LTD. & ANR.
..... Respondents
Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA
NAVIN CHAWLA, J. (Oral)

1. This appeal has been filed by the appellant challenging the judgment dated 31.03.2021 passed by the learned District Judge (Commercial)-03, Patiala House Courts, New Delhi in Arb No. 3044/2018, dismissing the petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') by the appellant challenging the Arbitral Award dated 25.04.2018 passed by the learned Sole Arbitrator.

2. The respondent no. 1 floated a tender dated 25.05.2001 for supply of self-supporting PVC drop wire with fiberglass roving as strength member 5mm dia. The appellant was declared as successful bidder in the tender and a Letter of Intent dated 18.07.2001 was issued in favour of the appellant for supply of 4690 kilometers of drop wire. As per the terms of the agreement, the appellant furnished a bank

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FAO (COMM) 190/2021

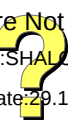
Page 1 of 9

guarantee for an amount of Rs. 2,69,200/-, that is 5% of the purchased value. As the appellant could not supply the drop wire within the stipulated period, extensions were granted to the appellant. However, as there was still shortfall in the supply, the respondent vide letter dated 16.12.2002 terminated the contract, encashed the bank guarantee and forfeited the amount thereof.

3. Admittedly, there was a shortfall of 190 kilometers of drop wire in the supply made by the appellant. The dispute between the parties arose out of a claim of the appellant seeking refund of the amount of the bank guarantee forfeited by the respondent alongwith interest thereon.

4. By way of the Impugned Award (which is the second award with the first award being set aside by this Court vide its order dated 29.09.2011 passed in FAO No. 222 of 2010), the learned Sole Arbitrator was pleased to reject the claim of the appellant observing as under:

“18. On the other hand the Respondent by way of amended pleadings and supporting evidence has shown the loss which it suffered because of the Claimant’s failure to supply the Dropwire in time. At the risk of repetition it may be mentioned that clause 14.1 of the subject purchase order dated 21.07.2001 obligates the parties to stick to a particular time frame. Clause 14.2 thereof provides that delay by the supplier in the performance of the delivery obligations shall render the



supplier liable to any or all sanctions including forfeiture of performance security, liquidated damages and or termination of the contract for default. Claimant's own letters placed at pages 65 to 77 of the Paper Book confirmed the Claimant's failure to supply the goods in time because of its own negligence or inability and not due to any fault on the part of the Respondent. The Respondent was also entitled to recover liquidated damages in term of clause 15.1 of the subject purchase order dated 21.7.2001.

19. *Moreover Respondent's additional documents Annex. R1 and R2 with the amended pleadings show its planned project to utilize the Dropwire for providing new connections to the consumers and also to consolidate and maintain the existing system. Detailed calculations have been given in these documents as to how many connections were likely to be provided with this wire and how much revenue could have been raised by the Respondent. Obviously due to the failure of the Claimant to supply to the Dropwire in time the Respondent suffered the loss of prospective profit and revenue. It is besides the point that in Civil Appeals No. 1440-41/2015 M/s. Construction*

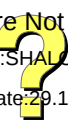
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FAO (COMM) 190/2021

and Design Services Vs. Delhi Development Authority the Hon'ble Apex Court has categorically held that in case of delay in completion of work relating to public utility actual loss need not be proved and the same can be presumed on the facts of the case.

20. *In the matter in hand the supply which had to be completed within a span of little more than five months could not be completed even in sixteen months and it goes without saying that this material had to be used for providing a public utility to the consumers on commercial basis. So it doesn't appeal to judicial conscience that there was no loss or damage to the Respondent.*

21. *As a natural consequence of my above said discussion I hold that the Respondent was justified in forfeiting and encashing the performance bank guarantee and that the Claimant is not entitled for its refund; so obviously the question of its entitlement to any interest does not arise at all."*

5. The Award was challenged by the appellant by way of a petition under Section 34 of the Act, which has been dismissed by the learned District Judge vide the Impugned Judgment observing as under:

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FAO (COMM) 190/2021

Page 4 of 9

“23. It is an admitted case of the parties that the petitioner was required to supply the total length of dropwire before 29.12.2001 as per the purchase order dated 21.07.2001, but if failed to complete the supply within the stipulated time. It had taken seven extensions of time to supply the dropwire. When the sixth extension was taken on 15.07.2002, the respondent in its letter had sounded a note of caution that it was the last extension and failure to supply would result in revocation of bank guarantee along with other penalty as per the terms and conditions. In pursuance to this note, the petitioner supplied two lots of 500 kms to make up the total supply of 4500 kms against the contractual 4690 kms and was still in default of 190 kms when the contract was foreclosed on 12.11.2002.

24. Clause 14.1 of Section III of General Conditions of Contract, obligated the petitioner to stick to a particular time frame. Clause 14.2 provided that delay by the petitioner in the performance of its delivery obligations shall render it liable to any or all the conditions i.e. forfeiture of its performance security, imposition of liquidated damages and/or termination of the contract for default. Clause 15.1 provided that if the petitioner failed to deliver the stores within the period prescribed for delivery, the respondent shall be entitled to recover liquidated damages. Clause 17.2 provides that in

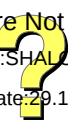
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Signing Date: 29.11.2021

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FAO (COMM) 190/2021

Page 5 of 9

the event, respondent terminates the contract in whole or in part pursuant to para 17.1, the respondent may procure, upon such terms and in such manner as it deems appropriate, goods similar to those undelivered and petitioner shall be liable to the respondent for any excess cost for such similar goods.

25. The documents placed by the respondent in additional pleadings i.e. Annexure R1 and R2 show that it had planned to utilize the dropwire for providing new connections to the consumers and also to consolidate and maintain the existing system. The respondent has given a detailed calculations as to how many connections were likely to be provided with the dropwire and how much revenue could have been raised by it. Admittedly, during evidence, the respondent has produced two purchase orders placed by it whereby it had purchased the dropwire @ Rs. 1190.70 per km by incurring extra cost of Rs. 51.70 per km but as pleaded, it was produced not to show the difference in price but to show that it was able to place the purchase order for the remaining length only in the month of June, 2003. The respondent has taken the average revenue per user for six months to calculate the loss.

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27. In the instant case, the respondent was doing the public utility services. It

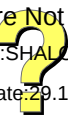
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Signing Date: 29.11.2021

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FAO (COMM) 190/2021

Page 6 of 9

has demonstrated from the documents that it had suffered losses on account of failure of the petitioner to complete the supply under the contract. Given the quantum of loss it suffered as evident from the record, it withheld only the meagre bank guarantee amount utilizing it towards the compensation of the loss suffered. It is to note that the performance bank guarantee was meant to secure due observance and performance of the terms and conditions of the contract.

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32. In the instant case, the respondent has led evidence how the delay had resulted into loss of business. It had to utilize the dropwire for providing new connection to the consumers and also to consolidate and maintain the existing system. It had to freshly call the tenders which took almost six months to take the supply. It has submitted the calculations as to how many connections were likely to be provided with the wire and how much revenue could have been raised by it. Given the quantum of loss it suffered, I am of the view the respondent was fully justified in withholding the meagre bank guarantee amount and utilizing the amount/compensation for the loss suffered.”

6. The learned counsel for the appellant submits that in the present case, the respondent had produced before the learned Arbitrator two

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FAO (COMM) 190/2021

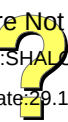
Page 7 of 9

purchase orders dated 13.06.2003 and 20.06.2003 which show that the respondent had incurred an additional cost of only Rs. 51.70 per km and therefore, the loss suffered by the respondent for the shortfall of 190 kms of drop wire was only Rs. 9,823/-. He submits that only this loss can be recovered from the appellant and therefore, the appellant was entitled to claim refund of Rs. 2,59,377/- alongwith interest thereon. In support of his submission, he relies upon illustration (q) to Section 73 of the Indian Contract Act, 1872. He further places reliance on Clause 17.2 of the General Conditions of Contract to the tender document to contend that in terms thereof, the respondent was entitled to claim as damages only the excess cost paid for similar goods being purchased by the respondent.

7. We have considered the submissions made by the learned counsel for the appellant, however, find no merit in the same.

8. At the outset, it is to be noted that the scope of interference of a Court under Section 34 of the Act in an Arbitral Award is highly circumscribed and the Court does not act as a Court of Appeal judging the merit of the Arbitral Award on facts. Reference in this regard may be made on the judgments of the Supreme Court in *Associate Builders vs. Delhi Development Authority*, (2015) 3 SCC 49; *Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India Ltd.*, (2019) 15 SCC 131.

9. In the present case, the respondent is a public utility service provider and not an ordinary business venture. It is also bound to follow the due procedure for procuring the supplies on default of the appellant, which would necessarily take time. The reliance of the



learned counsel for the appellant on illustration (q) to Section 73 of the Indian Contract Act, 1872, therefore, cannot be accepted. Similarly, Clause 17.2 of the General Conditions of Contract also cannot be read as restrictive of the rights of the respondent to claim damages.

10. The learned Sole Arbitrator and the learned District Judge have, therefore, rightly held that the damages cannot be confined only to the excess price paid by the respondent for procuring the shortfall of supplies made by the appellant. We find no perversity in such finding. In any case, challenge to such finding does not fall within the limited scope of interference with an Arbitral Award as permitted under Section 34 and 37 of the Act.

11. In view of the above, we find no merit in the present appeal. The same is dismissed.

NAVIN CHAWLA, J

MANMOHAN, J

NOVEMBER 26, 2021/rv /U

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FAO (COMM) 190/2021

Page 9 of 9