

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Date of Decision : 31.07.2009

M/s Jaiswal Steel Enterprises Pvt. Ltd.

....Petitioner

versus

Bharat Sanchar Nigam Limited and another

.....Respondents

CORAM : HON'BLE MR.JUSTICE J.S.KHEHAR.

Present : Ms.Manisha Gandhi, Advocate, for the petitioner.

Mr.Ashwani Talwar, Advocate, for the respondents.

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J.S.KHEHAR, J.

It is not a matter of dispute between the parties that in the contractual obligations between the parties, some disputes could be referred to an Arbitrator. Clause 20.1 of the general conditions of the contract is admittedly the arbitration clause. The same is being extracted hereunder:-

“20.1 In the event of any question, dispute or difference arising under this agreement or in connection therewith except as to matter the decision of which is specifically provided under this agreement, the same shall be referred to sole arbitration of the Director General, Department of Telecommunications or in case his designation is changed or his office is abolished then in such case to the sole arbitration of the officer for the time being entrusted whether in addition to the functions of the Director General, Department of Telecommunications or by whatever designation such officers may be called (hereinafter referred to as the said officer) and if the Director General or the said officer is unable or unwilling

to act as such the sole arbitration or some other person appointed by the Director General or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996, there will be no objection to any such appointment that the arbitrator is Government Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as government servant, he has expressed views on all or any of the matter under dispute. The award of the arbitrator shall be final and binding on matter is originally referred, being transferred or vacating his office or being unable to act for any reasons whatsoever such Director General or the said officer shall with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessor.”

It is apparent from the arbitration clause extracted herein above, that any question and dispute or difference arising between the parties except as to matter the decision of which is specifically provided under the agreement, shall be referred to a sole arbitrator.

In order to oppose the claim of the petitioner for appointment of an arbitrator, learned counsel for the respondents has invited this Court's attention to clause 16 of the general conditions of the contract. Clauses 16.1 & 16.2 of the general conditions of the contract are being extracted hereunder:

“16.1 The date of delivery of the stores stipulated in the acceptance of tender should be deemed to be essence of the contract and delivery must be completed not later than the date specified therein. Extension will not be given except in exceptional circumstances. Should, however, deliveries be

made after expiry of the contract delivery period, without prior concurrence of the Purchaser, and be accepted by the consignee, such deliveries will not deprive the purchaser of his right to recover liquidated damages under Clause 16.2 below. However, when supply is made within 21 days of the contracted original delivery period, the consignee may accept the stores and in such cases the provisions of Clause 16.2 will not apply.

16.2 Should the tenderer fail to deliver the stores or any consignment thereof within the period prescribed for delivery the purchase shall be entitled to recover ½% (half percent) of the value of the delayed supply for each week of delay or part thereof, subject to maximum of 5% of the value of the delayed supply, provided that delayed portion of the supply does not in any way hamper the commissioning of the other system. Where the delayed portion of the supply materially hampers installation and commissioning of the other systems, Liquidated Damage Charges shall be levied as above on the total value of the Purchase Order. Quantum of liquidated damages assessed and levied by the Purchaser shall be final and not challengeable by the Supplier.”

It emerges from Clauses 16.1 & 16.2 extracted herein above, that delay in delivery would result in liquidated damages. Determination of the quantum of the liquidated damages has also been expressly provided for in Clause 16. It is, however, material to notice that Clause 16 expressly mandates that the quantum of liquidated damages assessed and levied by the purchaser would be final, and would not be challengeable by the supplier.

It is not a matter of dispute that the orders passed by the respondents levying liquidated damages for delayed supply of the goods is the basis on which the petitioner seeks arbitration. The sequences of the facts narrated in the pleadings, reveal that supplies had to be made by the petitioner within 4 months of the execution of the order on 11.3.1999. However, on account of the death of a family member of the petitioner, the petitioner could not continue supply and sought extension of time. The request of the petitioner was accepted and extension was granted upto 11.9.1999. It is the case of the petitioner that the supplies were made to the respondents within the extended period allowed to the petitioner, and as such, there was no justification whatsoever for levying the liquidated damages.

So as to controvert the submission advanced by the learned counsel for the petitioner, learned counsel for the respondents have invited this Court's attention to a communication dated 30.7.1999 annexed with the written statement filed on behalf of the respondents, by which extension was granted to the petitioner to deliver the contracted goods upto 11.9.1999, which expressly notices, that the extension granted to the petitioner would be subject to imposition of the liquidated damages.

In view of the above, it is natural to conclude, firstly, that the controversy on the basis whereof arbitration is being sought, relates to liquidated damages sought from the petitioner, on account of delayed supply of goods. Secondly, extension allowed to the petitioner to supply the goods, was granted on the express undertaking that liquidated damages would be leviable, in terms of the agreement executed between the parties.

And, finally, that liquidated charges, payable by the petitioner, had been assessed in terms of Clause 16 of the general conditions of the contract extracted herein above.

In view of the aforesaid conclusions, there is no doubt whatsoever, that the controversy on which arbitration has been sought by the petitioner, has expressly been excluded from the purview of arbitration in as much as, it is a controversy in respect of a decision taken by the respondents on a matter specifically provided for under the agreement. Thus, it is not possible to accept the prayer made by the petitioner for appointment of an arbitrator, and the same is accordingly declined.

Needless to mention that it will be open to the petitioner to assail the action of the respondents by filing a Civil Suit, if the petitioner is so advised. If the petitioner is advised to file a Civil Suit, it will be open to the petitioner to seek condonation of delay for determining limitation, on the basis of the time spent by the petitioner in the present proceedings.

The instant petition is disposed of in the aforesaid terms.

31.07.2009

**Mohinder**

**(J.S.KHEHAR)**  
**JUDGE**