

(2009) 04 DEL CK 0529

Delhi High Court

Case No: O.M.P. No. 700 of 2008

Charan Medical Devices

APPELLANT

Vs

Biotronik Medical Devices India
Pvt. Ltd. and Another

RESPONDENT

Date of Decision: April 15, 2009

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 9

Hon'ble Judges: S.N. Dhingra, J

Bench: Single Bench

Advocate: K.N. Balgopal, Neeraj Chaudhary Atul Shankar Mathur and Shruti Verma, for the Appellant; Jayant Bhushan Somesh Chandra Jha and Ritesh Ratnam, for the Respondent

Final Decision: Dismissed

Judgement

Shiv Narayan Dhingra, J.

By this petition u/s 9 of the Arbitration & Conciliation Act, 1996, the petitioner has made a prayer that this Court should issue interim injunction restraining respondent No. 2 viz. Union Bank of India from encashing the Bank Guarantee bearing No. 37060IGL0013108 dated 22.8.2008 for Rs. 1,00,00,000/- (Rupees one crore only) and restrain respondent No. 1 from receiving any money under the aforesaid Bank Guarantee. The other prayer made is that this Court should stay the operation of notice dated 22.12.2008 issued by respondent No. 1 terminating the Distributorship Agreement between the parties.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner entered into a Distributorship Agreement with respondent No. 1 in respect of various medical devices to various hospitals, nursing homes etc in the entire southern part of India. As a condition for being appointed as distributor, the petitioner had given aforesaid performance bank guarantee of Rs. 1 crore. Respondent No. 1 terminated the Distributorship Agreement vide a notice dated

22.12.2008 stating therein that petitioner had failed to maintain the financial obligations as required in Clause 15(2) of the Distributorship Agreement and had failed to make payments within 90 days of delivery of the products which empowered the respondent No. 1 to terminate the agreement. It was also stated that the nine of the cheques issued by petitioner for clearing the dues got dishonoured, the conduct of the petitioner was thus blameworthy. The third ground stated was that the petitioner had failed to meet the target of minimum purchase amount as stipulated in Exhibit-8 & 9 of the Distributorship Agreement. The respondent No. 1 also claimed that the petitioner's Managing Director Mr. Atma Charan Reddy had been giving threats to the employees of the respondent No. 1 and went to the extent of saying that he would use his position as ex-MP to close down the office of respondent No. 1 in India, if it did not succumb to his demands.

3. The respondent No. 1 after serving this notice of termination of agreement, invoked the bank guarantee and the bank in fact had prepared and issued draft of the amount of bank guarantee. This Court vide order dated 29.12.2008 passed an interim order that in case the bank guarantee had been encashed, the respondent No. 1 shall hold the amount in ~~no~~ no lien account. The respondent No. 1 was thus, holding the amount in ~~no~~ no lien account.

4. The learned Counsel for the petitioner argued that the invocation of bank guarantee was unjustified. The grounds taken by the respondent No. 1 for cancellation of Distributorship Agreement were not made out. Though the cheques were dishonoured, the amount as against these cheques were subsequently paid to the respondent No. 1. It is denied that financial discipline was breached or petitioner had failed to meet the targets of minimum purchase.

5. While considering an application u/s 9 of the Arbitration & Conciliation Act this Court cannot make a detailed enquiry into the circumstances under which the contract was cancelled and cannot give a finding whether the termination of the contract was lawful or unlawful. Since there is an arbitration agreement, this aspect has to be dealt with by the Arbitrator. This Court also cannot give directions to respondent No. 1 for restoration of the contract. If the respondent No. 1 has terminated the contract in an unlawful manner, respondent No. 1 shall be liable for the consequences as may be determined by the Arbitrator. The Court cannot restore the position prior to termination of contract u/s 9 of the Arbitration & Conciliation Act, 1996. The jurisdiction of the Court u/s 9 is limited to the provisions mentioned therein and the order can be passed only to preserve the subject matter of the dispute and not to revert the process of the dispute. The petitioner has admitted that the amount of Rs. 70 lac was still due towards the respondent No. 1. Respondent No. 1 has also claimed damages and interests. The amount claimed by respondent No. 1 from the petitioner was much more than Rs. 1 crore, i.e. the bank guarantee amount. Prima facie, bank guarantee has been invoked as per the contract and the Court cannot issue an injunction against invocation of bank guarantee unless the

case of petitioner falls in the category where a fraud has been played upon the petitioner in obtaining bank guarantee or an irretrievable injustice was going to be caused to the petitioner.

6. It is not the case of the petitioner that a fraud was played upon the petitioner in obtaining bank guarantee. The case of the petitioner as pleaded and argued is that the irretrievable injustice would be caused to the petitioner. I consider that it is not a case of irretrievable injustice. In [U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers \(P\) Ltd.](#), Supreme Court observed that an allegedly maltreated party can sue the appellant for damages where there is apprehension for damages or injustice to be caused. In absence of special equity arisen for particular situation which may entitle the party on whose behalf guarantee is given to an injunction, the bank must pay to the party in whose favour the guarantee is given, on demand. Supreme Court categorically observed that it is only in exceptional cases that the Court should issue injunctions against invocation of bank guarantees.

7. The petitioner herein has miserably failed to show that it was a case of irretrievable injustice. The petitioner can always claim damages from the respondent in case the petitioner has suffered loss. It is a case where petitioner admittedly had to pay sum of Rs. 70 lac to the respondent No. 1 although the petitioner's case is that the petitioner was having goods of respondent No. 1 worth around Rs. 55 lac which the respondent should take back and out of the balance amount of Rs. 15 lac, the petitioner received credit notes from the respondent for part of the amount and the amount payable was only few lacs. I consider that this Court cannot enter into this controversy as what was the amount payable by the petitioner to the respondent in order to determine whether the bank guarantee has been rightly invoked or not.

8. In view of my above discussion, I find no merits in the petition. The petition is hereby dismissed.