

(2009) 11 DEL CK 0149
In the Delhi High Court
Case No : C.S. (OS) No. 292 of 2002

CEC Ltd.

APPELLANT

Vs

Indian Railway Corporation Company Ltd.

RESPONDENT

Date of Decision : 11-11-2009

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (2010) 166 DLT 132

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Shiv Khorana, for the Appellant; A.K. Singla and Pankaj Gupta, for the Respondent

Judgement

Valmiki J Mehta, J.

I.A. No. 768/1997 in CS(OS) No. 292/2002

1. These objections have been filed to the first Award dated 11.11.1996 passed by the sole Arbitrator.

2. The brief history with regard to what has transpired during the hearing of the objections is necessary before I deal with these objections on merits. The Arbitrator, in this case, had given a third Award dated 4/28.7.1997 and objections of IRCON to which award were dismissed by me alongwith objections of M/s. CEC Ltd. by my order dated 29.10.2009.

3. It has indeed been difficult to go through the record of this case because the complete arbitration record is not available in the Court. In view of the aforesaid position this Court had, way back on 12.9.2006, specifically by order stated that since the arbitration record is not available, to facilitate the hearing of the matter both the parties were directed to give a compilation of their respective arbitral record which they would be relying upon.

4. For the first time, I heard the Counsel for the non-objector in this case on

29.10.2009 when the objections with respect to third Award were dismissed on 29.10.2009. On that date, the present objections were adjourned subject to payment of costs of Rs. 25,000/- in view of the fact that Counsel for the objector was not ready. This case was also called out yesterday when out of the maze of the documents and the record filed it was endeavoured to dispose of the present objections. Since the electronic display board of this Court was not working and the Counsel for the non-objector was not present, this case was adjourned for today. Today firstly the objector in person, namely, Mr. S.K. Chopra, started arguing this case in the absence of Mr. Shiv Khorana. Thereafter, Mr. Shiv Khorana came and was allowed to continue with the arguments. During the course of the arguments, Mr. Shiv Khorana said that so far as the factual aspects are concerned since he was not present before the Arbitrator and since Mr. Chopra has argued his case Mr. Chopra should be allowed to address the arguments limited to the factual issues. This prayer was declined because the Court cannot hear different persons that is, first the Advocate and thereafter his client on different issues which are sought to be urged in this matter.

5. Ultimately, on account of whatever record is available and the serious limitation of the incomplete record this Court has endeavoured its best to hear and dispose of the objections.

6. The basic objections are two in number to the Award dated 11.11.1996. The first objection pertains to claim No. 3 forming part of issue No. 1 as decided by the Arbitrator. This claim pertains to the claim of the objector for repair charges of the machinery which was damaged and which machinery belonged to IRCON and which was repaired by the objector/contractor. Though Mr. Singla has referred to Clauses 21 of the G.C.C. and 8 of the SCC as also Clause 10B to contend that the responsibility was of the contractor/objector to maintain the machinery and to return it in good condition to IRCON, I do not propose to go into the merits of the matter because qua this claim the Arbitrator has held that such a claim falls outside the purview of the contract and therefore outside the purview of the arbitration clause.

7. Let us examine what has been held by the Arbitrator with respect to this claim. The Arbitrator has given basically two findings. The first finding is that the insurance policy for the plant and equipment/machinery is only for the damage to the machinery within the project area and not for every other area. The second finding is that the accident which caused damage to the machinery fell outside the project area. These are pure findings of facts based on the arbitration record, and which is not a complete record before me. In any case, the onus was on the objector to show as to why these factual findings are incorrect because sitting as a court hearing objections under Sections 30 and 33 of the Arbitration Act, 1940, more so in the present case with a long and chequered history, the findings of the Arbitrator have ordinarily to be accepted by the Court as correct unless the same are shown to be drastically incorrect amounting to perversity. I have asked Mr. Khorana to refer to me the insurance policy and also the facts

and findings as to how the accident did not happen beyond the project site/area but in fact happened within the project site. Mr. Khorana has expressed his inability to refer to any such documents. Ordinarily, therefore, objections in this regard would have been dismissed by me for non-prosecution because by the order dated 12.9.2006 parties were directed to file the necessary record on which they rely in support of their claims and which has not been done. In any case, since the Arbitrator has said that the accident happened outside the project area which is not covered by the insurance taken by the IRCON (and keeping in mind though not for the determination of this issue) since the basic liability under the contract to maintain the equipment and to return the equipment/machinery in proper condition to IRCON was of M/s. CEC Ltd., I am not agreeable that this objection can be sustained because the Arbitrator has rightly held the claim to fall outside the contract. The challenge in this regard to the Award for claim No. 3 for the reimbursement and repair charges of IRCON equipment of Iraqi Dinar 31,960.248 is therefore dismissed.

8. This takes me to the second issue which has been urged by the objector that is with respect to its claim for recoveries made by IRCON for the price of machinery that the Arbitrator was not justified in holding that the claims are barred by limitation. I may again note that the Arbitrator has arrived at a factual finding that this claim was not raised by the Contractor in the final bill dated 21.2.1984 but was raised thereafter for the first time on 27.5.1984. The Arbitrator also arrived at a finding of facts that this claim is thereafter not at all pursued thereafter right till litigation began in around 1991. In fact, even in 1990 when the objector wrote its letter dated 24.4.1990, no such claim was made. Accordingly, the Arbitrator has held that claim stands barred by limitation on 21.2.1991, the date of request for appointing an Arbitrator. At this stage, I may observe that though the Arbitrator has already held the claims to be barred by limitation, I find that effectively the Arbitrator has also said that the claims are in fact not live claims because neither the same were raised in the final bill dated 21.2.1984 nor in the letter of 24.4.1990 when other claims were raised for reference to arbitration. The complete silence of the petitioner for over 6-7 years is surely an indication that there were no live claims and in fact no claim or dispute survives under this head because admittedly in the final bill of the claimant/objector itself no such claim was raised and in fact in the Final Bill prepared by the objector itself the recoveries under this head were shown as proper recoveries. Accordingly, looking at it from the point of view of the same claim being of limitation or being not live claim this objection is not well merited. Mr. Khorana has sought to place reliance upon a contractual Clause which provides that the claims have to be raised after the completion certificate is issued. Mr. Khorana says that no completion certificate was issued and therefore his claims are within limitation. I may note that really the issue may not be actually with regard to applicability of this clause, but with regard to the fact that this claim was not even made in the final bill of the objector/claimant/contractor itself and in fact thereafter there was complete silence. Had the claim been a

genuine and a live one, the contractor would not have remained quiet and surely this claim would have featured in the letter dated 24.4.1990 as given by the contractor to IRCON. The finding of facts which have therefore been arrived at by the Arbitrator with respect to this claim being barred by limitation and effectively not being a live claim is such a finding where two views are possible and even if one view is a view which can be based upon Clause 19(6) of the contract, sitting and hearing objections under Sections 30/33 of the Act where the settled law is that the Court will not interfere merely because two views are not possible, I find that in the facts and circumstances of this case considering that I have already dismissed the objections of IRCON to the final Award wherein monies are now payable to the present objector and also the fact of the necessary record as regard the facts being not referred to, I have no hesitation therefore in dismissing these objections.

9. I have already imposed costs upon IRCON for dismissal of their objections by the order dated 29.10.2009. Accordingly, these objections are also dismissed with costs quantified at Rs. 50,000/- to be paid within a period of two weeks from today.

10. With these observations, the suit and the objections stand disposed of.

11. Counsel for both the parties want the Court to record that after passing of the present order, there are no pending objections of either of the parties to any of the Awards and if there are any such applications/objections, both the parties agree that they shall be deemed to be withdrawn today. The statements of the Counsel for the parties are therefore taken on record accordingly and accordingly, all the pending applications/objections, namely, CS(OS) No. 1007/97, CS(OS) No. 869/1991 and CS(OS) No. 741/1999 are disposed of.