

(1997) 03 DEL CK 0096

In the Delhi High Court

Case No : Objection Appeal No. 4681 of 1990 and Suit No. 851A of 1990

Har Govind Jaggi

APPELLANT

Vs

The Executive Engineer Delhi Development Authority and
Others

RESPONDENT

Date of Decision : 06-03-1997

Acts Referred:

Citation : (1997) 2 AD 742 : (1997) 1 ARBLR 425 : (1997) 66 DLT 304 : (1997) 116 PLR 69

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Kamal Nijhawan and V.K. Sharma, for the Appellant;

Judgement

M.K. Sharma, J.

(1) The petitioner filed a petition under Sections 14 and 17 of the Arbitration Act praying for a direction to the respondent No. 3, the Arbitrator, to file the original award dated 21.2.1990 in this Court along with the relevant records and proceedings and to make same a Rule of the Court.

(2) "THE respondent No. 1 awarded a contract of Acquisition of Stores relating to carriage of cement from Shakurbasti siding to Dda stores. During the year 1985-86, in respect of the aforesaid contract, disputes and differences arose between the petitioner and the respondents No. 1 and 2. Accordingly, in terms of the Arbitration Agreement executed between the parties, the disputes were referred to the sole arbitration of the respondent No. 3. After the Statement of Claims were filed before the Arbitrator and documents produced by the parties, the respondent No. 3 after hearing the parties made and published his award on 21.2.1990.

(3) On the aforesaid petition, notice was issued to the respondent No. 3 to file the award and the records of the arbitration proceedings in pursuance of which, the said award along with the records of the arbitration proceedings had been

filed in this Court. Notice of filing of the award was issued to the respondents No. 1 and 2 in pursuance whereof, the respondents filed an objection against the award which was registered as I.A. No. 4861/1990.

(4) Accordingly, by this judgment and order, I propose to dispose of the suit as also the aforesaid objection filed by the respondents No. 1 and 2.

(5) I have heard the learned Counsel appearing for the petitioner as also the learned Counsel appearing for the respondents.

(6) During the course of the arguments, the learned Counsel appearing for the respondents No. 1 and 2 submitted that the Arbitrator misconducted himself in making the award and that there are errors apparent on the face of the records in the award passed by the Arbitrator and, Therefore, the award is liable to be set aside.

(7) Claim No. 1: In respect of Claim No. 1, the contention of the learned Counsel for the respondents is that the Arbitrator has placed undue emphasis on the letter Exb. "C-23" in coming to his conclusion that the recovery of Rs. 21,642.00 effected by the respondents was not justified. I have considered the submissions of the learned Counsel for the respondents in the context of the evidence on record including Exb. "C-23". The said Exb. "C-23" clearly sets out that the Executive Engineer mentioned in the said letter that in view of the uncertain weather conditions prevailing and on non-availability of tarpaulins at the Station, the unloading of wagons in the open area might not be insisted upon. In the said letter, it was further stated that the delivery of cement will not be taken in the open area and that no demurrage will be levied on the wagons not unloaded in the open area. It is thus apparent from the aforesaid letter that the Executive Engineer did not allow unloading of the cement wagons in the open area. Under such circumstances, it cannot be said that the petitioner was, in any manner, responsible for not unloading the wagons for which demurrage/warfage was charged and the said amount was illegally withheld and deducted from the bills of the petitioner. Although under the conditions of the Contract, it was the liability of the petitioner to pay the demurrage/warfage charges, however, in view of the evidence on record, no such demurrage charged by the Railway for not unloading the cement in view of the specific directions of the Executive Engineer could be recovered from the Bills of the petitioner as he was not to be blamed for not Vol. unloading the cement. He, as the contractor was bound by the directions issued by the Executive Engineer of the respondent No. 1 and could not have acted and taken delivery of the cement from the Railways by violating the instructions of the Executive Engineer. In that view of the matter, the award passed by the Arbitrator holding that recovery of Rs. 21,642.00 from the bills of the petitioner to be not justified is based on reasons and is accordingly upheld.

(8) Claim No. 2 : This claim by the petitioner was for a sum of Rs. 10,197.50 deducted by the respondent for late supply of cement. The Arbitrator has held that the recovery made by the respondents for late supply of cement is in the

form of penalty and that the respondents have failed to establish that any loss had been caused to them for which such penalty could be imposed. Since the Arbitrator has come to a conclusion on facts that the respondents have failed to establish any loss having been incurred by them and, Therefore, no such recovery could be made from the petitioner, the same is a finding of fact arrived at by the Arbitrator and that Court cannot sit on appeal on such finding of the Arbitrator. The award is accordingly upheld.

(9) Claim No. 3 : This is a claim by the petitioner for a sum of Rs. 4,165.00 deducted by the respondents from the various bills for alleged short supply of cement bags. It is the case of the respondents that the petitioner supplied 42 bags of cement short. The recovery of the said shortage of cement bags was done in different R/A bills under special condition No. 7(f), that is, at the rate of Rs. 2,100.00 per metric tonne. According to the petitioner, before making the aforesaid recovery, no notice was ever issued to the petitioner for such short supply. The issue rate of cement was at Rs. 1,050.00 per metric tonne. The Arbitrator on appreciation of evidence has come to the conclusion that the penal rate recovery in the absence of any proof of loss suffered by the respondents is bad in law and hit by Section 74 of the Indian Contract Act. Accordingly, the Arbitrator held the recovery to the extent of Rs. 2,205.00 to be justified and the balance amount namely. Rs. 1,960.00 to be unjustified and allowed the said sum of Rs. 1,960.00 in favor of the petitioner. In other words, the recovery of 42 bags of cement at the actual issue rate was found to be justified by the Arbitrator and only to the extent of levying almost double the charge, that is, at the rate of Rs. 2,100.00 per metric tonne instead at the rate of Rs. 1,050.00 per metric tonne was found to be unjustified by the Arbitrator. Having regard to the submissions of the learned Counsel appearing for the respondents, I have carefully considered the award passed by the Arbitrator in this respect. The Arbitrator found that the respondents did not place on record any evidence of incurring any loss, if any, suffered by them. In view of the aforesaid findings of the Arbitrator to the effect that there is no evidence on record to show that any loss was suffered by the respondents, no penal rate in the nature of penalty could have been levied by the respondents. In this connection, reference may be made to a decision of this Court in *Salwan Construction Co. Vs. Union of India and Others*, wherein this Court held that the conclusion of the Arbitrator that in absence of loss having been suffered or the proof of actual loss, if suffered, the department was not entitled, having already recovered the issue rate, to recover double the issue rate of cement consumed by the claimants in excess of the theoretical calculations. The aforesaid legal principle was laid down in the said decision following earlier decisions of this Court in *Mis. R.S. Builders v. Union of India* in Suit No. 1092- A/ 1984 disposed on 24.2.1986 and in *M/s .Mohinder Nath & Co.v.Union of India* in Suit No. 103-A/1985. In the said decisions also, it has been laid down that the Union of India was not entitled to recover at double the rate without proving of actual damage having been suffered by it. In my considered opinion, the ratio of the aforesaid decisions of this Court is squarely applicable to the facts and

circumstances of the present case and, Therefore, the award passed by the Arbitrator in respect of this claim appears to be in conformity with the aforesaid ratio laid down by this Court. This part of the award is accordingly upheld.

(10) Claim No. 7 : In respect of this claim for a sum of Rs. 10,000.00 towards refund of rebate deducted by the Department, the arbitrator has allowed a sum of Rs. 8,296.88. On consideration of the records, the arbitrator found that the rebate availed of by the respondents is not justified and that the respondents have failed to honour their commitments in terms of the agreement. Since the aforesaid finding by the arbitrator is on appreciation of evidence and no error apparent on the face of the record could be pointed out by the learned Counsel appearing for the respondents, I uphold the said part of the award.

(11) Claim No. 8: In respect of Claim No. 8, the arbitrator has awarded an interest at the rate of 12% per annum on the awarded amount from the date of the award to the date of payment or decree whichever is earlier. In view of the settled law laid down by the Supreme Court, there is no error in the said award passed by the arbitrator and accordingly, the same is upheld.

(12) Additional Claim No. 1 In respect of additional Claim No. 1, the arbitrator has awarded a sum of Rs. 675.00 in respect of claim for the same amount recovered from the final bill of the petitioner without elaborating reason to the said recovery. The conclusive finding of the arbitrator is that the respondents have failed to substantiate with cogent evidence that petitioner was responsible for damage .to Railways and that such type of recovery is not covered under any provisions of the contract agreement. No valid objection could be raised by the respondents in respect of this award and accordingly, the said award is upheld.

(13) In the result, the objection filed by the respondents Nos. 1 and 2 stands rejected as having no merit. The award passed by the arbitrator is made a Rule of the Court. In addition, the petitioner shall be entitled to interest at the rate of 15% per annum from the date of decree till realisation in terms of Section 29 of the Arbitration Act. No costs.