
(2018) 03 DEL CK 0244

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 536 Of 2016

Mideast Pipeline Products Through Proprietor Maninder Singh APPELLANT
Vs

Fernas Construction Co. Ltd RESPONDENT

Date of Decision : 19-03-2018

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 28(3), 34, 43(4)
Sale Of Goods Act, 1930 — Section 15, 16

Citation : (2018) 03 DEL CK 0244

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Jayant Mehta, Rahul Kukreja, C.D. Mulherkar, Sahil Tagotra, Sahil Tagotra Tiwari, Prashant Kumar,

Final Decision : Allowed

Judgement

Navin Chawla, J

I.A. No.3771/2018

This application has been filed by the respondent seeking to address the oral arguments.

The petition had been heard and reserved for judgment on 05.03.2018 in absence of the counsel for the respondent.

For the reasons stated in the application, the same is allowed and the learned counsel for the respondent has been given an opportunity to make oral submissions in opposition to the petition.

O.M.P. (COMM) 536/2016

1. This petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 13.05.2015 passed by the Sole Arbitrator adjudicating the disputes between the parties.

2. The disputes between the parties arose out of the Work Order/contract dated 05.05.2010 by which the respondent had taken on hire two "Pipelayer Caterpillar 583" (hereinafter referred to as 'CAT 583') for a period of three months on a monthly hire charge of Rs.3,07,000/- per unit. Some of the conditions of this contract are necessary to be reproduced for the purpose of the present adjudication:

"1. Scope of work:-

To provide a equipment on hire basis as per details and specification given below:

Particulars/specification of Equipments & hiring rates/prices for the equipment shall be as given here under:

Item

Minimum Duration of work/order contract

Unit

Quantity

Unit rate per month (Rs.)

Pipelayer, Caterpillar 583

3 months

Nos.

2

307000/-

Any Change in the specification will not be acceptable. The equipment shall be in good condition. In case equipment is found to be not in good condition the same shall be returned back and no payment whatsoever including the mobilization/demobilization charges shall be payable. The decision of FCCL shall be binding to confirm the condition of the equipment.

The hiring rates/price, tor above equipments shall be for a monthly working/operation for pipe layer, for the stipulated period/duration of this work order The said rates are inclusive one trained operator and one helper per machine at site."

"28 Supercession Entire work order/contract:

This work order/contract constitutes and represents the entire work order/contract between the parties with regard to rights and obligation of each of the parties and cancels and supersedes all prior understandings, letters, representations, negotiations between the parties in respect of the matters dealt with herein."

(Emphasis supplied)

3. The two equipments were supplied by the petitioner to the respondent on 08.05.2010 when they were dispatched from the petitioner's yard at Derabassi (Punjab) and Panipat (Haryana). It is the case of the petitioner that before making the consignment of the equipments, the same had been duly inspected by the representative of the respondent. This is denied by the respondent.

4. On receipt of the equipment, the respondent vide its email dated 17.05.2010 complained as under:

"As per inspection your pipe layer make-Caterpillar model 583. These pipe layer didn't fulfill our requirement. Pipe layer boom are of 40 ton not 65 ton. Secondly pipe layers mechanisms are mechanical not hydraulic."

5. The respondent reiterated its complaint vide email dated 31.05.2010 and the same is reproduced herein below:

"We have received two no's pipe layer from your side but as per clause 1, after inspection we found your pipe layers are not suitable for 70 ton. These pipe layers don't fulfill our requirement and all in bad & not with family boom and no counterweight. Due to these we intently return the same. Kindly return our advance payment and security deposit."

6. The petitioner responded to the above email vide its email dated 02.06.2010 inter-alia claiming that the equipments had been duly inspected by the representative of the respondent before being dispatched to their work place. I may at this stage note that the email admits that what was supplied to the respondent was not the hydraulic machine for which the brochure has been sent by the petitioner to the respondent. The petitioner by this email further called upon the respondent to return the equipments paying at least one month rental for the same and undertook to pay the balance on return of the equipment.

7. The respondent vide its email dated 24.06.2010 reiterated that the pipelyer is not suitable for 70 ton and does not satisfy its requirements. The said email is reproduced herein below:

"We have received two no's pipe layer from your side but As per clause no.- 1, after inspection at site we found your pipe layer are not suitable for 70 ton. These pipe layers don't fulfill our requirement and all in bad & not with family boom and no counterweight. These pipe layer laying idle at yard from the date of receiving at our site. Kindly demobilized equipments & return our Advance payment security deposit. For more conversation you can discuss with our higher management (Mr. Rohit Singhal- 9650784555 (CEO) & Mr. Sanjiv Malhotra -09810120055 (Head- South East Asia))."

8. The petitioner vide its email dated 24.06.2010 reiterated that the equipment supplied is the one which was selected by the respondent and the respondent should have known its capacity. They further reiterated that the equipment has been supplied only after due inspection and therefore, if the equipment is not satisfying the purpose for which it was taken by the respondent, the petitioner

cannot be blamed for the same. The petitioner further called upon the respondent to return the equipment in accordance with Clause 2 and 3 of the contract.

9. The respondent, vide its email dated 25.06.2010 called upon the petitioner to demonstrate that the equipment supplied to the respondent is suitable for 70 tons. The said email is reproduced herein below:

"We are not accepting your below email point. Booms are of 40 T. counter weight is not sufficient, please demonstrate that they are suitable for 70 T."

10. By an email of the same day, the petitioner replied as under:

"1. xxxx

2. Please let us know in which communication you have started your requirement (70 Ton) and where have we committed to provide these requirements. The contract is for CAT 583 and hence whatever are its capacities.

3. xxxx

4. We offered you CAT 583 which were sent to you and have been inspected by the machines and have been loaded in your presence. Everything you have claimed thereafter does not stand and in fact if you are making these accusations after you yourself inspected the machine and now you are casting doubts on your own competence and integrity and hence we cannot be responsible for your mistakes.

5. The offer for inspection and your visit for inspection was the time for any demonstrations of lifting capacities and not after you have signed contracts and taken our machines."

11. The respondent, vide its letter dated 04.08.2010 called upon the petitioner to refund the advance rent paid by it. The contents of this letter are also of importance for the purpose of the present adjudication and the same are reproduced herein below:

"In continuation with our work order and our request for quotation (email) dated 05.05.2010 earlier and our frequent emails, we regret to inform that side boom provided to us are not 70T capacity and cannot lift 70T.

The equipments capacity cannot be inspected prior to transportation to site, you are therefore requested to refund the advance and the rent paid by FCCL immediately so that we can transport the machines (Booms already handed over to you back) at the earliest and close the work order. No further claims or cost impact shall be entertained under this work order."

12. Finally, the respondent returned one of the equipment along with some parts of the second equipment on 29.07.2010.

13. The petitioner vide its letter dated 07.09.2010 called upon the respondent to

return the balance of the second equipment as well. It reiterated that the machines that were given to the respondent were 'CAT 583' which are in accordance with the specification given in the work order.

The respondent, however, insisted on the return of the advance before returning the second equipment. This led to a criminal complaint being filed by the petitioner against the respondent and it was only on 03.10.2011 that the balance of the second equipment was returned by the respondent to the petitioner.

14. The disputes before the Arbitrator can be summarized into the following two issues:

1. Whether the petitioner was to supply to the respondent a pipelayer with 70 tons capacity or the named equipment in the work order i.e CAT 583?
2. Whether the equipment actually supplied by the petitioner to the respondent was CAT 583 as specified in the work order or not?

15. The Arbitrator, relying upon the letter dated 29.04.2010 from the petitioner to the respondent, the email dated 01.05.2010 from the respondent to the petitioner and the return email dated 01.05.2010 from the petitioner to the respondent has held that the petitioner was to supply a 70 tons capacity pipelayer to the respondent and having failed to do so, is in breach of the agreement. The relevant finding of the Arbitrator in this regard are quoted herein below:

"8.7 On the strength of these two clauses of the Work Order set out in para 8.4, learned counsel for the claimant submitted that the document marked Ex CW1/2 is completely obviated from consideration. The Work Order (Ex. CW 1/3) should be taken to be a complete document, and any external aid is legally impermissible. The contention completely overlooks the underlined portions of clause 28, set out herein above. The net result is that the capacity of the equipments needed by the claimants has not been stated in the Work Order {Exhibit CW 1/3}, and in view of the requirement clearly stated by the respondent as well as the claimant in Ex.CW1/2, it is evident that the intention of the parties was for supply of CAT 583, of 70 tons capacity. In other words, the capacity of the equipment not having been stated in the Work Order, the clauses relied upon by the claimant do not help the claimant. The irresistible conclusion, therefore, is that the parties had agreed for supply of CAT 583, of the capacity of 70 tons, and of hydraulic variety."(Emphasis supplied)

16. In my opinion, the Arbitrator being a creature of the agreement itself cannot act contrary to the terms of the agreement. In the present case, the agreement, as quoted above, had mentioned the equipment to be supplied by a brand name. There was absolutely no ambiguity in the terms of the contract which required any interpretation from the Arbitrator. It is only in case where a clause of the agreement is capable of interpretation in different manner and the Arbitrator interprets it, the Court is precluded from interfering with such award only on the

basis that the interpretation, though possible or plausible, is not how the Court would like to interpret it. In the present case, the Arbitrator was not required to interpret the terms of the agreement at all as there was no ambiguity in the terms of the Supply Order/Agreement. The prior correspondence relied upon by the Arbitrator had culminated in the final Work Order/contract. Therefore, the Contract has to be read on its own terms. Of course, if the terms of the contract are ambiguous in any manner, the Arbitrator can look into the prior negotiations to find what the parties intended, however, where the terms of the contract are clear and unambiguous, the Arbitrator cannot hold that these clear and unambiguous terms do not reflect the true intent of the parties as may be ascertained from the negotiations or correspondence exchanged between the parties prior to entering into such contract. *Naihati Jute Mills Ltd. v. Khyaliram Jagannath* AIR 1968 SC 522; *Joseph Darmanin v. Carmel Micallef*, AIR 1946 PC 50.

17. In *Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL)*, 2017 SCC Online 1239, the Supreme Court has cautioned that the 'business efficacy test' cannot be applied by the Court to substitute to its own view of the presumed understanding of the commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regards to the intention of the parties. Therefore, there was no occasion for the Arbitrator to have, in the name of interpreting the contract, re-written the same by imparting an alleged intent gathered by it from the correspondence exchanged between the parties prior to entering into the contract.

18. In *Food Corporation of India vs. Chandu Construction and Anr.* (2007) 4 SCC 697, the Supreme Court had held that the express covenants of contracts cannot be ignored and a claim for payment of money cannot be granted on some vague plea of equity. As the Arbitrator derives its authority from the contract, if he acts in disregard of the same, he acts without jurisdiction. A deliberate departure from the contract amounts to not only manifest disregard of his authority but would also be a violation of Section 28(3) of the Act. Paragraphs 11 to 15 and 19 from the said judgment are reproduced hereinunder:-

"11. It is trite to say that the arbitrator being a creature of the agreement between the parties, he has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the court. We may, however, hasten to add that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error (see *Associated Engg. Co. v. Govt. of A.P.* [(1991) 4 SCC 93] and *Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises* [(1999) 9 SCC 283]).

12. In this context, a reference can usefully be made to the observations of this

Court in *Alopi Parshad & Sons Ltd. v. Union of India* [AIR 1960 SC 588] wherein it was observed that the Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The Court went on to say that in India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into will justify a court, while holding the parties bound by the contract, in departing from the express terms thereof. Similarly, in *Naihati Jute Mills Ltd. v. Khyaliram Jagannath* [AIR 1968 SC 522] this Court had observed that where there is an express term, the court cannot find, on construction of the contract, an implied term inconsistent with such express term.

13. In *Continental Construction Co. Ltd. v. State of M.P.* [(1988) 3 SCC 82] it was emphasised that not being a conciliator, an arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the court provided his error appears on the face of the award.

14. In *Bharat Coking Coal Ltd. v. Annapurna Construction* [(2003) 8 SCC 154] while inter alia, observing that the arbitrator cannot act arbitrarily, irrationally, capriciously or independent of the contract, it was observed, thus: (SCC pp. 161-62, para 22)

"22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."

15. Therefore, it needs little emphasis that an arbitrator derives his authority from the contract and if he acts in disregard of the contract, he acts without jurisdiction. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action (also see *Associated Engg. Co. v. Govt. of A.P.* [(1991) 4 SCC 93]).

xxxxx xxxxx

19. From the above extracted terms of the agreement between FCI and the claimants, it is manifest that the contract was to be executed in accordance with the CPWD specifications. As per para 2.9.4 of the said specifications, the rate quoted by the bidder had to be for both the items required for construction of the godowns, namely, the labour as well as the materials, particularly when it was a turnkey project. It is to be borne in mind that filling up of the plinth with sand

under the floors for completion of the project was contemplated under the agreement but there was neither any stipulation in the tender document for splitting of the quotation for labour and material nor was it done by the claimants in their bid. The claimants had submitted their tender with eyes wide open and if according to them the cost of sand was not included in the quoted rates, they would have protested at some stage of execution of the contract, which is not the case here. Having accepted the terms of the agreement dated 19-9-1984, they were bound by its terms and so was the arbitrator. It is, thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. We are of the view that the arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low and another contractor, namely, M/s Gupta and Company had been separately paid for the material. The claimants' claim had to be adjudicated by the specific terms of their agreement with FCI and no other."

19. Learned counsel for the respondent has relied upon the judgment of the Supreme Court in *Commercial Auto Sales Private Limited v. Auto Sales (Properties)*, (2009) 9 SCC 620; *Mcdermott International Inc. V. Burn Standard Co. Ltd & Ors.*, (2006) 11 SCC 181; *National Highway Authority of India v. ITD Cementation India Ltd.* (2005) 14 SCC 21; *National Highway Authority of India v. JSC Centrodorstroy* (2016) 12 SCC 592; and order dated 03.07.2009 passed by this Court in OMP 338/2009 titled *Samho Gunyong Co. Ltd. v. Flakt (India) Ltd. & Ors.* to contend that the Arbitrator was obligated to take into consideration the correspondence exchanged between the parties while interpreting the terms of the contract and interpretation of a contract being a matter for the Arbitrator to determine, this court would not substitute its view for that of the Arbitrator.

20. While there can be no doubt on the above-stated proposition, at the same time, where the Arbitrator has wandered outside the contract and ignores the express covenants thereof or puts an interpretation to the contract that is wholly contrary to the express terms thereof, the court shall not be powerless to interfere with such award. *Food Corporation of India v. Chandu Construction*(supra); *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.* (2007) 8 SCC 466; *Security Printing and Minting Corporation of India Ltd. v. Gandhi Industrial Corportion* (2007) 13 SCC 236. As observed above, the equipment being ordered by brand name, there is no question of interpretation left for the Arbitrator to consider. Therefore, these judgments, in my opinion would have no application to the facts of the present case.

21. In this regard, though not strictly applicable, learned counsel for the petitioner has rightly relied upon Section 15 and Section 16 of the Sale of Goods Act, 1930, which are reproduced as under:-

"15. Sale by description.-- Where there is a contract for the sale of goods by

description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.

16. Implied conditions as to quality or fitness,- Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:-

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

Xxxxx"

22. The above provision clearly shows that where there is a contract for sale (in this case the contract of hire) of a specified article under its trade name, there is no implied condition as to its fitness for any particular purpose. Applying the said principal to the facts of the present case, once the equipment to be supplied by the petitioner to the respondent was mentioned by the trade name i.e. 'pipelayer Caterpillar 583', its performance or non performance for the particular purpose required by the respondent, was of no importance and could not have been used for the purpose of rewriting the contract between the parties.

23. Even otherwise, the prior correspondence relied upon by the Arbitrator also cannot support the interpretation that he has put to the contract or give rise to the implied term that he imported into the agreement.

24. The negotiations between the parties seem to have been initiated by the respondent through some teleconversation, followed by the quotation sent by the petitioner for "583 Pipelayer/Side Boom Machine" vide its letter dated 29.04.2010. There is no mention of the capacity of this machine in the letter/quotation.

25. By its email dated 01.05.2010, the respondent informed the petitioner that it required two 70 tons capacity pipelayer for its project and inquired if the petitioner was interested in supplying such pipelayer on hire basis. The petitioner by its email(s) of the same date supplied the brochure of CAT 583 and also its quotation. Interestingly, the brochure though mentions the maximum lifting capacity of the machine as 65kgs., it also mentions the lift capacity at tipping point as 35 kgs and working range as around 25 kgs. Therefore, certainly CAT

583 did not have the capacity of 70 tons as allegedly required by the respondent. Still, the respondent, who certainly cannot claim itself to be a layman, entered into the contract with the petitioner without mentioning the capacity of the machine required by it.

The maxim caveat emptor would clearly be applicable to a case of this nature. It is also of relevance to note that the contract/Work Order dated 05.05.2010 is on the letter-head of the respondent, still the respondent did not prescribe the capacity of the machines in the Work Order. The only inference is that the capacity of the machine was not a condition of the contract and no such implied condition can be imported into the contract. The Arbitrator, therefore, has clearly rewritten the agreement between the parties by importing conditions that were not found in the agreement itself.

26. The next question involved in the present case is whether the petitioner did supply to the respondent pipelayer Caterpillar 583 or not?.

27. I have reproduced the above correspondence addressed by the respondent to the petitioner in detail only to show that till 15.01.2011 i.e. almost more than seven months after the supply of the equipments, there was no complaint made by the respondent that the equipment supplied is not the pipelayer Caterpillar 583 or a substitute version thereof. Even by the email dated 15.01.2011, the dispute raised by the respondent was not that the equipment supplied is not Cat 583. The said email is reproduced herein below:

"1. Both the equipment supplied shall be tested for its properties as per the Manufacture CAT 583. This shall cover the aspects or equipment condition, load lifting capacity, essential counterweights for lifting the maximum load.

2. The results shall decide upon the agreement of final settlement of the hire."

28. By another email of the same date, the respondent had stated that if the test passed the acceptable limits of CAT 583, it would pay the entire rental to the petitioner. The said email is reproduced herein below:

"Further to email below it has also been agreed that if the tests passes to the acceptable limits of CAT 583, FERNAS shall pay the rent till date and if it fails MIDEAST shall pay 5 times the advance paid. Please confirm for us to proceed with the tests."

29. A reading of the above two emails would show that it was not the case of the respondent that the equipment supplied is not CAT 583. The only test the respondent wanted was whether the machine performed as per the brochure published for the said machinery. This again cannot be a condition put on the petitioner who is the supplier of the equipment and not the manufacturer thereof.

30. It was only with the email dated 21.03.2011 that the respondent for the first time raised a grievance that the machinery supplied by the petitioner to the respondent was in fact not CAT 583. This email, as is evident from its date, is

after almost nine months from the supply of equipment. Further, respondent curiously stated that the respondent was aware of this fact immediately after supply of the equipment. Paragraph 12 of the letter alleged that the operator of the petitioner had accepted this fact even at the time of inspection and did not agree to operate the equipment at the time of inspection. If this was so, why the respondent did not return the machines immediately, has not been explained.

31. The above correspondence would clearly show that for a long period of time, there was no dispute between the parties that the equipment supplied by the petitioner to the respondent is not the one which is mentioned in the Work Order. The dispute was only whether it is capable of 70 tons operation or not. It is only after a long lapse of time that the respondent started raising the grievance that the equipment supplied is in fact not the one mentioned in the Work Order.

32. The Arbitrator on this issue has held as under:

"It may incidentally be stated that the learned counsel for the respondent during the course of submissions stated that it would have raised no objection if the machines had performed upto 65 ton as the CAT 583 brochure provides its lifting capacity as such.

This was followed by the next e-mail dated 31.05.2010 (CW1/14), from the respondent to the claimant, regarding return of the two machines. The text of the e-mail reads as follows-

"We have received two nos. pipe layer from your side but as per clause 1, after inspection we found your pipe layers are not suitable for 70 ton. These pipe layers don't fulfill our requirement and all in bad and not being with family boom and no counter weight. Due to these we intently return the same. Kindly return our advance payment and security deposit."

Such prompt communications from the respondent to the claimant, conveying in no uncertain terms supply of grossly deficient machines, read with the position that it had deposited a sizeable sum of Rs.9,84,242.00 with the claimant by way of advance and security deposit well before the equipments were mobilised, speaks volumes as to the bonafides of the respondent. It is thus manifest on the face of it that the claimant did not have in its possession CAT 583, of 65/70 tons, of the hydraulic variety, and had supplied different equipments, possibly a converted Dozer a converted of 40 tons, and the mechanical variety. It is evident that the claimant, knowing full well that it did not have machines of the contracted specifications, purposely and with the motive of wrongful gain had supplied different equipments and of different specifications and hence avoided all attempts to have the equipments tested in the presence of a Caterpillar representative as sought for by the respondent on several occasions. This was clearly an act of breach of agreement on the part of the claimant who took a chance of sending such equipments possibly in the hope that it may not be detected, or that the respondent will not pursue the matter as it has done, and the claimant had already pocketed Rs.9,84,242.00P."

33. The above would show that the Arbitrator has not considered the effect of the delay in making of the complaint by the respondent nor has discussed any evidence led by the parties on this issue. The Arbitrator draws an adverse inference against the respondent for it not agreeing to put the equipment to test, without even appreciating if the insistence on such test was in accordance with law or contract. The finding of the Arbitrator at best can be summarized as conjecture and not based on the evidence.

34. Another important issue in the present case as been noted above is that one of the equipment had been returned by the respondent to the petitioner on 29.07.2010, while the second equipment had been returned, only after filing of a criminal case, on 03.10.2011. The petitioner had raised a claim for wrongful detention of this equipment by the respondent. Learned counsel for the respondent has been unable to show any provision in the contract or law which would allow the respondent to retain the equipment for the advance rent paid by it to the petitioner. In any case, this was an issue to be determined by the Arbitrator while considering the claim of the petitioner. Unfortunately, the Arbitrator has dismissed the claim of the petitioner in a cursory manner, which is reproduced herein below:

"In view of clause 1 of the Work Order set out hereinabove, if the equipment is not in good condition, the same shall be returned back and no payment whatsoever including the mobilization/demobilization charges incurred by the respondent shall be payable with effect from the date of such expenditure till the date of refund. In view of the conduct of the claimant, the entire consequences adverse to the claimant shall be attributable to it, for example, the delay as well as the cost involved in mobilization/demobilization of the equipment on both sides of the journey, deterioration of the equipments, if any, in the respondent's yard (for which there is not sufficient evidence) etc. The respondent cannot at all be held responsible for the same. Thus the claims of the claimant must be rejected."

35. The Arbitrator therefore, has not considered the claims made by the petitioner at all and has rejected the same without giving any cogent reason.

36. The Arbitrator, in the Impugned Award, has further awarded damages of approximately Rs. 36 lakhs in favour of the respondent for the alleged breach of contract by the petitioner. As noted above, the contract in question was for hire of two machines at the monthly rent of Rs. 3,07,000/- per month per machine and for a period of three months. The total contractual value was, therefore, 18,42,000/- plus taxes. The damages awarded are therefore, totally unreasonable especially when by its email dated 02.06.2010, the petitioner had offered to refund back the advance rental paid by the respondent after deducting one month's rental.

37. In view of the above, the Impugned Award is set aside, leaving it open to the parties to initiate such appropriate proceedings as may be available to them in

law. If any such proceeding is initiated, the parties shall be entitled to claim the benefit of limitation in terms of Section 43(4) of the Act.

38. The petition is allowed in the above terms with no order as to cost.