
(2010) 02 DEL CK 0249
In the Delhi High Court
Case No : OMP. No. 411 of 2005

M/s. Vijay Trading and Transport Co.

APPELLANT

Vs

Central Warehousing Corporation

RESPONDENT

Date of Decision : 19-02-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2010) 02 DEL CK 0249

Hon'ble Judges : G.S. Sistani, J

Bench : Single Bench

Advocate : Rajiv Mishra, for the Appellant; K.K. Tyagi and Mr. Iftekhhar Ahmed, for the Respondent

Judgement

G.S. Sistani, J.—The present petition, are the objections filed by M/s. Vijay Trading and Transport Company against the award dated 18.3.2005 passed by Sh.S.P. Singla, the sole arbitrator. The facts of this case are that the respondent / claimant had entered into a regular handling and transport contract with the petitioner for a period of two years from 28.8.2001 to 27.8.2003 in respect of Inland Container Depot (I.C.D.) Babatpur, Varanasi. Parties executed an agreement on 30.8.2001. Since the performance of the contract on the part of petitioner herein was not found satisfactory particularly in regard to export loaded container no. TRIU-4991702X40", which was illegally detained, though the same was required to be delivered to the designated Port, the respondent terminated the contract. According to the respondent /claimant various show cause notices were issued to the petitioners and having got no satisfactory response and on account of pressure being exerted from the aggrieved users of the ICD, the claimant /respondent made arrangement for an alternate H&T contractor at the risk and cost of the petitioner w.e.f. 5.1.2002 after issue of notice to the petitioner herein. The contract was finally terminated on 21.2.2002 and the work was got executed for the remaining unexpired period of contract at the risk and cost of the petitioner herein. The case of the petitioner as set up before the Arbitrator was that after the award of the contract, the petitioner

made sincere efforts to execute the work with due diligence, however, the container no. TRIU-4991702X40", was illegally detained by M/s.ODC Roadways of which one Sh.Prabhu Narayan Singh was the proprietor. It was also argued that the petitioner herein had taken all possible steps including legal proceedings in various courts including Allahabad High Court for speedy recovery of the container, but in spite of the efforts made by the petitioner herein, the claimant / respondent herein terminated the contract illegally, withheld their payment of pending bills and also forfeited the security deposit and earnest money in respect of ICD Saharanpur. On the pleadings of the parties, initially the following issues were framed by the arbitrator:

- (i) Whether the termination of the contract, vide order dt.21.2.2002, issued by the claimant is valid?
- (ii) Is the claimant entitled to a sum of Rs.50,05,820/- (including Rs.10,98,464/- on account of excise duty) towards loss of container of M/s.Bholanath Industries Ltd., Varanasi from the respondent?
- (iii) Is the claimant entitled to a sum of Rs.6,73,475/- towards risk & cost the respondent?
- (iv) Is the claimant entitled to a sum of Rs.15,38,981.32 towards recovery to be made by Bank of Maharashtra?
- (v) Is the claimant entitled to a sum or Rs.1,34,000/- towards services rendered by M/s.Ifran Crane Services for handling the containers?
- (vi) Is the claimant entitled to a sum of Rs.8,720/- towards payment of wages to be made to be labourders of the respondent?

2. Subsequently it was decided with the consent of the parties that every claim and counter claim raised by the parties should become an issue for adjudication. Issue No.1 was however, retained for adjudication.

3. The followings were treated as issues/ claims by the sole arbitrator while deciding the objections :

- 1. Whether the termination of the contract, vide order dated 21.2.2002 issued by the Claimants is valid?
- 2. Are the claimants entitled to a sum of Rs.27,81,261/- plus interest towards illegal detention of export loaded container of M/s.Bholanath Industries Ltd., Vasanasi from the respondents?
- 3. Are the claimants entitled to a sum of Rs.7,99,858/- towards risk and cost amount for unexpired period of contract from the claimants?
- 4. Are the claimants entitled to a sum of Rs.10,98,464/- towards excise duty payable to the Department of Central Excise & Customs Varanasi.
- 5. Are the claimants entitled to a sum of Rs.2,76,552/- towards custom duty

payable to the Department of Central Excise & Customs.

6. Are the claimants entitled to a sum of Rs.15,38,981.32/- towards the claim lodged by Bank of Maharashtra through Debt Recovery Tribunal.
7. Are the claimants entitled to a sum of Rs.1,34,000/- towards services rendered by M/s.Irfan Crane Service for handling the containers.
8. Are the claimants entitled to a sum of Rs.8,720/- towards payment of wages to be made to the labours of the respondents?
9. Are the claimants entitled to a sum of Rs.1,63,125/- towards payment of container detention charges to M/s. Shipping Corporation of India.
10. Are the claimants entitled to a sum of Rs.10,68,000/- towards business loss.
11. Are the claimants entitled to claim towards handling and transportation of illegally detained container no.TRIU 4991702x 40" from Ghaziabad to I.C.D. Varanasi amounting to Rs.23,000/-.
12. Are the claimants entitled to claim towards TA/DA of official in regard to retrieval of illegally determined container amounting to Rs.67,038/-.
13. Are the claimants entitled to claim towards legal fees Rs.1,27,324/-.

Counter Claim

1. Are the respondent entitled to a sum of Rs.8,40,536/- towards payment of pending bills.
2. Are the respondent entitled to a sum of Rs.85,300/- towards payment of illegal deductions made by the claimant in respect of bills dated 30.9.2001, 15.10.2001 and 31.10.2001.
3. Are the respondent entitled to a sum of Rs.4,30,284/- towards refunds of security deposit.
4. Are the respondent entitled to a sum of Rs.15,75,484/- including interest of Rs.4,64,815/- towards illegal detention of the fork lift.
5. Are the respondent entitled to a sum of Rs.1,66,800/- plus interest of Rs.61,113.60/- making a total of Rs.2,27,913.60/- towards payment of damages for illegal use and detention of hand trolleys (4 in Nos.) employed at I.C.D., Varanasi.
6. Are the respondent entitled to a sum of Rs.25,22,500/- Plus Rs.10,53,645/- as interest for the remaining period of contract.
7. Are the respondent entitled to a sum of Rs.34,02,476/- together with interest towards loss of goodwill.
8. Are the respondent entitled for interest due to withholding of the payment of the transport bills of Rs.8,40,536/-.

4. The objections have been pressed with respect to the following claims which have been allowed by the arbitrator and are summarized as under:

Issue no.1 regarding the validity of the termination of the contract was decided in favour of the claimants and the termination of the contract vide order dated 21.2.2002 was upheld. Secondly claim no.11 was allowed by the arbitrator and the claimants were held entitled to recover a sum of Rs.23,000/- from the respondent towards the cost incurred for transporting the container from Ghaziabad to I.C.D. Varanasi. Thirdly the claim no.12 was allowed by the arbitrator and the claimants were held entitled to recover a sum of rs.67038/- from the respondent regarding TA/DA of the officials towards retrieval of illegally detained container.

That the claim no.8 which was regarding the non payment of labourer charges it was directed by the arbitrator that the claimant should investigate the claim and if found justified should first pay and then recover from the outstanding bills of the respondent. Similarly claim no.9 which was regarding the payment of detention charges of M/s.Shipping Corporation of India it was directed by the arbitrator that the claimants should first negotiate with the Shipping Corporation of India and pay the bill within a month of the award and recover the amount actually paid not exceeding Rs.1,63,125/- from the respondent outstanding bills.

The counter claim no.1 raised by the respondent M/s.Vijay Trading & Transport Company regarding the payment of pending bills of Rs.8,40,536/- was allowed by the arbitrator and the respondent M/s.Vijay Trading & Transport Company were held entitled to the payment of the aforesaid amount from the claimant i.e. C.W.C. The counter claim no.2 raised by the respondent M/s.Vijay Trading & Transport Company regarding payment of Rs.85,300/- which was illegally deducted by the claimants C.W.C. from the bills of the respondent dated 30.9.2001, 15.10.2001 and 31.20.2001 was partly allowed and the claimants C.W.C. were directed to pay Rs.57,000/- to the respondent. The counter claim no.8 regarding payment of interest was partially allowed by the arbitrator and the claimant / respondent Central Warehousing Corporation was directed to pay interest at the rate of 12% on the amount payable to the petitioner M/s.Vijay Trading & Transport Co. if the same was paid within one month and at the rate of 15% if the same was paid after one month.

5. While deciding the objections to the award it must be kept in mind that the scope of hearing objections u/s 34 of the Arbitration and Conciliation Act, 1996 is limited and narrow. The court while deciding the objections to the award does not sit as a court of appeal neither court can examine the correctness of the award on merits with reference to the material produced before the Arbitrator. It has been held in the case of Puri Construction Pvt. Ltd. Vs. Union of India (UOI), that Court while deciding objections to an award does not sit as a court of appeal over the view of the arbitrator by re-examining and re-assessing the materials. It has also been consistently held that the approach of the Court should be such to support the award if it is not unreasonable rather than to declare it illegal. Courts

should restrain themselves from re-apprising the evidence and even if the Courts are inclined to take a view which is different from that taken by the Arbitrator, the Court is not entitled to substitute its own view over that of the Arbitrator. The Supreme Court in the case of D.D. Sharma Vs. Union of India (UOI), has held that an Arbitrator is a Judge chosen by the parties and his decision should ordinarily be final. On careful examinations of various judgments, it is clear that the award passed by the Arbitrator can be challenged u/s 34 of the Act on the grounds that the award is either illegal or is against the contractual provisions of the parties or the award is so perverse that it shocks the judicial conscience of the Court. Merely because the court could come to a different conclusion on the same set of facts and evidence on record would not be a ground to interfere unless the finding is perverse (DDA Vs. Bhagat Cong. Co. Pvt. Ltd 2004 (3) Arb. LR 481 . The Apex Court has observed in Sudarsan Trading Co. Vs. Government of Kerala and Another, , that so long as the view taken by the Arbitrator is plausible though perhaps not the only correct view, the award cannot be examined by the Court. The present objections accordingly are to be decided keeping in view the aforesaid requirements and ingredients of section 34 of the Act.

6. It may be noticed that issue No.2 - 7 were decided against the respondent.

7. Issue no.1 (Whether the termination of the contract vide order dated 21.2.2002 issued by the claimant is valid?), has been decided in favour of the claimant (respondent herein) and against the petitioner herein.

8. Counsel for petitioner submits that all the reasoning assigned by the arbitrator for upholding the termination of the contract are unsustainable in law and fact. It has been contended that the Manager, ICD Varanasi had issued a certificate that no work had suffered on account of any fault or default of any equipment, vehicle or person of the contractor or on the part of H & T Contract during the period of bill. Similar certificate was given along with the bill. It has also been contended that petitioner herein was restrained from performing the contract from 5.1.2002 whereas the actual termination of the contract took place on 21.2.2002. It has been strongly urged before this Court that the claimant /respondent herein did not straightaway terminate the contract on 5.1.2002, but held prior negotiations with one M/s.Kataria Carriers for handling of the transport contract at ICD Varanasi at ad-hoc basis for three months and only thereafter order dated 5.1.2002 was passed by the Regional Manager, CWC, Lucknow. It is submitted that prior negotiations with M/s.Kataria Carriers clearly shows the mala fide intentions on the part of the respondent herein. It has also been contended that it is settled law that consequence of process cannot precede the process itself. Counsel also submits that in this case the tender agreement was executed between the respondent and M/s.Kataria Carriers on 15.1.2002 but they were allowed to operate from 5.1.2002. Thus the alternate arrangement was made not in exigency of work, but was a calculated design to remove the petitioner herein. It has also been argued that respondent has failed to comply with the terms of

the contract and no proper show cause notice was given to the petitioner herein. It has also been submitted before this court that the Arbitrator has held that the container should have been transported within seven days from ICD Varanasi to JNPT Navi Mumbai, whereas the contractor took more than seven days, while admittedly, as per Chapter "Import Operations- I" of the contract, 10 days were provided for transporting the container at Mumbai. It has also been argued before this Court that the Arbitrator has upheld the termination and contract on account of loss of export loaded container belonging to M/s.Bholanath Industries Limited which container was ultimately recovered and the goods were re-processed and re-exported at a higher price. Neither did M/s.Bholanath Industries Limited contested their case before the Arbitrator, nor did they press their claim before the State Consumer Forum, Lucknow, as it was dismissed in default vide order dated 21.4.2006. It is contended that only on the basis of one solitary incident the contract awarded to the petitioner was terminated.

9. Counsel for respondent herein has also urged before this Court that the arbitrator has arrived at a finding in favour of the claimant/ respondent based on cogent reasons. It is contended that not only the container belonging to M/s.Bholanath Industries Limited was detained for more than 10 days, the respondent also received several complaints independently from other users regarding abnormal delay in transportation as well as in re-positioning of the containers. The careless and negligent attitude of the respondent (petitioner herein), projected a bad name of the respondent in the trade and users. Notice dated 28.11.2004 (1.12.2001), 7.12.2001 (10.12.2001), 20.12.2001, 21.12.2001 and 28.12.2001 (Ex.C-56, C-57, C-58 and C-59 and C-60 respectively) were issued to the respondent herein due to their unsatisfactory performance on account of disappearance of containers during transit, transportation of container taking 20 - 25 days from ICD to Gateway Port in many cases against usual seven days and non-availability of sufficient numbers of trailers to cope up with the demand of transportation. Counsel for respondent submits that all these failures were included in notice dated 28.12.2001 (C-60) which led to the termination of the contract on 21.12.2002 (C-65), as per the provisions of Clause X-(a) & X (b) of the Contract. The arbitrator has given the following findings, with respect to issue no.1 :

13. I find that the letters/ notices dated 28.11.2001 (1.12.2001), 7.12.2001 (10.12.2001), 20.12.2001 (Exhibits C-56, C-57, C-58 respectively) have brought out specific failures and breach of contract conditions by the respondents. Clause X(a) and Clause X(b) (Summary Termination) of the terms and conditions of the contract provide that the claimants right (Regional Manager, CWC, Lucknow) in the event of breach by the respondents; H&T contractor of any of the terms and conditions of the contract to terminate the contract forthwith and to get the work done for the unexpired period of the contract at the risk and cost of the contractor and forfeit the security deposit, etc.

14. I find from the notices and letters quoted above that the respondent was not

able to provide satisfactory services in terms of the contract. It must be noted that duties and responsibilities of the respondent as the H&T contractor are very vital to the international trade of the country. The respondent who was engaged for the transportation of import & export containers from ICD, Varanasi to Gateway Ports, was required to perform his work diligently and to the satisfaction of the claimant, users and trade. Detention/ missing of the containers due to causes attributed to the respondent have to be considered while appreciating performance of the respondent, in terms of the contract agreement. Non-availability of trailers had virtually crippled the transportation of the container from ICD, Varanasi to Gate-Way Ports. I find from various letters exchanged between the parties which have been quoted specifically in the termination of the contract order dated 21.2.2002 (C-65) that the services rendered by the respondent were far from satisfaction. In this context, the claimant have placed on records a letter dated 10.2002 (C-48) written by the Secretary, Export Promotion & Export Commissioner (UP), which is a complaint regarding settlement of claims of M/s.Bhola Nath Industries Ltd. for the missing container. There is a reference to a letter (C-6) from the Asstt. Commissioner (Customs), ICD, Babatpur, Varanasi expressing his displeasure of the work of the respondent regarding non-availability of sufficient number of containers to fulfill the requirement of transportation, excessive transit time in transportation of containers to Ports and disappearance of containers. Although these letter have not been referred to specifically in the termination order dated 21.2.2002, these documents have been placed before me and the respondent had knowledge of these documents. There had been no satisfactory reply to these letters vide reply of the respondent Exhibit 2 pages 1 3. The only explanation is incomplete documentation on the part of the claimant. What about non-availability of trailers? These failures in the H& T work are considered serious infraction of terms and conditions of contract conditions and adequate grounds to terminate the contract.

15. In view of above finding, I find no infirmity in the order dated 21.02.2002 (C-65) issued by the Claimant Corporation terminating the contract and I am in agreement with the same. This issue is accordingly decided in favour of the claimant and against the respondent.

10. Perusal of the award shows that the arbitrator has considered the contentions of the petitioner herein and thereafter has arrived at a finding. I find no infirmity in the reasoning which has been rendered by the arbitrator. It has been observed that the dispute between the parties mainly arose in connection with detention of the export loaded container no. TRIU-4991702X40", which was led on trailer no.38D-3288 owned by M/s.ODC Roadways. The said container was moved on 6.11.2001 from ICD Varanasi and did not reach its destination i.e. JNPT, Navi Mumbai within the time period upto 16.11.2001. This container was illegally detained by Sh.Prabhunath Singh, the owner of M/s.ODC Roadways at some unknown place. The petitioner herein was issued notices dated 19.11.2001 and 24.11.2001 (Ex.C-1 & CWC -4). The arbitrator has observed that when the

exporter M/s.Bholanath Industries Limited pressed for early recovery of the container and also raised a claim towards compensation for loss of the container, the claimant started making enquires and issued several notices to the respondent (petitioner herein) for recovery of the container and non-performance of the contractual obligations. Besides letter addressed by M/s.Bholanath Industries Limited, they also filed a claim against the respondent herein before the State Consumer Forum, Lucknow.

11. Based on the settled position of law, I am satisfied that the arbitrator has applied his mind and has come to a fair and just finding.

12. The arbitrator has decided issue nos.2, 3, 4 and 5 against the claimant (respondents herein). Claim No.6 and 7 were not pressed by the claimant during the hearing before the Arbitrator, therefore, the same were rejected.

13. Claim No.8 pertains to non-payment of labour charges, amounting to Rs.8720/-. The case of the claimant (respondent herein) before the Arbitrator was that the respondent has failed to make the payment of wages to the labourers engaged at ICD Varanasi and the claimant being the principal employer had received a claim from the labourers (Ex.C-102) to the tune of Rs.8720/-. In support of this claim respondent herein had placed before the Arbitrator Ex.-6, to show that they had already paid the wages to the labourers, namely, Shyamjee. The payment voucher was placed on record. The arbitrator, came to the conclusion that the claimant/ respondent herein should investigate the claim of the labourer and if found justified should first pay it and then recover the outstanding bills of the respondent. It has been contended by counsel for the petitioner that the decision rendered by the arbitrator is manifestly erroneous. It is contended that once both the parties had adduced evidence, the arbitrator should have decided the issue in favour of either of the parties and it was not open for the arbitrator to pass a direction for further investigation into the claim of the labourers.

14. Counsel for respondent has stated that the workers/ labourers had made a claim to the respondent and they have been paid their wages. However, on the contrary, the petitioner herein did not submit any document or proof with regard to payment made by them to the labourer.

15. I have carefully considered the submissions made by counsel for the parties. Taking into consideration that the respondent was the principal employer and demand was raised by the labourers being Ex.C-102 and the payment was made by the respondent Ex.-6, which was filed by the respondent before the Arbitrator in support thereof, I find no infirmity in the findings of the arbitrator. The respondent once having paid the amount would thus be entitled to an amount of Rs.8720/-. There is also no merit in the submission made by counsel for the petitioner that the arbitrator could not have directed the respondent to first investigate about the payment due and after making the payment recover the same from the outstanding dues. In fact it seems that the arbitrator has made

this direction, while deciding claim Nos.8 and 9, to give benefit to the petitioner herein and in case the respondent was able to negotiate for a lesser amount the petitioner would get benefit therefrom.

16. Claim No.9 has been raised towards payment of container detention charges to M/s. Shipping Corporation of India to the tune of Rs.1,63,125/-. As per claimant, Container No.TRUI - 4991702 x 40" belonged to M/s. Shipping Corporation of India, who through their agent M/s.CMT Pvt. Ltd. claimed the aforesaid amount towards the container detention /hire charges for the period from 06.11.2001 to 31.12.2003 i.e. upto the date the exporter has informed that cargo has deteriorated and is of no use to them.

17. It is contended by counsel for the petitioner herein that no reason has been assigned by the arbitrator in support of his conclusion. It is contended that respondent did not send any communication to show that any exercise had been undertaken by them subsequent to the passing of the award with regard to negotiations with M/s.Shipping Corporation of India. Further it has been contended that there is nothing on record to show that the amount of Rs.1,63,125/- has been paid towards payment of container detention charges and also this amount was raised by M/s.CMT Private Limited and not by M/s. Shipping Corporation of India as stated in the award. It is thus contended that M/s.C.M.T. Private Limited had raised a claim regarding container detention charges who were not party to the contract and thus the claim was a third party claim. It was further urged before this Court that the arbitrator neither summoned M/s.C.M.T. Private Limited to prove their claim, nor any affidavit was filed. It is submitted that the arbitrator has in similar circumstances summoned M/s.Bholanath Industries Limited, a third party, but a separate procedure had been followed with regard to M/s.C.M.T. Private Limited. It is also contended that as per the award the respondent was required to first negotiate with M/s. Shipping Corporation of India and only thereafter deduct the amount from the pending bills of the petitioner herein.

18. Counsel for respondent submits that respondent has taken up the matter with M/s.C.M.T. Private Limited, the authorized representative of M/s. Shipping Corporation of India, which is a Government of India undertaking. The respondent received enhanced claim of Rs.1,99,082/- in place of Rs.1,63,125/- on the ground that the dollar conversion rates had increased from Rs.45 to Rs.49.40 per dollar and after long drawn negotiations/ correspondence with both M/s.C.M.T. and M/s.Shipping Corporation of India, the claim and the payment was finally restricted to Rs.1,63,125/- and detention charges have been made as per the contract condition clause XII (g) of the Contract Agreement. The arbitrator has decided this issue in favour of the claimant, respondent herein on the ground that the M/s. Shipping Corporation of India, a Government of India undertaking has claimed detention charges amounting to Rs.1,63,125/- as a result of detention of the container no.TRIU-4991702X40" by M/s.ODC Roadways, who was a joint/ sub-agent of respondent (petitioner herein) engaged

and employed by them to discharge the work assigned. The arbitrator has also held that petitioner herein is liable for the losses suffered by the respondent under clause XII(g) of the Tender Agreement. I find no force in the submission of counsel for the petitioner that the arbitrator could not have directed the respondent to negotiate with Shipping Corporation of India and only after making the payment to them recover the amount actually paid not exceeding 1,63,125/-. In the reply to the objections which have been filed it has been stated on affidavit that after negotiations although initially Rs.1,99,082/- was demanded, the respondent herein has paid Rs.1,63,125/-. This issue has been rightly decided by the arbitrator in favour of the respondent.

19. Issue No.10 has been decided against the claimant.

20. Issue no.11 regarding claim in the sum of Rs.23,000/- towards handling and transportation of illegally detained container from Ghaziabad to ICD Varanasi has been decided in favour of the claimant. On reading of the award, I find that the arbitrator has taken into consideration that the container was to be handed over to the respondent on 06.11.2001 and thereafter to be transported and delivered at the designated port, but instead of doing so, the container was found missing and untraceable and could only be traced on 25.05.2003, as a result of which the container could not be exported. The container was released through intervention of the Court and thus had to be transported from Ghaziabad to ICD Varanasi. The transportation of this container cost the claimant/ respondent herein Rs.23,000/- for which the claimant had submitted documents Ex.C-111 to C-113, to substantiate his claim. The arbitrator has rightly allowed this claim based on documents submitted by the claimant/ respondent herein, and I find no infirmity in his decision.

21. Claim Nos. 12 towards TA/DA of his officials in regard to retrieval of illegally detained container in the sum of Rs.67,038/- has been allowed by the arbitrator and has been held as under:

36. It was submitted by the claimant that to facilitate retrieval of illegally detained container, the claimant had incurred an amount of Rs.67,038/- towards TA/DA in respect of various officials. The claimant has relied upon documents exhibited as C-11 in this regard.

37. I allow this claim of Rs.67,038/- to the claimant only on the ground that this expenditure was incurred by the claimant for retrieval of the container, in question, due to non-performance /negligence/ default on the part of the respondent in carrying out the contractual obligations as envisaged under the contract agreement entered into between the parties, hence this claim is decided in favour of the claimant and against the respondent.

22. Taking into consideration that the arbitrator has relied upon documents Ex.C-11, I am of the view that the arbitrator has rightly allowed this claim in favour of the claimant and as against the petitioner herein. The view taken by the arbitrator cannot be re-examined by the court and reassessed when the

arbitrator has given cogent reasons.

23. Claim No.13 has been decided against the respondent herein.

24. The learned Arbitrator has allowed counter claim Nos.1 and 2 of the petitioner herein.

25. The petitioner herein had raised counter claim No.3 towards refund of security deposit and the petitioner had claimed a sum of Rs.4,30,284/-. The respondent herein has submitted that as per the provisions of the contract agreement after termination of the contract, the Regional Manager, Lucknow has forfeited a sum of Rs.4,30,284/- towards security deposit. It is submitted by counsel for the petitioner that not only did Regional Manager, Central Warehousing Corporation, Regional Office Lucknow wrongly terminate the contract but also illegally forfeited the security deposit of Rs.4,30,284/-. Counsel for petitioner submits that clause X(B) of the condition of the contract provides for forfeiture of the security deposit. Relevant clause B is reproduced below:

Clause X (B) Summary Termination

The Regional Manager Central Warehousing Corporation, Lucknow shall also have, without prejudice to other rights and remedies, the right in the event of breach by the contractor of any of the terms and conditions of the contract to terminate the contract forthwith and to get the work done for the unexpired period of the contract at the risk and cost of the contractor and/or forfeit the Security Deposit or any other part thereof for the sums due to any damages, losses, charges, expenses or costs that may be suffered or incurred by the Corporation due to the contractor's negligence or unworkman like performance of any of the services under the contract.

26. It is submitted that the security deposit can only be forfeited under the circumstances mentioned in clause X(B) of the contract.

27. A careful reading of clause 10 (b) would show that the regional manager, Central Warehousing Corporation would have the right in the event of breach by the contractor of any of the terms and conditions of the contract, to terminate the contract forthwith and to get the work done for the unexpired period of the contract at the risk and cost of the contractor and/or forfeit the security deposit or any part thereof for the same due to any damage, losses etc. that may be suffered or incurred by the corporation due to the contractor's negligence. In this case, admittedly, on account of breach, the contract was terminated at the risk and cost of the contractor.

28. It is contended that the order of termination of contract whereby the security deposit was also forfeited does not record any reason for the forfeiture of the security deposit. Similarly no reason has been given by the arbitrator in the award while rejecting counter claim No.3. It is also contended that since the arbitrator has already allowed claim Nos.11 and 12 with regard to cost and expenditure incurred by the claimant, Central Warehousing Corporation, there

was no cogent reason to uphold the forfeiture of the security deposit, as there can be no forfeiture, without damages. In response to the submission made by counsel for the petitioner, counsel for the respondent has justified the forfeiture of the security deposit on two counts, firstly in view of the heavy claim raised by M/s.Bholanath Industries Limited for which they have filed a claim before the Consumer Forum, Lucknow and secondly on account of bank guarantee in the sum of Rs.10.0 lacs furnished by the respondent for release of container.

29. It is further contended by Mr.Tyagi, counsel for respondent that the container handed over to the petitioner was detained by a third party (Sh.P.N.Singh), who filed a Civil Suit No.1176/2001 against M/s.Vijay Trading and Transport Company and Ors. on account of the fact that his dues had not been cleared by the petitioner. The respondent herein filed an application in the said suit for release of the container which was rejected by the Civil Court, Ghaziabad on 28.11.2002. The respondent was then forced to file a Civil Revision No.180/2002 before the High Court at Allahabad, in which a direction was issued to the trial court to dispose of the application afresh. Accordingly, the trial court released the container on a bank guarantee of Rs.10.0 lacs subject to decision in the case. It is contended that the aforesaid case is still pending in the Ghaziabad Court and is at the evidence stage. It is submitted that the learned Arbitrator has rightly rejected the counter claim of the petitioner. Mr.Tyagi, also contends that in case the respondent herein is unsuccessful in the suit, the bank guarantee would be encashed by Sh.P.N. Singh and the respondent would suffer loss, on account of the default of the petitioner and the respondent would be left with no security for the payment. In response to the submission made by counsel for the respondent, it is contended that although M/s.Bholanath Industries Limited were initially being represented before the Arbitrator in the proceedings, however, subsequently they refused to take part in the proceedings. Further it is contended that M/s.Bholanath Industries Limited also did not press their claim before the State Consumer Forum, Lucknow and certified copy of the order dated 21.4.2006 has been placed on record to show that the claim of M/s.Bholanath Industries Limited stands dismissed in default and further no restoration application has been filed till date. In view of no other claim pending, the security deposit could not have been forfeited. Thus it is contended that the counter claim no.3 has been rejected in an erroneous manner.

30. During the course of hearing counsel for respondent has been unable to satisfy the court with regard to any claim pending from M/s.Bholanath Industries Limited on date. Petitioner has also placed on record certified copy of the order to show that the claim made by M/s.Bholanath Industries Limited before the State Consumer Forum, Lucknow stands dismissed in default. It may be noticed that certified copy of the order placed on record shows that the claim filed by M/s.Bholanath Industries Limited stands dismissed in default pending before the Consumer Forum, Lucknow and for which no application for setting aside the order has been filed.

31. Thus it cannot be said that there is a claim pending with regard to M/s.Bholanath Industries Limited. However, since the respondent has given a bank guarantee in suit No.1127/2001, to enable them to release the container which had been detained by a third party (Sh.P.N. Singh) on account of a dispute between the said Sh.P.N. Singh and the petitioner herein, the security amount deposited by the petitioner with the respondent cannot be released on this ground alone. However, in case the petitioner substitutes its own bank guarantee in place of the bank guarantee furnished by respondent herein in that event the liability of the respondent is discharged and the petitioner would be entitled to refund of the security deposit in the sum of Rs.4,30,284/-.

32. The petitioner herein has raised counter claim No.4 in the sum of Rs.15,74,484/- including interest of Rs.4,64,815/- towards illegal detention of fork lift. Counter claim No.5 in the sum of Rs.1,66,800/- plus interest of Rs.61,113.60 = Rs.2,27,913.60 towards the payment of damages of illegal use and detention of hand trolleys (4 in Nos.) employed at ICD Varanasi. In support this claim, the petitioner herein has submitted that for the successful executing of the contract he had employed one fork lift and 4 hand trolleys at ICD, Varanasi, which were owned by them. It was contended that same were illegally detained by the claimant and as per the prevalent market rate the rent for a fork lift with 3 MT capacity was approximately Rs.40,000/- per month. The illegal detention of the fork lift was from 5.1.2001 to 27.8.2003 and thereafter from 28.8.2003 till date. "As per Maharashtra Fork -lifts Owners Association, Mumbai, the rate prevailing at the Mumbai Port is Rs.2,600/- per shift (for 8 hours per day). It was further added by the respondent that the prevalent rent in the market in respect of one hand trolley per day in Rs.50/-. Thus, the total amount of rent of 4 hand trolleys works out to Rs.200/- per day. The illegal detention of 4 hand - trolleys was from 5.1.2002 to 27.8.2003 and thereafter from 28.8.2003 to till date. Thus, the respondent claimed a sum of Rs.11,10,669/- and Rs.1,66,800/- towards rent for the illegal detention of one fork-lift and 4 hand-trolleys respectively."

33. Counsel for the respondent submits that only one fork lift and four hand trolleys were detained at the time of termination of the petitioner's contract and a claim amounting to Rs.40.0 lacs was lodged by M/s.Bholanath Industries Limited. Accordingly it was decided not only to withheld the payment due to the respondent, but also to forfeit all the equipments in use. The Arbitrator has dealt with this counter claim in the following manner:

I have carefully examined the counter claim of Rs.15,75,484/- towards the detention of the forklift and Rs.61,113.60 towards the detention of the hand-trolleys. I find from Clause 5 (g) of the tender conditions of contract that the claimant has the right to demand balance due when sufficient sum is not available to cover the full amount recoverable from security deposit and other dues. In view of the heavy claim amount of M/s.Bhola Nath Industries and customs/ Excise Department and others, I do not find any illegality in the action

on the part of the claimant in detaining the fork-lift and hand-trolleys as security. The possibility of recovering these claim amounts from the respondent is remote and difficult. During the arbitration proceedings, the respondent had not pressed for these counter claims and for release of the equipment. Therefore, I do not see any merit in these counter claims and these two issues are decided against the respondent and in favour of the claimant.

34. I find no infirmity in the reasons rendered by the arbitrator and the counter claim Nos. 4 and 5 have been rightly rejected.

35. The arbitrator has also rejected the counter claim No.6 for Rs.25,22,500/- + Rs.10,53,645/- interest for the remaining period of the contract. Since I find no infirmity in the findings of the award rendered by the arbitrator with regard to claim No.1 that the contract was rightly terminated, the arbitrator has correctly decided this counter claim No.6 against the petitioner herein.

36. The arbitrator has examined the matter in depth and has analyzed the evidence produced and the documents placed on record to come to the conclusion. Accordingly, the objections are dismissed except counter claim No.3.