

Jeevan Engineering Works Vs Union of India

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Court : Delhi

Decided On : Jul-02-2010

Judge : Mr. Rajiv Sahai EndLaw. J.

Acts : [Arbitration Act, 1940](#) - Sections 30, 33

Appeal No. : CS(OS)2666-A/1996

Appellant : Jeevan Engineering Works

Respondent : Union of India

Advocate for Def. : Mr. R.V. Sinha ; Mr. A.S. Singh, Advs.

Advocate for Pet/Ap. : Mr. Shiv Khorana, Adv.

Judgement :

1. Whether reporters of Local papers may No be allowed to see the judgment?
2. To be referred to the reporter or not? No
3. Whether the judgment should be reported No in the Digest?

ORDER

1. The objections filed by the petitioner vide I.A. No.4766/1997 under Sections 30 and 33 of the [Arbitration Act, 1940](#), upon service of notice of filing of the award, are for consideration. Disputes arose between the parties out of a contract placed

by the respondent on the petitioner for supply of six diesel dumpers. It was inter alia a term of the said contract that if the respondent was not satisfied, after trial of the two dumpers to be supplied initially, it could foreclose the order for the remaining four dumpers without any financial liability. The respondent, prior to the expiry of the period of trial of the first two dumpers supplied, called upon the petitioner to rectify certain defects found therein. However, simultaneously the petitioner was also called upon to supply the remaining four dumpers. It is the case of the respondent that the petitioner failed to rectify the defects in the first two dumpers and also failed to supply the remaining four dumpers within the stipulated time. The petitioner though had dispatched the remaining four dumpers; according to the respondent though it was not inclined to accept the delivery of the remaining four dumpers for the reason of the delivery having been offered after the stipulated period therefor but there being no procedure of the railways for returning the consignment the delivery of remaining four dumpers was accepted and the same were rebooked with the railways to the petitioner. The petitioner however failed to take the delivery of such four dumpers and the same were ultimately reconsigned back to the respondent. It is not in dispute that thereafter the four dumpers remained with the respondent.

2. The petitioner before the arbitrator made a claim of Rs.8043/- towards the balance 5% price of the first two dumpers and of Rs.3,21,705/- being the price of the remaining four dumpers, besides for interest and costs of arbitration. The respondent made a counter claim of Rs.1,59,625/- for expenses towards repair/rectification of the first two dumpers which the petitioner had failed to carry out and of Rs.1,13,406.35p towards the infructuous expenditure incurred in consignment / re-consignment and freight charges incurred with respect to the remaining four dumpers, besides for interest and costs.

3. The arbitrator appointed by the respondent has vide award impugned in this proceeding, though held the petitioner entitled to Rs.8043/- towards balance 5% price of two dumpers, allowed the same to be adjusted out of the amount of Rs.1,59,625/- towards expenses on repairs of the said two dumpers allowed to the respondent. The claim of the petitioner for price of the remaining four dumpers has been disallowed for the reason of the petitioner having tendered the delivery

thereof after the expiry of the period stipulated there for and for the reason of the petitioner having otherwise failed to perform its duties with respect to the first two dumpers. The claim of the petitioner for interest on Rs.8043/- has also been declined. The arbitrator has allowed both the counter claims of the respondent subject to adjustment of Rs.8043/- as aforesaid but has rejected the claim of the respondent for interest.

4. The objections to the award have also remained pending before this Court for long. The usual issues were framed and evidence by affidavit was ordered to be led thereon, even though the arbitrator's record has been requisitioned. The counsels for the parties have been heard.

5. The petitioner has in the objections also pleaded lack of opportunity of being heard before the arbitrator. However, no arguments were addressed on that aspect. The counsel for the petitioner during hearing before this Court has contended that even though it is not in dispute that the remaining four dumpers were also with the respondent, the arbitrator has still denied the price thereof to the petitioner. It is also contended that there was no evidence whatsoever before the arbitrator of the respondent having incurred expense of Rs.1,59,625/- for repair / rectification of first two dumpers or of Rs.1,13,406.35p in payment of freight /consignment/re-consignment of the remaining four dumpers. The award is also challenged on the ground of being without reasons though required to be speaking. It is also contended that there was no delay in delivery of the remaining four dumpers inasmuch as the same were offered for inspection within the stipulated time. Holes are also poked in the claim of Rs.1,13,406.35p by contending that for the same distance, different freights are being claimed. It is also pointed out that while in the communication dated 12th February, 1992 C-24 in the arbitrator's record, the respondent has claimed only Rs.17,518/- towards repairs of the first two dumpers but in the claim before the arbitrator the amount was inflated to Rs.1,59,625/-. It is also urged that there was no reason for the arbitrator to decline interest on 5% balance price of the first two dumpers admittedly found due to the petitioner. It was argued that the award is without any application of mind and liable to be set aside.

6. The counsel for the respondent per contra contended that the respondent is not liable for the price of the remaining four dumpers, having already rejected the same and there is no error inviting interference in the award.

7. Though the counsel for the petitioner has along with the written arguments handed over, annexed a number of judgments but need is not felt to deal with the same inasmuch as considering the long time which has elapsed and the amounts involved and for the reasons stated hereinbelow, and to hopefully put a quietus to the matter it is deemed expedient to modify the award:

a. The award of Rs.1,59,625/- for repair/rectification of the first two dumpers i.e. equal to the cost thereof is not found to be in accordance with law. It defies logic that the price of repair/rectification would be the same as the cost of the product. If that were to be so, the respondent, instead of having the goods repaired/rectified ought to have gone for new goods. It is unbelievable that the respondent would go ahead with the work of repair/rectification without obtaining estimates there for. There is no commercial sense which is expected even from government in spending the same amount as the cost / price of the goods on repair/rectification.

b. It being not a dispute that notwithstanding rejection and to and fro movement of the remaining four dumpers, before the commencement of arbitration the possession thereof was with the respondent only. The award does not record and it is not the case of the respondent that before the arbitrator the respondent offered delivery of the remaining four dumpers. The remaining four dumpers having remained in the possession of the respondent and the arbitrator having not made any award for return thereof to the petitioner, could not have deprived the petitioner of the price of the said four dumpers.

8. For the aforesaid reasons it is deemed expedient to modify the award as under:

a. The claim of the respondent of Rs.1,59,625/- for repair/rectification of the first two dumpers is modified to that of Rs.17,518/- claimed by the respondent in its communication dated 12th February, 1992 C-24 in the arbitrator's record. There being no other evidence before the arbitrator save for the claim simplicitor, of the respondent of having incurred the remaining amount, the claim of the respondent

for remaining amount over and above Rs.17,518/- is disallowed. Out of the said sum of Rs.17,518/-, payable by the petitioner to the respondent, the petitioner shall adjust Rs.8043/- being the 5% balance price of the first two dumpers, due from respondent to petitioner. b. Though the petitioner is found entitled to price of the remaining four dumpers of Rs.3,21,705/- but subject to adjustment there from of Rs.1,13,406.35p allowed in the award to the respondent towards freight and cost of consignment/re- consignment of the remaining four dumpers. In the entirety of the facts and circumstances, no case for interference with the award for the sum of Rs.1,13,406.35p in favour of the respondent is made out. A perusal of the arbitration record does show that the dispute between the parties with respect to the delivery of the remaining four dumpers, acceptance of delivery/rejection was a highly contentious one involving interpretation of correspondence and the view taken by the arbitrator is not found to be such which could not be a possible view from the entire record. The view taken by the arbitrator being a possible view, interference in exercise of power under Sections 30 and 33 of the 1940 Act is impermissible. The award for the said amount cannot be said to be perverse or such which is de hors the record. c. Thus, the respondent is liable to pay a total sum of Rs.1,98,823.65p to the petitioner as under:

i) Towards cost / price of four dumpers. : Rs.3,21,705/- ii) Towards 5% balance price / cost of

two dumpers. : Rs.8,043/- A. Total : Rs. 3,29,748/-

iii) Less repair / rectification cost of two dumpers. : Rs.17,518/- iv) Less freight / consignment / reconsignment cost of four dumpers. : Rs.1,13,406.35p B. Total : Rs.1,30,924.35p

Balance i.e. A-B : Rs.1,98,823.65p d. I have also considered the question of interest. The award does not grant any interest to either party. Considering the nature of controversy it is not deemed appropriate to grant any interest while modifying the award, also not in exercise of powers under Section 29 of the 1940 Act.

9. The award, subject matter of the proceedings, is thus modified as aforesaid with the direction to the respondent to pay to the petitioner the sum of Rs.1,98,823.65p within eight weeks herefrom failing which the same shall incur simple interest at 9% per annum. A decree in terms of the modified award is also passed. However, the parties are left to bear their own costs.

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