

* HIGH COURT OF DELHI

% Date of decision: May 26, 2008

+ FAO(OS) 257/2008

Union of India ...Appellant
through Mr.Sanjay Kumar
Pathak, Advocate

Versus

M/s N.K.Garg & Co. ...Respondent
through Mr.Raman Kapur &
Mr.Sandeep Sharma, Advocates

Coram :

Hon'ble Mr.Justice Manmohan Sarin
Hon'ble Mr.Justice Manmohan

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

Manmohan Sarin, J.(Oral)

C.M.No.7778/2008

Exemption allowed subject to all just exceptions.

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1. Admit.

With the consent of the parties, since only a short question is involved, appeal is taken up for disposal.

2. The Appellant-Union of India by this appeal assails the order passed by the learned Single Judge in OMP No.327/2002 dated 19th March, 2008 by which the learned Single Judge dismissed the objections filed under section 34 of the Arbitration and Conciliation Act, 1996 holding that objections do not fall within the ambit of Section 34 of the Act.

3. The Learned Single Judge in his succinct judgment has culled out the relevant facts. For facility of reference, we recapitulate some of these.

4. The Union had awarded the contract to the respondent which entailed filling up for earth in embankment, construction/extension of hume pipe bridges, bridges of varying sizes, construction of barriers etc in connection with 2nd line work of Ghaziabad-Hapur BG Doubling vide letter no.74-W/13/345/GZB-MB/WA/Zone-I dated 5th March, 1997. This work was valued at Rs.69 lacs. The stipulated date of completion of work was 4th December, 1997 i.e within nine months. Disputes had arisen with regard to execution of the work which were referred to the arbitration of the nominees of the Railways-UOI namely Shri Parmatma Sharan, Chief Engineer, Northern Railways, Shri R.K.Kardam, Adviser/Judicial Commissioner, Northern Railways and Mr.Shanker Banerjee, Financial Advisor & Chief Accounts Officer, Northern Railways. From the foregoing, it would be seen that the Arbitrators were highly placed officers of the Northern Railways. It was this panel of Arbitrators which had made and published the award on 11th February, 2002 against which a petition under section 34 of the Act was filed which was rejected vide the impugned judgment. We may note at the outset that the subject matters of the award were claim nos.1, 2 & 6. The Arbitrators had made separate awards in respect of these three claims. Except for the refund of security, amount awarded in these claims by the Arbitrators were considerably less than the amounts claimed. As regards claim on account of interest, though the respondent claimed interest @ 24%, the Arbitrator had awarded interest @

12% per annum on the entire award amount minus Rs.50,000 being the amount of short term deposit receipt. The learned Single Judge considering that the Supreme Court was seized of the question of the maintainability of the claim for interest in the wake of clause 16(2) of the General Conditions of Contract, held that interest need not be paid to the contractor-respondent by the appellant and the appellant would abide by the outcome of the Special Leave Petition filed by the appellant before the Supreme Court. The respondent-contractor has not assailed this finding given by the learned Single Judge and the appellant cannot have any grievance with regard to the same.

5. Mr.Sanjay K Pathak, learned counsel appearing on behalf of appellant-UOI urged before us that the award in respect of claim no.1 was contrary to the provisions of clauses 45 & 63 of the General Conditions of the Contract according to which the measurements taken by the Railways with regard to the work done by the respondent were to be treated as final and binding. Counsel submits that claim no.1 should have remained an excepted matter and the award, if any, given was a nullity and void ab initio. The learned Single Judge has duly noted these contention of the counsel for the appellant. In the instant case, a Court Commissioner was appointed vide orders dated 29th May, 1998 in OMP No.127/1998. This order was not assailed by either the appellant or respondent and attained finality. Pursuant thereto joint measurements of the work were taken by the Court Commissioner after giving notice to the parties and submitted his report. It is significant that the appellant duly participated in the joint measurements and the proceedings have been duly signed by

representatives of both the parties. No specific objections were filed to the joint measurements. The Arbitrators, in these circumstances, duly took note of the joint measurements as taken by the Court Commissioner and did not accept the measurements of the appellant as final. In our view, it was rightly so done. The order appointing Court Commissioner for joint measurements was an order which was not questioned and had been implemented by both the parties by participating in it. This having been done and joint measurements have been taken, it does not lie in the mouth of the appellant now to question the said joint measurements.

6. It is not open for the appellant to now contend that joint measurements ought to be ignored and should not have been taken in view of clause 45 & 63 of the General Conditions of the Contract and the measurements taken by the Railways should have been treated as final as this was an excepted matter. We may also notice at this stage that against a claim of Rs.15,50,000/- awarded amount is Rs.8,75,000/-. We also cannot ignore that award was given by high functionaries of the Railways and they are experts in their respective field. Mr.Pathak vainly attempted to urge that Arbitrators had wrongly ignored the provisions with regard to clause 9.35 of the Special Conditions of Contract and not permitted the deduction of 50 c.m. We refrain from making any observation as neither it is permissible nor our domain to go into the findings with regard to these minute details of manner of measurements for which the Arbitrators are the final Judges. We also find that other pleas regarding number of trees having not been handed over to the appellant, cannot be taken note of, in view of the similar issues, as noted above.

Appeal has no merit and is dismissed with costs of Rs.5000/- to be deposited with the Delhi High Court Legal Services Committee.

Caveat No.116/2008

In view of the appearance of counsel for the respondent, caveat stands disposed of.

Manmohan Sarin, J.

Manmohan, J.

May 26, 2008
ssb