

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: January 16, 2009

Date of Order: March 02, 2009

+ ARB. P. 210/2004

%

02.03.2009

Unitech

...Petitioner

Through: Mr. S.K. Maniktala with Mr. Alok Tripathi and Mr. Jeemon,
Advocates

Versus

J.K. Industries Ltd.

...Respondent

Through: Mr. T.K. Ganju Sr. Adv. with Ms. Meghalee, Ms. Rajeshwari, Mr.
Rajat Bhardwaj and Mr. Ranjan Narain, Advocates

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. This petition under Sections 14, 17 & 29 of the Arbitration Act, 1940 (hereinafter "the said Act) read with Section 151 of CPC has been preferred by the petitioner for making the award dated 31st August 2004 a Rule of the Court.

2. After notice of the award was served upon the respondent, the respondent filed objections to the award under Sections 30, 33 of the said Act and prayed that the award be set aside. The objections were raised by the respondent on the ground that the learned Arbitrator had mis-conducted himself in the proceedings and there were prima facie errors apparent on the face of the record.

3. Brief facts are that the respondent awarded a contract for construction of a factory building and other civil and engineering works including laying of foundations for equipment and machinery at Banmore Tyre Plant Site in District Morena, Madhya Pradesh to the claimant. The claimant had been sending running bills to the respondent every month on the basis of the work executed by the claimant and joint measurement done by the claimant and the Consultant appointed by the respondent. After the work was over, the claimant submitted final bill. Initially, the respondent had appointed M/s DCL as its Consultant. DCL remained as Consultant upto 17th running bill. Thereafter, the respondent had appointed M/s GC Sharma as its consultant for verification and checking of the bills. M/s GC Sharma did the work of checking the running bills and final bill from 18th running bill onwards. In the final bill the respondent raised a dispute about the correctness of measurements. The measurements were verified by respondent's consultant M/s GC Sharma. Annexure C-1/A, a document duly signed by the Chief Engineer of the respondent and representative of M/s GC Sharma shows that against a total bill of Rs.4,14,92,192.76 after checking and verification of the bill by M/s G.C. Sharma, an amount of Rs.3,85,39,983.88 was cleared for payment. However, the bill finally passed by the respondent and signed by DN Rathi was of Rs.3,62,64,224.41. Since an amount of Rs.24,37,138.57 was deducted in respect of the earth work and lead. This amount of Rs.3,62,64,224.41/- was also not paid to the claimant. Thus the claimant sought a reference of the dispute to the Arbitrator and the matter was referred to the Arbitrator. Before the learned Arbitrator, the claimant initially made total 9 claims amounting to Rs.5,79,11,729.11. However, during proceedings, the claimant gave up certain claims and the claim stood reduced to Rs.4,61,80,970.74. During further proceedings after reconciling the accounts

and payments received, the claimed amount was reduced and it stood reduced to Rs.61,73,440.74. The final proceedings before the learned Arbitrator and the award passed by learned Arbitrator shows that the claim was further limited to Rs.47 lac only and claimant conceded that rest of the payment has been received.

4. The respondent also filed six counter claims amounting to around Rs. One crore. The learned Arbitrator gave full latitude to the parties to establish their claims; and also appointed Local Commissioner for measuring the visible items of the constructed portions. After spending more than 9 years in the arbitral proceedings, he ultimately gave an award of Rs.47 lac to the claimant towards principal amount. He awarded 15% simple interest from 1st April 1993 to 1st April 1997 and thereafter 12% simple interest from 1st April 1997 to 31st March 2002 on the principal amount and from 2002, the interest was further reduced to 9% per annum. Thus the total interest from 1st April 1993 till passing of the award was calculated and it amounted to Rs.66,62,250/-. The future interest of 9% on the award was allowed if the payment was not made by 31st March 2004. Rs.3 lac was allowed as costs of Arbitration.

5. Counsel for the objector/respondent vehemently argued that the learned Arbitrator wrongly relied upon the document Annexure C1/A. It is submitted that this document was an internal document of the objector and the Arbitrator could not have relied upon this document. The award based on this document was therefore bad and this was an error apparent on the face of award. The other ground of challenge of the award by the objector is that as per the contract, the total value of contract was fixed at Rs.218 lac and was revised to Rs.220.35 lacs. The contract provided a permissible increase in

value by 25% of the contract value and further provided that the value of the extra items covered in the contract in no case were to exceed Rs.59,85,583/-. Thus, as per the terms of the contract, the maximum of the contract could not exceed Rs.335.28 lac, while the claimant claimed amount more than the total contractual value of the contract and the Arbitrator allowed amount of Rs.47 lac which was beyond the contractual value. The Arbitrator could not have travelled beyond the contract and the award was, therefore, bad in law.

6. During arguments, counsel for the respondent also pointed out the difference between the total running bill and the final bills. He submits that the final bill could not have been raised by claimant more than the total of the running bills and the calculations mentioned in the final bill of claimant exceeded the quantities as mentioned in the running bills. It is stated that this difference in the quantities of the final bill and the running bills was pointed out to the Arbitrator but the Arbitrator paid no attention to this and, therefore, the learned Arbitrator mis-conducted himself during the proceedings.

7. I consider that none of the objections raised by the respondent are sustainable. A perusal of the award passed by the learned Arbitrator would show that the Arbitrator had made all efforts to reconcile the disputes regarding measurement. He also appointed a Local Commissioner on the suggestions of both the parties. After Local Commissioner gave report, the parties had prepared a chart of payable amounts against different items on the basis of agreed measurements of many of the items. The efforts of compromise, however, fizzled out. The measurement of the items so agreed shows that the claims made by the claimant was on the basis of actual

measurements of the area and the work done. The Local Commissioner's report was ultimately rejected by the Arbitrator because both the parties after taking several hearings and opportunities to arrive at a common basis did not come forward with any common basis. The learned Arbitrator also found that the Local Commissioner had exceeded his jurisdiction. He even included measurement of hidden items which could not have been measured. He, in his report, talked of defects in the building which was not his jurisdiction, neither the part of commission. He also subjected some parts of the building, after taking samples, to quality control testing which was also not part of his commission. Considering the fact that the Local Commissioner exceeded the commission, his report was rightly rejected by the learned Arbitrator.

8. The learned Arbitrator rightly relied upon the Annexure C-1/A. The respondent/objector could not have claimed that this document could not be relied upon by the learned Arbitrator as it was an internal document of the objector. It was settled between the parties that all bills sent by the claimant were to be referred to the Consultant appointed by the Objector and the consultant was to verify the bills. This verification of the bill was to be done by the consultant after joint measurement. This exercise of joint measurement was to be done by the Consultant in presence of the representatives of the claimant. Annexure C-1/A is the document prepared by the consultant of the respondent/objector wherein he had reduced the final bill of the claimant after doing verification of the measurement of the work done by claimant. It was not open to the respondent not to agree with the consultant and say that whatever has been written by the consultant was beyond his authority. The stand taken by the respondent that Mr. R.S. Chadha, the person deputed by M/s GC Sharma had no authority to do the

measurement and arrive at the amount payable to the claimant is baseless. All the pre-final bills and the final bill were checked by a person, deputed by M/s GC Sharma and this summersault taken by the respondent was rightly rejected by the learned Arbitrator. Similarly, the claim of the respondent that another measurement was carried out by Mr. Somarajan, representative of the claimant was rightly rejected. The learned Arbitrator had found that Mr. Somarajan had resigned from the services of the claimant much before the date of alleged joint measurement by the objector/respondent. I consider that this joint measurement was a false boggy raised by the respondent.

9. As far as claim of the objector regarding exceeding total value of the contract is concerned, I find that this plea is baseless. Clause 3 of the agreement entered into between the parties which has been reproduced in the award reads as under:

“3. This Contract comprises the construction of buildings, machinery and equipment foundations, other civil engineering works and all other subsidiary works connected therewith within the same site as may be ordered to be done from time to time by the company for the time being although such works may not be shown on the drawings or described in the said specifications or the said schedule of rates.” (emphasis added)

10. The learned Arbitrator after going through the contract has come to conclusion that the contract was item rate contract. It is also a fact that all running bills were passed by the consultant appointed by the objector on the basis of contract which prescribed item-wise rates and the total value of the running bills itself exceeded the amount being stated by the objector as the

total amount of the contract. Had the total amount of the contract been limited, the running bills would not have been approved on the basis of item rate and the measurement? The mere fact that the running bills were approved on the basis of item rates and measurement shows that the payment was to be made for the work executed on the basis of item rates. The estimated value of the contract specified in the contract could not have limited the value of the total contract. If this limitation had been there, there would have been some clause about limiting the value of the running bills and there would have been percentage payment prescribed of the total value of the contract at different stages. The very fact that all running bills were to be approved on the basis of the work done item-wise and rates approved in the contract, the plea taken by the objector must fail. I find that the learned Arbitrator in this case had remained within the four corners of the contract and the award rendered by the learned Arbitrator is not beyond the provisions of the contract and the award cannot be interfered on this ground.

11. It is settled preposition of law that Court while examining an award under Sections 14 and 17 or under Section 30 and 33 of the Arbitration and Conciliation Act does not act as an appellate court and cannot re-appreciate the evidence and cannot rewrite the judgment either upholding the award or rejecting the award. The Court has only to see that the learned Arbitrator has not committed any error apparent on the face of it and the award is not based totally on no evidence or the learned Arbitrator was not biased towards one party or has not conducted the proceedings in a biased manner. No procedural error or bias of the learned Arbitrator is reflected from the proceedings of the arbitration. The award passed by the learned Arbitrator is a reasoned award and I do not find any preposition of law relied upon by the

learned Arbitrator which is illegal. There is no error apparent on the face of the award. The objections raised by the objector/respondent are baseless and untenable. The same are hereby rejected. The petition filed by the petitioner hereby succeeds. The award passed by the learned Arbitrator is hereby made Rule of the Court. Decree sheet be drawn accordingly.

12. The petition stands disposed of in above terms.

March 02, 2009
rd

SHIV NARAYAN DHINGRA J.