

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) No.43/2009**

Reserved on: 24th February 2009

Date of Decision : 3rd March 2009

VIVEK JAIN Appellant

Through Mr. Shiv Khorana, Adv.

versus

UNION OF INDIA Respondents

Through None.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | No |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

% J U D G M E N T

MUKUL MUDGAL,J.

CM 1898/2009 (delay)

For the reasons mentioned in the application, the same is allowed. The delay in filing the appeal is condoned. The application stands disposed of.

FAO(OS) No.43/2009

1. With the consent of the learned counsel for the appellant, the appeal is taken up for hearing.

2. This appeal challenges the judgment of the learned Single Judge dated 25th February 2009 delivered in the Civil Suit (OS) No.584-A/1999, in which the challenge was raised to the award dated 27th January 1999 in the petition filed under Section 30 and 43 of the Arbitration and Conciliation Act, 1996.

3. The brief facts of the case are as under:

a) The dispute in the present case arises from inviting of tender by the respondent Union of India for the disposal of “B”-Thermal Power Station at Raj Ghat (DESU). The appellant/claimant Vivek Jain had responded to the said tender and offered a sale value of Rs.1,61,11,007/-.

b) Accordingly, the contract was placed on the appellant for the disposal of thermal power station on 3rd December 1986. The appellant was to deposit the sale value for the plant within the stipulated period and the earnest money of Rs.1 lakh was deposited by the appellant. Upon the appellant failing to deposit the sale value by due date, the contract was cancelled at the appellant's risk.

c) Thereafter the appellant again participated in the second tender for the sale of the plant which was opened on 10th December, 1987 and the appellant had quoted the sale price of Rs.1,65,61,007/-. The appellant/claimant had also furnished a security of Rs.1 lakh.

d) The appellant/claimant again failed to make payment of the sale value of the thermal power station in a phased manner as stipulated in the contract in spite of several extensions granted to the appellant and consequently, again the contract was cancelled at the appellant's risk on 16th September 1988. Prior to the cancellation of the contract, the appellant deposited a sum of Rs.44,06,251/- with the respondent.

e) The third tender was opened on 29th September, 1988 where the appellant was not a successful tenderer and consequently, the appellant raised the dispute regarding the refund of the part deposited amount which led to the reference to the arbitrator as per the agreement between the parties. In his statement of claim, the appellant/claimant raised a claim of Rs.72,44,585/- with 18% interest per annum from 1st January 1991. The details of the appellant's claim are as follows:

“i)	Refund of amount deposited	Rs.44,06,251/-
ii)	Refund of first security	Rs.1,00,000/-
iii)	Refund of second security deposit	Rs.1,00,000/-
iv)	damages	Rs.5,00,000/-
v)	Interest @ 18% per annum from due date till 31.12.90	Rs.21,38,334/-”

f) The arbitrator had allowed the claim No(i), (ii) and (iii), though the claim for damages of Rs.5,00,000/-, i.e., claim No.(iv) was rejected. Interest @ 18% per annum on the awarded amount with effect from 23rd September 1991 till the realization of the amount was also awarded.

g) It was also held that the counter claim of Rs.26,601/- filed by the

respondent was already rejected by the earlier award dated 23rd September, 1991.

h) The respondent Union of India challenged the said award dated 23rd September, 1991 before the learned Single Judge of this Court wherein the respondent contended that the arbitrator had misconducted himself by arriving at a finding that the entire amount of Rs.44,06,251/- was wrongly withheld. In fact, this amount was not withheld but was adjusted towards compensation charges of Rs.41,05,379/- due from the appellant for the delayed payment and towards ground rent of Rs.10,66,465 payable by the appellant. The respondent also contended that the levy of compensation charges and the ground rent was as per the terms of the contract which was totally ignored by the arbitrator. It was also submitted by the respondent before the learned Single Judge that the extensions were sought by the appellant for making payments, which clearly made the appellant/claimant liable for payment of compensation charges as well as ground-rent. Thus, the finding of the arbitrator regarding withholding the amount of

Rs.44,06,251/- was not justified. The respondent's counter claim in respect of Rs.26,601/- was rejected and in doing so, the fact that this Court had already set aside the earlier award was totally ignored.

i) The respondent further contended that the arbitrator erred in ignoring the compensation charges and ground rent which was part of the contract. Consequently, the arbitrator had wrongly allowed the payment of earnest money which was forfeited by the Government when the appellant failed to make payment of the amount of the contract and failed to perform the contract. Similarly, the earnest money was forfeited as per the contract which was ignored by the arbitrator. Finally the award was also challenged on the ground that the arbitrator could not allow the interest @ 18% per annum from the date of first award.

j) The learned Single Judge in the impugned judgment dated 25th February 2008 held as under:

i) The arbitrator rendered his award with reference to the terms of the contract between the parties;

ii) The appellant had not challenged the cancellation of the contract or the forfeiture of the security amount which was done in accordance with the terms of the contract. Clause 6 of the tender documents provides ***“Should the tenderer fail to observe and comply with the foregoing stipulation, the amount deposited as a security for the performance of the foregoing stipulation shall be forfeited to the Government.”***

iii) The arbitrator could not have ignored the above clause particularly in view of the fact that the cancellation of the second contract was challenged by the appellant and upheld right up to the Hon'ble Supreme Court. Thus, the non-performance by the appellant and the terms of the contract were ignored by the arbitrator and the Claim No.(iii) was wrongly allowed in favour of the appellant. Thus, the arbitrator has travelled beyond the scope of the reference and the award was liable to be set aside and such conduct of the arbitrator amounted to misconduct.

The payment clause of the contract reads as under:

“The buyer shall make payment for the goods purchased into the State Bank of India/Nationalized Banks at such place as the Director shall specify

and by the date fixed. Extension, if any, in the date of payment and the period of such extension shall be at the discretion of the Director/Government. Extension, if any, shall be subject to the payment of compensation at the rate of 10% of 1% of sale value per day of default. The Deposit-at-Call receipt for the amount of compensation payable will be forwarded by the buyer before or along with DACR for the Sale value. Permission to remove or take delivery of the goods will only be given on production of the DACR for the Sale value and compensation where paid.”

iv) The tender document was modified when the second contract was released in favour of the appellant to the extent that the extension was to be granted @ 20% of 1% of sale value per day of default and such letter was on the record of the arbitrator.

v) The second extension was granted to the appellant by the letter dated 19th April 1988 and third extension on 19th May 1988 and thereafter again on 22nd July 1988. The relevant part of the letter dated 22nd July 1988 reads as follows:

“..... However, on a very extraordinary case and although not bound to do so I hereby allow you:-

1) Payment of balance of the 25% of the cost of sale as provided in Clause IVA (ii) of the Sale Letter

dated 8th January 88 plus compensation charges as per contract (to make up for 25% of total payment to enable issue of SRO) by 10th 1988.

2) To make payment of balance of the contract value, viz., Rs.1,23,20,756/- plus compensation charges as per contract within 30 days of the issue of SRO which will be issued by us immediately after receipt of payments from you as mentioned in para 1 above.

If compliance in toto as above is not made by you the sale letter mentioned in the subject will be liable to be cancelled and the stores in question will be disposed of at your risk and cost.

Save as above this amendment to the sale letter is issued leaving all other terms and conditions of the sale letter remaining unaltered and is also without any prejudice to the terms and conditions of the sale letter and other rights available to the seller.”

vi) The contract was cancelled due to conduct of the appellant in seeking repeated unwarranted extensions. The cancellation of the contract was challenged in this Court and thereafter in the Hon'ble Supreme Court, but the cancellation stood affirmed by dismissal of the Special Leave Petition by the Hon'ble Supreme Court against the judgment of the High Court against the appellant/claimant. In respect of the claim of the claimant a suit and writ petition were also filed. The writ petition was dismissed and the suit was not

pressed upon. Thereafter, the arbitration clause was invoked and the first arbitrator held that unsuccessful challenge by the claimant to the termination of the contract and the dismissal of the writ petition filed by the claimant seeking the amount with interest and dismissal of the suit led to a clear conclusion that the claimant was not entitled to refund of the amount so claimed.

vii) The first award was challenged before this court and the Court directed that the filing of the writ petition would not amount to res judicata against the claim of refund and the same was to be considered on merits. The validity of the cancellation of the contract having been upheld by the Hon'ble Supreme Court the arbitrator was required to consider the refund of the amount claimed by the appellant as per the contractual terms.

viii) It is undisputed that the appellant paid an amount of Rs.44,06,251/- lakhs and period for payment was extended from time to time at the behest of the appellant and the delayed payment had to be compensated as per the terms of the contract by the appellant by paying penalty. On the basis of the

terms of the contract, a claim had been raised about the payment of Rs.7,59,380/- as a compensation for delays.

k) The appellant was thus entitled to the refund of the total amount less contractual compensation for delayed payment and not for the entire amount as held by the arbitrator. Since the arbitrator had ignored the terms of the contract, the entire amount of Rs.44,06,251/- was wrongly allowed in favour of the claimant by him. The appellant was thus entitled to an amount of Rs.44,06,251 – 7,59380.

4. The learned Single Judge also reduced the interest from 18% per annum to 10% per annum pendentelite. Consequently, the award was modified to the extent that the claimant was entitled to Rs.3646,871/- with interest @ 10% per annum from 23rd September 1991 till the realization.

5. In our view, the learned Single Judge proceeded entirely on the basis of the terms of the contract and Shri Shiv Khorana, the learned counsel for the appellant has been totally unable to establish as to how the judgment of the learned Single Judge could be faulted.

6. The conduct of the appellant evidently shows that it was the appellant alone who was solely responsible for the delays, coupled with the fact that the cancellation was upheld by the Hon'ble Supreme Court, the learned Single Judge could not arrive at any other conclusion save and except that the award of the entire amount of Rs.44,06,251/- to the claimant by ignoring the compensation payable as per the contract in the sum of Rs.7,59,380/- is incorrect and liable to be interfered with. The arbitrator had totally lost sight of the terms of the contract contained in the tender and the subsequent correspondence between the parties which was most material and relevant evidence, and the learned Single Judge has correctly analyzed and applied the contractual terms. Accordingly, the appeal having no merits is dismissed with no orders as to costs.

MUKUL MUDGAL, J.

VIPIN SANGHI, J.

March 03, 2009

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