

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

+ **CS(OS) No.2679/2000**

Reserved on : 23rd November, 2009.

Pronounced on: 2nd December, 2009

INDCON PROJECTS & EQUIPMENTS (P) LTD.

...Petitioner

Through: **Mr. S.C. Nigam, Advocate.**

VERSUS

DEZURIK (INDIA) LTD.

....Respondent.

Through: **Mr. S.S.Rana, Advocate with Ms.
B.Rana, Advocate and Ms. Meenu
Sharma, Advocate.**

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers 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

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JUDGMENT

VALIMIKI J. MEHTA, J.

I.A.No.2859/2001 in CS(OS) No.2679/2000

1. These are objections under Sections 30 and 33 of the Arbitration Act, 1940 to the Award dated 4.5.1998 passed by the sole Arbitrator. The Award in

question is a non-speaking Award and which the Arbitrator was entitled to pass, and the relevant part of which reads as under:

“ I, K.C. Sodhia, the arbitrator in this case, having considered fully and carefully all relevant aspects of the claims and counter claims of the two parties, have come to the conclusion that, in full and final settlement of the claims and counter claims brought before me by the two parties, Dezurik (INDIA) Ltd. should pay a sum of Rs.3,24,500 (Rs. Three lacs twenty four thousand five hundred) to Indcon Projects & Equipment Ltd. within 60 days of the date of this Award. In case of delay in payment beyond the time limit mentioned, interest at the rate of 12% per annum shall be payable by Dezurik (INDIA) Ltd. for the period of delay.”

2. The scope of challenge to a non-speaking Award is extremely limited.

The Court is not entitled to probe into the mental process of the Arbitrator which has led to passing of the Award. Keeping in view the limitation of law as aforesaid, I have heard the objections.

3. Mr. S.S. Rana, on behalf of the objector, has canvassed four main points and which are:-

(i) The Award which has been passed is beyond the scope of the order of reference.

(ii) The documents which are relied upon by the claimant are fabricated and manipulated and therefore the Arbitrator was not justified in relying upon the same.

(iii) The Arbitrator has mis-conducted himself and the proceedings by not

ordering for the payment of three valves which have been illegally retained by the claimant/non-objector.

(iv) The Arbitrator has mis-conducted himself because whereas the Award is dated 4.5.1998, stamp papers put on the same are of the year 2000.

4. So far as the first issue is concerned, the matter was referred to arbitration vide a petition under Section 20 of the Act by the order dated 6.3.1996 passed by this Court in suit No.1278/1990. Mr. Rana has argued that what was referred to the Arbitrator by the order dated 6.3.1996 were the disputes as enumerated in paras 5 to 10 of the petition and which disputes were two in number. The first dispute was for a claim of Rs.1,50,000/- on account of the risk purchase of three valves which the claimant alleged to have purchased from other sources on account of the default in supply of the same by the objector and the delays caused by the objector. The second claim was a claim for loss of profits allegedly on account of the non-objector being not successful in getting a fresh contract from its principal M/s. Jai Parkash Industries. Mr. Rana has thereafter taken me through the paragraphs of the claim petition filed before the Arbitrator by the non-objector and more particularly paras 13 and 14 which set out the claims. A reference to the calculations which have been furnished for the claim of Rs.6,50,000/- shows that the said claim is on account of the substitute valves and the additional spares which had to be purchased by the claimant/non-objector for the new system where the

substitute valves were to be installed. I may note that it was the case of the non-objector/claimant in the arbitration proceedings that on account of failure of the objector to supply the necessary valves, the non-objector was forced to re-design the DPG unit so as to adapt the same to the new substituted valves which they had sourced from elsewhere on account of the default of the objector.

5. No doubt, a reference to paras 5 to 10 of the petition under Section 20 of the Act shows that the claimant had originally claimed only a sum of Rs.1,50,000/-, however, I may note that the head of the claim was with respect to the loss caused to the claimant on account of the failure to supply the valves by the objector and whereupon the claimant had to source valves at a higher cost from a third person. The issue therefore is basically of a larger claim and also an issue with respect to redesigning the DPG unit at a higher cost because of the new valves which were to be sourced.

6. Admittedly, this objection that the claim with respect to re-designing of the system and incurring cost with respect thereto and the higher cost of the new valves being beyond the scope of the order of the reference was not taken up before the Arbitrator at any stage of the arbitration proceedings. This objection has been raised for the first time before this Court in these proceedings and the counsel for the objector has argued that this being a legal plea the objector is entitled to take the same at any stage because the Award being beyond the scope of the order of

reference is an Award of an Arbitrator who lacked jurisdiction to pass the same. The counsel for the objector has also relied upon two judgments, one of the Supreme Court in *Orissa Mining Corporation Vs. Prannath Vishwnath* AIR 1977 SC 2014 and the other of a Division Bench of the Sikkim High Court in *Principal Chief Engineer cum Secretary Vs. M.B.Chettri* 1995(2) Arbitration Law Reporter 313. The judgment of the Supreme Court in *Orissa Mining Corporation's* case (*supra*) holds that an Arbitrator cannot exceed his jurisdiction by embarking upon a claim which is beyond the terms of reference. It was held that the Arbitrator must confine himself to the claims referred to him only. In *M.D. Chettri's case* (*supra*) the Division Bench of the Sikkim High Court has held that even if no objection is taken during the arbitration proceedings, objection can be taken for the first time in appeal that the Arbitrator has taken into consideration claims beyond the reference order.

7. I am afraid that none of the two judgments cited by the counsel for the objector have application to the facts and circumstances of the present case. Whereas in the case before the Supreme Court in *Orissa Mining Corporation's* case does not deal with the issue of estoppel which issue applies in the facts of this case, the decision in *M.D. Chettri's* case will not apply in view of the below stated decision of the Supreme Court. The judgment, which in fact is applicable to the facts of the present case is, of the Supreme Court reported as *Inder Sain Mittal Vs.*

Housing Board Haryana (2002) 3SCC 175 in which the Supreme Court has clearly held that a person who does not take any objection with regard to the jurisdiction of the Arbitrator during the course of the arbitration proceedings and therefore takes the chance of the Award going in his favour, cannot once the Award has gone against him object to the jurisdiction of the arbitrator and he is deemed to have waived his right to object to the jurisdiction of the Arbitrator. As noted by me above no objection was at all taken by the objector that part of the claim was beyond the order of reference, and therefore, having contested the case on merits and taken the chance of the Award going in its favour the objector now cannot turn around and challenge the Award merely because the same has gone against it. The objector is therefore deemed to have waived its objection to the jurisdiction of the Arbitrator.

8. So far as the second point which has been argued is that the Arbitrator has misconducted himself and the proceedings because he has relied upon fabricated/manipulated documents, the said objection cannot be sustained because the Award in this case is a non-speaking Award. The Award in fact states that the Arbitrator has duly considered the pleadings of the parties as also the documents relied upon by the parties in support of their contentions. The Arbitrator is the final fact finding authority and this Court cannot reappraise the evidence merely because two views are possible from the facts on the arbitrator's record. Once the Arbitrator

has duly considered the documents, it means that the Arbitrator has arrived at a finding of fact that the said documents relied upon are not forged and fabricated considering that the Award is a non-speaking Award. Mr. Rana took me through the documents with its alleged contradictions to show that the same are fabricated and manipulated whereas and on the other hand Mr. Nigam on behalf of the non-objector has endeavoured to show that there is no fabrication but only a change in the name of the company, however, I need not dwell in too much depth with respect to these findings of facts because, as stated above, not only is the Award a non-speaking Award but there is also a finding of fact that the documents have been considered (consequently the same not being fabricated) which is a pure finding of fact with which this Court cannot interfere because it is in the domain of the Arbitrator to arrive at a finding of facts. While deciding this issue I am also affected by the fact that on merits of the case not much stress with any conviction was laid by the counsel for the objector on the ground that there was no breach of contract by the objector with respect to the valves supplied. Therefore, in other words the objector is in fact guilty of breach of contract by not only supplying defective valves but it made the supply after great delay. Considering all the abovementioned facts and circumstances, I am not inclined to interfere with the finding of facts arrived at on the basis of documents with respect to the cost incurred by the claimant for replacing the defective valves supplied by the objector on the ground

that the documents in this regard are fabricated as contended.

9. The third issue which was canvassed by the objector was that the Arbitrator mis-conducted himself and the proceedings in not ordering for return of the three valves which have been admittedly supplied to the claimant/non-objector. Mr. Rana canvassed that the objector was entitled to refund of Rs.2,50,000/- being the cost of three valves illegally retained by the non-objector. I may note that initially I was inclined to consider this issue, but, I note that the Arbitrator has specifically used the expression “in full and final settlement of the claims and the counter claims brought before me by the two parties” and the amount which has been awarded is Rs.3,24,500/- as against the claimed amount of Rs.6,50,000/-. Therefore, it is conceivable that the Arbitrator in the non-speaking Award has reduced from the claimed amount of Rs.6,50,000/- a sum of Rs.2,50,000/- towards costs of the three valves of which the objector is seeking refund/adjustment. Therefore, in the facts of the present case and in view of the non-speaking Award, I do not find that the Arbitrator has necessarily not given the benefit of the counter claim of Rs.2,50,000/- to the objector. This objection, therefore, is also misconceived and cannot be sustained.

10. Another issue which was canvassed before me by the counsel for the objector was with respect to the manipulation in affixing stamp papers to the Award. I may note that the objection seems to be prima facie factually correct

inasmuch as the Award is of 4.5.1998 and the stamp papers are of the year 2000, however, even if that be so what would turn on the same? It is not disputed by the objector that both the parties (including objector) received the copy of the Award soon after the passing of the Award in the year 1998 itself and it is not therefore the case that the contents of the Award passed in 1998 have been altered subsequently in the year 2000 and in which year it was filed in this Court. The decision on merits has not been affected by this avoidable act of the Arbitrator, more so as the Award is a non-speaking Award. If that be so at best there is misconduct by the Arbitrator not during the course of the arbitration proceedings but after the conclusion of the arbitration proceedings in rewriting the Award on stamp papers which was originally not done. Mr. Nigam has relied upon decision of Division Bench of the Patna High Court reported as *M/s Pradip Trading Co. Vs. State of Bihar AIR 1974 Patna 315* which states that merely because the Award is not on stamp papers will not make it invalid within the meaning of Section 30 of the Act. In my opinion nothing consequently turns on the objection that the Arbitrator has subsequently put stamp papers on the Award because the Award was in fact duly received by both the parties, immediately, after passing of the Award in 1998 itself and there cannot be said to be any manipulation in the contents of the Award. I would, therefore, in the facts of this case tend to ignore this technical argument and the flaw in the action of the Arbitrator. At the very best additional penalty under the Stamp Act, 1899 can

be imposed before enforcing the Award but the Award cannot under such circumstances be set aside on the ground of mis-conduct.

11. The last point which has been urged by the counsel for the objector is that the rate of interest awarded by the Arbitrator at 12% is a very high rate and the Court should reduce the rate of interest. I feel that this contention of the counsel for the objector is justified because the Supreme Court in a recent chain of judgments reported as *Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority & ors.* 2005 (6) 678, *McDermott International Inc. Vs. Burn Standard Co. Ltd. & ors* 2006 (11) SCC 181, *Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd.* (2006) 7 SCC 700 and *Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra*, 2007 (2) SCC 720 and *State of Rajasthan Vs. Ferro Concrete Construction* (2009) 3 Arb.LR. 140 (SC) has held that the Courts should take note of the consistent fall in the rates of interest and must reduce the rate of interest considering the changed scenario. This Court has, in terms of the aforesaid mandate of the Supreme Court judgments, been uniformly awarding interest @ 9% per annum simple. Therefore, in the facts and circumstances of the present case and in terms of the mandate of the aforesaid Supreme Court judgments, I reduce the rate of interest granted by the Award from 12% to 9% per annum simple. In view of the above, the Award is made rule of the Court with the only modification that the rate of interest as awarded in the Award shall be read as 9%

per annum simple instead of 12% per annum.

12. With these observations the objection IA 2859/2001 is dismissed except to the extent of allowing modification of the reduced rate of interest. The I.A & suit stand disposed of accordingly.

December 2, 2009
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VALMIKI J.MEHTA, J