

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

+ **Date of Decision : 28.05.2009**

% **O.M.P. No. 244/2000**

KALYANPUR CEMENT LTD. Petitioner
Through: Mr. Rakesh K. Khanna, Sr.
Advocate with Mr. Reetesh Singh,
Advocate.

versus

UNION OF INDIA Respondent
Through: Mr. A.K. Bhardwaj, Advocate.

CORAM:
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 Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

VIPIN SANGHI, J. (Oral)

1. The petitioner M/s. Kalyanpur Cement Limited has filed objections under Section 34 of the Arbitration and Conciliation Act (The Act) to challenge the award made by the sole arbitrator Sh. B.L. Nishad on 19.05.2000 in case no. 39-N/99. The claims of the respondent UOI arising out of a contract dated 17.04.1995 against R/C. dated 31.03.1995 for supply of Portland Cement by the petitioner to the respondent were referred to arbitration of Sh. B.L. Nishad on 05.05.1999.

2. The case of the respondent Union of India before the

Arbitrator was that the petitioner supplier had failed to supply the goods despite extension of delivery period up to 25.08.1995. The original delivery period expired on 30.06.1995. The respondent cancelled the contract of the petitioner at the risk and cost of the petitioner for the unsupplied quantity of cement. The respondent claimed an amount of Rs. 84,75,196.08/- from the petitioner. The details of the claim made by the respondent were contained in exhibit 'X' filed along with the statement of claim.

3. The petitioner refuted the claim on the ground that the petitioner did not receive confirmed orders for supply of cement and, therefore, could not effect the supply. It was also pleaded that there was an in between agent, namely, Orbtik Overseas Private Limited, who desired payment of commission. There was dispute between the petitioner and the said agent and the agent had also filed a suit against the petitioner. It was claimed by the petitioner that the orders were never given to the petitioner directly.

4. The learned Arbitrator allowed the claim of the respondent Union of India and the reasons given by him in his award read as follows:

"i) The respondent's case is that supply orders were given to some agent M/s. Orbtik Overseas Pvt. Ltd. but I find that the contract was entered with the respondent and the respondent is governed by the terms of the contract. The responsibility due to non-supply of stores is of the respondent and the respondent failed to perform the contract and did not make supply of ordered stores.

Therefore, respondent had committed the breach of contract.

ii) The claimant filed the documents showing the difference between respondent's rate and market rate on or about date of breach with calculation of general damages.

iii) The respondent neither filed nor produced any evidence to show that the rate prevailing during that period was less rate than the proved by the claimant.

iv) There is no other rate made available by the respondent and the claimant has suffered loss on account of breach of the contract by the respondent."

5. The learned Arbitrator also awarded interest on the awarded amount from the date of publishing the award till actual realization.

6. The first objection argued by learned Senior Counsel Mr. Rakesh Khanna appearing for the petitioner is that the award is not reasoned. He submits that not only under the provisions of the Act but even the terms of the contract, as the claim was beyond Rs. 1 lacs, the Arbitrator was obliged to give a reasoned award. He refers to Clause 24 (7) of the contract in this regard. He submits that the reasons given by the Arbitrator are cryptic. He submits that the Arbitrator has merely relied upon the statement showing the difference between the petitioner's contractual rate and the market rate for calculation of general damages.

7. His further submission is that the proceedings were concluded before the learned Arbitrator on 27.04.2000. Thereafter the respondent Union of India had filed documents along with index dated 28.04.2000 before the Arbitrator in support of their claim for general

damages to establish the market rate at the relevant time. He submits that the petitioner did not have any opportunity to deal with the document produced after the closure of the proceedings on 27.04.2000. He thus submits that the proceedings are vitiated due to violation of principles of natural justice, which the learned Arbitrator was bound to follow. He also submits that the respondent did not prove the documents filed after 27.04.2000 in accordance with law. In support of this objection, he relies on the averment contained in response to Para 32 of the objection petition wherein the respondent Union of India inter alia states: *“During the course of proceedings on 27.04.2000 it was mentioned by the Respondent before the Arbitrator that the general damages were calculated on the basis of supply orders and the calculations were available with Arbitrator. The calculations were also explained to the Arbitrator. The documents were, however, filed on 28.04.2000 sustaining the rates already mentioned in the statement of claim and in other documents. The copies of the documents filed on 28.04.2000 were given to the petitioner also by the Respondent. The petitioner never refused any of the documents or the contents therein before the Arbitrator or to the Respondent/Union of India.”*

8. Learned Senior Counsel for the petitioner also submits that though the alleged breach of the contract had occurred in the year 1995, the arbitration agreement was invoked only in the year 1999, that is, beyond the period of three years. He submits that therefore,

the claim itself was barred by limitation.

9. Learned counsel for the respondent Union of India on the other hand supports the award. He submits that there are sufficient reasons given in the award. The Arbitrator has come to a finding of fact that the petitioner had breached the contract by not making supply of the ordered stores. He submits that since the contract had been awarded to the petitioner, the petitioner alone was responsible for its performance and the liability for non supply of the stores was also that of the respondent and not of some so called agent M/s. Orbtik Overseas Private Limited as claimed by the petitioner. He submits that the respondent Union of India had filed detailed computation of its claim of general damages. So far as the filing of the documents on 28.04.2000 is concerned, he submits that the rates claimed by the Union of India were founded upon actual rates established in contract for supply of stores at the relevant time. However, the document to substantiate that claim was filed immediately after the closure of the hearing on 27.04.2000 along with the index dated 28.04.2000 with an advance copy to the petitioner. The petitioner never objected to the said filing or to the document being taken on record. Even with regard to the contents of the documents, neither any objection nor any comment was raised by the petitioner to claim that the rate contained therein is not relevant for purposes of computing the general damages as claimed by the respondent. He submits that the award was made only on 19.05.2000 that is nearly twenty days after the submission of

the documents. The fact that the petitioner did not raise any objection before the Arbitrator clearly shows that the petitioner really had no objection to the filing of the said document or to its contents. He submits that the petitioner cannot, therefore, raise any grievance in this regard in these proceedings. So far as the objection with regard to the limitation is concerned, he submits that no such objection was raised before the Arbitrator. It was permissible for the petitioner to raise an objection on limitation before the Arbitrator, and since no such objection was raised, the petitioner is not entitled to raise any objection in these proceedings.

10. I have heard learned counsels for the parties and perused the award and the relevant record. I am of the view that there is no error in the award and no ground for setting aside the award under Section 34 or under any other provision of the Act is made out in this case. The finding of the arbitrator that the petitioner had failed to perform the contract and did not make supply of the stores is a finding of fact. His conclusion that the petitioner herein had committed breach of the contract, therefore, cannot be questioned. The document showing the difference between the contractual rate with the petitioner herein, and the market rate on or about the date of breach with calculation of general damages shows that it is a detailed computation dealing with each of the instances of failure to supply on the part of the petitioner against the specific orders. The complete computation of the claim for general damages was placed on record before the Arbitrator. From the

award it is seen that the petitioner did not produced any evidence to controvert either the defaulted quantity, or the rate claimed to be prevailing in the market at the relevant time by the respondent.

11. So far as the objection to the filing of documents with index dated 28.04.2000, that is, after the conclusion of the hearing is concerned, I find merit in the submission of the learned counsel for the respondent Union of India that no objection to the same was raised by the petitioner before the Arbitrator even though the award was made about twenty days later. If the petitioner was so minded the petitioner could have raised objection to the filing of the said document by the respondent and could have made its submission with regard to the said filing, as well as to the contents of the said documents. Neither of this was done. The Arbitral proceedings terminated upon making of the final award. Therefore, the petitioner could have moved an application before the Arbitrator itself for making further submission on the document filed by the respondent along with the index dated 28.04.2000. Therefore, the grievance raised by the petitioner that he did not have sufficient opportunity to deal with the said document does not appear to be justified.

12. The objection with regard to limitation was not raised by the petitioner before the Arbitrator. For this reason there is no finding given by him on this aspect. When the petitioner did not raise any objection before the learned Arbitrator on the aspect of the claim being barred by limitation, none can be raised at this stage. Though the

reasons given in the award are not very elaborately stated, they are crisp and clear. There is a clear nexus between the reasons given and conclusions reached by the learned Arbitrator. I, therefore, reject the objections to the award on Claim No. 1.

13. So far as the aspect of grant of interest at the rate of 18 per cent from the date of the award till realization is concerned, in my view, the same appears to be excessive considering the prevalent rates of interest. Accordingly, the rate of interest is modified and is reduced to 9 per cent per annum. With the aforesaid modification, the objections are dismissed leaving the parties to bear their respective costs.

VIPIN SANGHI, J.

MAY 28, 2009
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