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IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No. 291/2000

13th November, 2009.

M/S. INDIAN FARMERS FERTILISER COOPERATIVE LTD.

..Petitioner

Through: Mr. V.K.Makhija, Senior Advocate
with Mr. Manoj Verma, Advocate,
Mr. Vikas Bhadauria, Advocate
with Mr. Saurabh Seth, Advocate.

VERSUS

M/S. INDIA TUBE MILLS & METAL INDUSTRIES PVT. LTD.

...Respondents

Through: Mr. Sumit Sen, 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?
3. Whether the judgment should be reported in the Digest?

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JUDGMENT (ORAL)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the Award dated 24.8.2000 passed by the sole Arbitrator.

2. The only grievance as raised by the learned senior counsel for the petitioner against the Award is that the objector was entitled to make recovery from the bills towards the liquidated damages because the Arbitrator has held objector/IFFCO is not guilty of breach of contract by causing delays in performance of the contract. The learned senior counsel has referred to para 11.2 of the Special Conditions of the Contract (SCC) which reads as under:

“11.2 In case of delay in completion of the work, for reasons not attributable to the Owner, the Owner shall deduct liquidated damages at the rate of ½% of the Contract Price for each week of delay or part thereof subject to a maximum of 5% of the Contract Price.”

The Senior counsel therefore urges that because there is the expression used in clause 11.2 that “for reasons not attributable to the owner”. The same means that since the Arbitrator has not held the objector guilty of any delays, the objector was therefore entitled to make recovery from the bills for liquidated damages in terms of the aforesaid clause 11.2.

3. In order to appreciate the contention of the counsel for the objector, it is necessary to refer to paras 41 and 46 of the Award

which are the conclusions arrived at by the Arbitrator with respect to the issue of delay in performance of the contract. These paras 41 and 46 reads as under:

“41. Thus as a matter of fact the delay which had occurred in completion of the contract is not attributable to ITM and legally also not attributable to IFFCO. Issue No.1 is decided accordingly.

46. The clause entitling IFFCO to impose liquidated damages can be legally invoked if the delay in completion of the contract is due to reasons attributable to ITM. ”

4. In view of the aforesaid factual finding, it is quite clear that the respondent is not guilty of breach of contract, although the petitioner also may not be guilty in committing breach of contract by causing delays.

5. The question is what therefore follows. In law, being the provisions of the Contract Act 1872, damages can be claimed under Section 73(unliquidated damages) or Section 74(liquidated damages) if in the first place the guilty party is responsible for the breach of the contract. In the present case, the guilty party is alleged to be the respondent. Therefore, it has to be seen whether the respondent/contractor was guilty of breach of performance by causing

delay because it is only if there is breach of contract by the respondent then the provisions of Section 73 or Section 74 would come into play. These Sections cannot come into play unless and until a person who is alleged to be guilty is in fact guilty of breach of contract. Merely because the person who alleges breach is not guilty of breach of contract cannot automatically mean that the opposite party is also automatically guilty of breach of contract. The finding of the Arbitrator in paras 41 and 46 above ultimately hold the respondent not guilty of breach of contract in performance of his obligations under the contract by causing any delays. The law with respect to challenge to an Award under Section 34 of the Arbitration and Conciliation Act, 1996 is now well settled. An Award can be challenged only if the same is against the contractual provisions or is illegal or is so perverse that it shocks the judicial conscience. I do not find that in the present case it can at all be said that the Award is in any manner violative of clause 11.2 of the SCC or the law, namely, Section 74 of the Contract Act. No perversity has been shown to me for challenging the finding of the Arbitrator.

6. Once it is held that the respondent is not guilty of breach of contract, consequently there arises no question of the respondent being held guilty of liability for liquidated damages in terms of clause 11.2 of the SCC. In the present case, what the respondent claimed before the Arbitrator was the claim for the work done by it for the petitioner. It is out of these amounts payable for work done that the petitioner sought to make recovery for liquidated damages in terms of clause 11.2 of the SCC. The Arbitrator having found the respondent not guilty of breach of contract held that the recoveries made by the objector were not sustainable and therefore allowed the claim of the respondent/claimant with respect to the amount of work done. I do not find any fault whatsoever with the Award on the ground on which the same is sought to be challenged by the objector. No other ground except what is discussed above has been pressed before me.

7. Accordingly, these objections are dismissed with costs quantified at Rs.50,000/- which shall be payable within a period of four weeks from today failing which they shall carry further interest @ 18% per annum.

8. The present petition is disposed of accordingly.

VALMIKI J.MEHTA, J

November 13, 2009
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