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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: April 30, 2009

Date of Order: July 14, 2009

+ OMP No.429/2004

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14.07.2009

POWER GRID CORPN. OF INDIA Petitioner

Through : Mr. S.B. Upadhyay, Sr. Adv. with
Ms. Anisha Upadhyay & Mr. Pawan Upadhyay, Advs.

Versus

SIEMENS

.... Respondent

Through: Mr. C. Mukund with Mr. Avneesh Garg, Advs.

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. By this petition under Section 34 of the Arbitration and Conciliation Act, petitioner has assailed an award dated 15th August, 2004 passed by the Arbitral Tribunal.

2. Brief facts relevant for deciding this petition are that the petitioner accepted tender/bid of the respondent for purpose of laying down transmission lines. Three contracts were entered into between the parties on 14th March, 2000 for the purpose; one was called as off-shore supply contract and two were called as on-shore supply and service contracts. Under contract no.C51513-S656-2/672 dated 14th March, 2002, the claimant had supplied power equipments/goods as

per contract to the respondent and when the equipments and material entered into State of Orissa where project was to materialize an entry tax was imposed by State of Orissa under the Entry Tax Act, 1999. This tax was paid by the petitioner and later on was deducted from the bills of the respondent. The respondent raised a dispute with the petitioner that the liability to pay the entry tax was not that of the respondent and it was that of the petitioner. The deduction made of an amount of Rs. 91,75,389/- was contrary to the contract and should be refunded back to it. Since the petitioner took a stand that the payment of entry tax was the liability of the respondent, it refused to refund the amount. The Arbitration Clause was invoked by the respondent and the claim of the respondent for refund of this amount was referred to the Arbitral Tribunal consisting of three members. Before the Arbitral Tribunal the only issue to be decided was as to who was liable to bear the burden of entry tax under Orissa Entry Tax.

3. The Arbitral Tribunal after considering the terms of the contract and the rival contentions came to conclusion that the liability to pay entry tax under Orissa Entry Tax was that of the petitioner and not of the respondent and the petitioner could not have deducted the amount of entry tax paid by it from the bills of the respondent. It therefore directed the petitioner to refund the amount along with 11% interest.

4. The petitioner, aggrieved by the award, has assailed the award on the ground that the Tribunal wrongly decided the contractual liability of the parties and wrongly fixed the burden of the entry tax upon the petitioner. The Tribunal did not appreciate that the bid price was a lumpsum price inclusive of all Indian taxes, dues and levies on the bought out materials, components, equipments, etc. and in view of the lumpsum bid price the liability of payment of all the taxes including Orissa Entry Tax was that of the respondent and the petitioner had been wrongly burdened by the Tribunal with this amount and the award was contrary to the terms of the contract. It is submitted that the tribunal ignored that in the summary price proposal vide Clause 1, Siemens as a foreign bidder indicated the lumpsum price for entire scope of the work which included the local tax liabilities so the entry tax being local tax was liability of the respondent.

5. A perusal of record and the award would show that after the bid was accepted, the petitioner had entered into three separate contracts with the respondent. Though, the bid was one, but by mutual agreement the contract was divided into three separate contracts as stated above. The Arbitral Tribunal found that the dispute arose in respect of supplies made under on-shore supply contract no.C51513-S656-2/672 and this contract provided under Clause 22.1 that in case the contractor was to pay entry tax/Octroi tax, the same shall be reimbursed by the owner. The Tribunal also found that the contract provided the delivery of goods ex factory and the ownership

in the goods passed on to the petitioner the moment goods left the factory of the claimant/respondent. It also found that the invoices showed the petitioner as consignee and delivery challan showed the dispatch of goods to the petitioner and the lorry receipts were prepared in the name of the petitioner with a certificate that the materials were received and handed over to Siemens site office store in-charge. After considering the terms of the contract and the fact that clause 22 of the contract agreement itself provided that in case of dispute, the contract agreement will take precedence over volume-I, volume-I will take precedence over volume-II of the contract agreement and volume-II will take precedence over volume-III of the contract agreement, the Arbitral Tribunal observed that in view of this clause that the volume-I was to take precedence over volume-II and volume-II was to take precedence over volume-III, and the fact that Article 3.1 of the contract dealing with the scope of work clearly provided that all equipments or accessories etc. from within India will be dispatched on ex-works base, therefore ownership over the goods was to be considered as that of the petitioner.

6. The petitioner had relied on Clause 21.1, INB whereby the bidder was required to quote lumpsum price for entire scope of work and INB 17, 20.1, 20.2 and 20.3 and GCC 31.2 to press the point that the price was inclusive of all liabilities of taxes and the contract being lumpsum contract all custom duties, levy duties, sales tax payable on transaction was responsibility of the contractor, i.e., respondent.

However, this argument was rejected by the Tribunal in view of the fact that INB 22.1 referred only to off-shore contract and INB 22.2 referred to on-shore supply contract. INB 22.2 only provided that the tax payable between the contractor and his sub-contractor for supply of equipments, components, raw-materials, etc. for their use or consumption or dispatched directly to the owner shall be included in the bid price and no separate claim on this behalf will be entertained by the owner. The Tribunal found that Clause 22.2 has to be harmoniously constructed along with other clauses of the contract and when the on-shore supply contract specifically provided that octroi and sales tax, if paid by the contractor, shall be reimbursed to him by the owner, the entry tax being in the nature of the octroi has to be burdened by the petitioner/owner.

7. It is settled law that while entertaining the objections under Section 34 of the Arbitration and Conciliation Act, 1996, the Court does not sit in appeal and does not act as an Appellate Court. Where the view taken by the Arbitrator, after considering the documents executed between the parties, is a plausible view, the Court, even if is of opinion that other view should have been taken, cannot substitute its own view in place of the view of the Arbitrator and set aside the award. Even where two views are equally possible and one view is taken by the Arbitrator, the Court cannot interfere into the award. In the present case, the view taken by the Arbitrator that it was the petitioner who was to bear the burden of entry tax is a plausible view

taken on the basis of a different clauses of the contract, I consider that this Court need not interfere with the award on the ground that another view was also possible. I find support from the **MP Housing Board vs. Progressive Writers and Publishers** JT (2009) 4 SC 219. This Court in **DDA vs. Anand and Associates** 151 (2008) DLT 18 (DB) had observed that the interference by the Court while hearing objections does not mean that the Court has to sit in appeal. The Court cannot substitute its finding against the findings of the Arbitrator.

8. I consider no ground is made out before this Court for interference into the award. Objections have no force and are hereby dismissed.

July 14, 2009
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SHIV NARAYAN DHINGRA J.