

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

+ **ARB. P.No. 53/2009**

8th April, 2010

JINDAL STEEL & POWER LTD. Petitioner
Through: Mr. A.S. Mathur, Advocate
VERSUS

N.S.ATWAL, SOLE PROPRIETOR,
GURU MEHAR CONSTRUCTION Respondent
Through: Mr. Siddharth Aggarwal,
Mr. Simon Benjamin, Advocates

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

% **JUDGMENT(ORAL)**

VALMIKI J. MEHTA, J

Review Application No. 3/2010

1. A petition under Section 11 of the Arbitration and Conciliation Act, 1996 was filed by the review petitioner for reference of various disputes to arbitration. This petition was disposed of vide order dated 03.12.2009 and the petition was

dismissed. The order dated 03.12.2009 dismissed the petition as what was argued was that those disputes be referred to arbitration which pertained to a loan given by the petitioner to the respondent. It was found that the Loan Agreement was much subsequent to and independent of the principal contract/work order dated 02.3.2001 placed upon the respondent by the petitioner (under which the respondent was to carry out various services of excavation for the petitioner at a site near Dongamohua Village District Raigarh, M.P.) and only the principal contract contained the arbitration clause, whereas there was no arbitration clause in the subsequent loan transaction.

2. Now, the present review application is filed pointing out a mistake that the disputes which were sought to be referred through the petition under Section 11 of the Arbitration and Conciliation Act, 1996 were the disputes not only for the Soft Loan Agreement but also with respect to the Agreement originally entered into on 02.03.2001 and thereafter extended vide letter dated 17.7.2006 and followed up by a work order dated 04.08.2006. In substance, what is stated in the review application is that the petition under Section 11 was in two parts. The first part sought reference of the disputes pertaining to the excavation works and the second part sought reference of the disputes under the Soft Loan Agreement to arbitration. Though the disputes under the Soft Loan Agreement were not referred to arbitration, but, the disputes with respect to the original Agreement of

excavation ought to have been referred to arbitration. It is not disputed by counsel for the review petitioner that at the time of hearing which led to the passing of the order dated 03.12.2009, arguments were only advanced for reference of the disputes to arbitration with respect to the Soft Loan Agreement and not with respect to the disputes pertaining to the Excavation Agreement. It is pleaded that this is a *bona fide* mistake committed by the petitioner inasmuch as a reference to the petition under Section 11 shows that what was sought to be referred to arbitration were the disputes not only of the Soft Loan Agreement but also the disputes arising out of the principal contract of excavation and as continued in 2006. It is contended that this mistake falls within the meaning of the expression “any other sufficient reason” as found under Order 47 of the Code of Civil Procedure, 1908 (CPC).

Notice was issued in this review application and time for reply was taken by the respondent on 16.02.2010. Three weeks time was given to file a reply on 16.02.2010. However, till date no reply has been filed by the respondent. I am, therefore, proceeding to dispose of the review application inasmuch as the opportunity of filing the reply has not been availed by the respondent. In fact, today, further time was sought for filing of the reply to the review application and which I have declined.

3. The counsel for the respondent vehemently argues for dismissing of the review application and contends that the disputes with respect to the Agreement of Excavation cannot be referred to arbitration inasmuch as the original contract with respect to excavation activities containing the arbitration clause is dated 2.3.2001 and which stood expired after the four years period thereof. It is contended that though the subsequent renewal letter dated 17.7.2006 was received by the respondent, however, the consequent work order dated 4.8.2006, which contained the Arbitration Clause, was not received by the respondent. It is, therefore, contended that since the work order dated 04.08.2006 has never been received by the respondent and since the respondent has not acted on that basis disputes cannot be referred to arbitration pursuant to the work order dated 04.08.2006.

4. I do not agree with the contention of the learned counsel for the respondent for the reason that even assuming that the work order dated 04.08.2006 is not received by the respondent, it is not disputed that the letter dated 17.07.2006 has been received by the respondent. This letter dated 17.07.2006 reads as under :-

“JSPS/VG/ORDER/2006/1707

July 17, 2006

M/s. Guru Mehar Construction
204, Avalon Apartments
New Mangla Puri
8, M.G. Road
New Delhi – 110 030.

Kind Attn: **Mr. N.S. Atwal**

Subject: Excavation works at Jindal Opencast Coal Mine

Dear Sir,

Please refer to the various correspondences regarding the rates for excavation in various types of soil at the Coal Mine of Jindal Steel & Power Limited. The Management is pleased to **renew** your contract at the following rates:-

- 1) Excavation in Soil – Rs.30.25 / BCM – Diesel Capping – 0.6 Ltr/ BCM
- 2) Excavation in Coal –Rs.31.25 / BCM – Diesel Capping – 0.6 Ltr / BCM
- 3) Excavation in Hard Store / Shale – Rs. 38.63 / BCM – Diesel Capping
- 0.8 Ltr / BCM

The Excavation quantity for the contract period will be 8.5 Million BCM $\pm$ 10%.

The above rate will be in force from 15th Feb 2006 to 31st March 2007. Based on your satisfactory performance the terms and contract will be decided further. You may approach ED, JSPL, Raigarh, who will issue formal work order to you.

Thanking you,

Yours faithfully,
For **JINDAL STEEL & POWER LIMITED**

(VIKRANT GUJRAL)
VICE CHAIRMAN & CEO”

5. The expression used in the very first para of this letter namely “renew” is important. Renewal is an extension of an existing contract which is renewed i.e. an old contract given a new life for a new period. It means that all the terms and conditions of the original contract stand adopted subject to any variation contained in the letter dated 17.07.2006. The only variation contained in the

letter dated 17.07.2006 is the change in the rates with respect to excavation. Thus, even if there is no work order dated 04.08.2006, the work order dated 02.03.2001 will hold the field and, admittedly, this work order contains an Arbitration Clause.

6. In fact, the respondent itself understood the issue in this very manner because in their letters dated 22.11. 2006 and 05.01.2007, the respondent itself sought reference of the disputes to arbitration in terms of Clause 18 of the work order dated 02.03.2001. These paragraphs of the letters of the respondent to the petitioner dated 22.11.2006 and 05.01.2007 respectively read as under :-

“We hereby request you to refer the matter to Arbitration in terms of Clause 18 of the Work Order dated 02 March 2001, flowing out of which the entire episode has come off. We would be submitting our claims separately. The payments due to you or to us can only be finalized after the Arbitration award.”

“In view of the above, we would once again request that an Arbitrator should be appointed in terms of Clause 18 of the Work Order dt. 02.03.2001”

7. In my opinion, therefore, clearly there is an Arbitration Agreement. This Arbitration Agreement is Clause 18 in the work order dated 02.03.2001 and which has simply been renewed by the letter dated 17.07.2006. Once there is a renewal, and as already stated by me above, the original terms and conditions continued and which original terms and conditions do contain an Arbitration

Clause. Also as already stated by me above, the respondent itself has understood this accordingly as per its letters dated 22.11.2006 and 05.01.2007.

8. The counsel for the respondent raised an additional point that no review application is permissible once a petition under Section 11 of the Arbitration and Conciliation Act, 1996 is disposed of. I have in fact wholly failed to understand this argument of the learned counsel for the respondent. Surely, provisions of review are available when a petition under Section 11 of Arbitration and Conciliation Act is disposed of if the conditions contained in Order 47 CPC are satisfied. A petition under Section 11 is dealt with by this Court as a delegatee of the Chief Justice under Section 11 and this Court functions as a civil Court exercising ordinary original civil jurisdiction vide Section 2(e) of the Arbitration and Conciliation Act, 1996. To a Civil Court, the provisions of Code of Civil Procedure, 1908 surely apply. I, therefore, fail to understand the argument raised by the learned counsel for the respondent on the basis of Section 11 (and more particularly sub-Section 7 thereof) that a review application is not maintainable once a petition under Section 11 is disposed of.

9. No other issue/argument/point was urged by either of the parties.

10. Accordingly, I hold that there is an error or mistake apparent on the face of the record being the order dated 03.12. 2009 and which has arisen on account of

the *bona fide* mistake of the petitioner in not arguing for seeking reference of disputes to arbitration in terms of the work order dated 02.03.2001 and continued vide letter dated 17.07.2006, although, such a case was in fact laid down in the petition under Section 11. In my opinion, this in fact also amounts to “any other sufficient reason” as found under Order 47 Rule 1 of the Code of Civil Procedure, 1908. The disputes pertaining to the principal contract dated 2.3.2001 and as renewed vide letter dated 17.7.2006 are therefore liable to be referred to arbitration as there is an Arbitration Clause, the disputes fall within the scope of the Arbitration Clause and there is no other objection to the maintainability of the petition.

11. Accordingly, I hereby allow the review application and review the order dated 03.12.2009 whereby, the petition under Section 11 will stand partly dismissed in terms of the said order with respect to the Soft Loan transaction between the parties, however, the disputes/differences/claims/counter-claims pertaining to excavation activities and which are the subject matter of the work order dated 02.03.2001 and as renewed by the letter dated 17.07.2006 are referred to the arbitration of Hon’ble Mr. Justice R.C. Chopra (Retd.) N-7, Greater Kailash-I, New Delhi-110048 (Mob: 9818097777). I am informed by the counsel for the petitioner that the claim of the petitioner will be approximately in the region of one and a half crores at least. This figure I am only stating in order to

fix the fee of the Arbitrator and it will not prevent the petitioner from raising all its claims whatsoever it deems fit before the learned Arbitrator. The fees of the learned Arbitrator is fixed at Rs.2,20,000/- to be equally shared by the parties and which will be payable in three equal portions. The first portion will be payable when the Arbitrator enters upon the reference. The second tranche will be payable when the evidence commences and the third part would be payable at the time of commencement of the final arguments. The Arbitrator will in addition be entitled to all actual out of pocket miscellaneous expenses including secretarial charges. The petitioner should file his claim petition before the Arbitrator within a period of three weeks from today. The respondent shall file the written statement and counter claim, if any, within a period of three weeks thereafter. Replication-cum-written statement to the counter claim be filed within a period of three weeks thereafter.

12. Parties to appear for preliminary directions before the learned Arbitrator on 23rd April, 2010 at 5.00 PM. The Arbitrator shall endeavour to dispose of the matter within a period of approximately one year from the date he enters appearance. None of the parties will seek unnecessary adjournments in the arbitration proceedings and Arbitrator will be entitled to impose costs with respect to the unnecessary adjournments which are sought by either of the parties.

I may state that I originally intended to refer the matter to the Delhi High Court

Mediation and Conciliation Centre, however, the counsel for the parties were not agreeable in this regard.

13. The review application is accordingly disposed of in terms of the above, leaving the parties to bear their own costs. Arbitration petition 53/2009 and the review application both are now disposed of in terms of the present order. I may clarify that since the Section 11 petition is partly allowed, no costs shall be payable as imposed upon the petitioner vide order dated 03.12.2009.

VALMIKI J. MEHTA,

April 08, 2010
dkg/J