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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: July 16, 2009

Date of Order: July 30, 2009

+OMP 102/2007

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Ashok Kumar Chhabra

Through: Ms. Nandni Sahni, Advocate

30.07.2009

...Petitioner

Versus

Union of India

Through: Ms. Manpreet Kaur with Ms. Mamta Tandon, Advocates

...Respondent

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 & Conciliation Act, 1996, the petitioner has assailed the award dated 7th December 2006 whereby the learned Arbitrator, out of the three claims raised by claimant (petitioner herein), allowed only one claim of Rs.1 lac on account of forfeiture of earnest money and awarded interest thereon @ 10% per annum. The petitioner is aggrieved because of rejection of two other claims of petitioner, one on account of loss of profits expected from the contract and other on account of hire charges due to non-operational of plant and machinery i.e. hot mix plant.

2. Brief facts relevant for purpose of deciding this petition are that the petitioner was having a hot mix plant in Delhi. He participated in tender invitation issued by respondent for construction of a road. One of the basic conditions of the tender was that the party must have a hotmix plant of its

own. The petitioner participated in the tender process in 1997 and was awarded the contract on 21st January 1998.

3. By an order dated 10th October 1996, the Supreme Court had given directions that all 43 hotmix plants functioning in Delhi shall stop functioning with effect from 28th February 1997 and they shall be relocated outside Delhi. In the list of 43 hotmix plants, the hotmix plant of the petitioner was not mentioned due to an omission. The Pollution Control Board, however, served a notice on petitioner on 6th March 1997 to show cause as to why this plant be not closed down immediately as this plant was functioning after 28th February 1997, the last date given by the Supreme Court. After considering the reply of petitioner, the Pollution Control Board Committee vide order dated 16th May 1997 directed petitioner to stop operating and functioning of hotmix plant forthwith. The matter also came up for hearing before the Supreme Court and the Supreme Court vide order dated 5th December 1997 included the plant of petitioner in its directions dated 10th October 1996. The petitioner thereafter had preferred a writ petition before this Court against the order of sealing the hotmix plant issued by Central Pollution Control Committee. This Court while entertaining the writ petition made it clear that the order of closure passed by Central Pollution Control Committee still stands and its operation has not been stayed neither the order has been set aside.

4. Despite the fact that the hotmix plant of the petitioner had been ordered to be closed down and could not have been operational under law, the petitioner participated in the tender and sent its tender to respondent although it was a pre-condition of the tender that the tenderer should have a hotmix plant operational. That only means that hotmix plant should be

lawfully operational. A hotmix plant being run illegally could not have satisfied the precondition.

5. The contract of the petitioner was cancelled by the respondent since the petitioner had not proceeded with the work. The earnest money was forfeited. After this, the petitioner invoked the arbitration clause and raised three claims as stated in para 1 above and the learned Arbitrator only allowed the claim in respect of earnest money and interest thereon as observed above.

6. It is argued by counsel for petitioner that the work on the road could not be started because Bitumen which was to be supplied by respondent was not at all supplied. When she was confronted with the orders of Delhi Pollution Control Board, Supreme Court and Delhi High Court, she stated that nonetheless and irrespective of the order of the Supreme Court, the hotmix plant of the petitioner was functioning. However, she admitted that the petitioner was sentenced by the Supreme Court for violation of its order of closure of hotmix plants for a period of seven days imprisonment and a fine of Rs.1 lac. The apology tendered by the petitioner was rejected by the Supreme Court holding that the apology cannot be a weapon of defence to purge the guilt of contempt and the apology given by the contemnor was not a product of remorse or contrition.

7. It is obvious that supply of bitumen by respondent to petitioner would have been in direct violation of the order of the Supreme Court of closure of hotmix plants and respondent would have also been guilty of contempt of the Court by supplying bitumen for operation of hotmix plants. The supply would

have also been in violation of the orders of Pollution Control Board and orders of the Supreme Court. In view of the order of the Supreme Court for closure of hotmix plants in Delhi and order of Pollution Control Board issued in May, 1997, the petitioner was not even qualified for participating in the tenders. The learned Arbitrator though had considered this, but still allowed the claim of petitioner against forfeiture of earnest money. I consider when the precondition of filling up the tender was that the person should have a hotmix plant, the petitioner who was running a hotmix plant contrary to the orders of the Supreme Court and contrary to the orders of Pollution Control Board, could not have been awarded the contract at all. The concealment of fact that his plant was running contrary to the orders of the Supreme Court and in violation of the orders of Pollution Control Board should have resulted in direct forfeiture of the earnest money and this amount could not have been awarded by the arbitrator to the petitioner. However, since the respondent has not challenged the award of learned arbitrator on this count and this Court is not considering the petition under Section 34 made by respondent, hence the award on this count cannot be set aside.

8. In view of above facts, the arbitrator rightly did not allow the claims of petitioner for profits or for loss of hire charges of the machinery. These claims were not tenable in view of the fact that the petitioner was basically unqualified even to participate in the tender process.

9. I find no force in this petition. The petition is hereby dismissed. No orders as to costs.

July 30, 2009
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SHIV NARAYAN DHINGRA J.