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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: March 26, 2009

Date of Order: April 22, 2009

+ OMP 347/2008

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Union of India

Through: Mr. A.S. Dateer, Advocate

Versus

**M/s S.D. Technical Services Pvt.
Ltd. & Anr.**

Through: Mr. S.M. Chopra, Sr. Adv. with Ms. Amrit Kaur Oberoi,
Advocates

22.04.2009

...Petitioner

...Respondents

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. This petition has been filed under Section 34 of the Arbitration & Conciliation Act, 1996 whereby the petitioner has filed objections against the award dated 2nd November 2008 passed by learned Arbitrator after the matter was remitted back to him.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner had procured redial drilling machine from the Respondent against the Contract No. COMOW/IR/S-2597/A93/G-105/Pt.III dated 29th March 1996. After the supply of redial drilling machines, a dispute arose between the parties regarding payment and the matter was referred to the Arbitrator in view of the arbitration clause in the agreement entered into between the parties. The learned Arbitrator gave its award in favour of respondent on 5th

October 2000. In the award, the learned Arbitrator allowed certain claims of the respondent contained in Part-I of the contract. Regarding claims in Part-II, the learned Arbitrator observed as under:-

“(b) Claims in Part-II are for indigenous supply and are basically towards duties and taxes. The Respondent’s view is that these are not payable as per Contract Agreement signed by both the parties according to which prices are net package price. Perusal of the Contract agreement shows that the prices agreed upon are inclusive of taxes. The Claimant’s plea, however, is that the agreement had been signed by them unconditionally to avoid delay and they have been protesting that the department should consider payment of taxes and duties and the rate quoted by them should be considered as ex-Works price exclusive of taxes. They have also been requesting to get the issue settled through the Arbitrator and arbitrator has been appointed by the Respondent to decide the various issues including this.

It is a fact that the Claimant has been asking for this payment before signing of Contract Agreement and after that also. While arguing as to why they have signed the Contract Agreement in which taxes are not payable separately, they contended that it was signed in good faith thinking that Department will consider the issue on merits.

Contract agreement being the governing document in this case, the payment beyond what is permissible under the Contract Agreement has not been accepted by the Respondent. The Respondent’s decision as not to allow payment beyond contract payment cannot, thus, be considered wrong.” (emphasis added)

3. After this award was passed, claimant/ respondent made an application

under Section 33 of the Arbitration & Conciliation Act, 1996 and sought clarification from the Arbitrator regarding award under Part-II of the Contract. Relevant portion of the application is as under:

2. Indigenous Part-II of supply:-

- (A) *Claim 2(a) was for Rs.40,77,814/- which consists of (I) Rs.25,38,424/- being price/ cost of equipment, (ii) Rs.11,42,241/- Excise Duty and (iii) Rs.3,97,149/- Sales tax. The learned Sole Arbitrator has held that duties and taxes are not payable separately, making thereby original cost of equipment has to be paid, but this is not clarified in the Award, hence it is prayed to be clarified.*
- (B) *Likewise claim 2(b) for Rs.11,47,318/- consist of (I) Rs.9,76,274/- being balance cost of equipment received by the Respondent (ii) Rs.1,26,916/-, Excise Duty and (iii) Rs.44,128/- Sales Tax. As explained above against claim 2(a), clarification for cost of equipment, is also prayed to be given."*

4. After this clarification application was made, learned Arbitrator passed another order dated 24th October 2000 making following observations:

"As brought out on page 3, para 5(b) of the Award already published by me on 5.10.2000, claims in Part-II have been considered mainly to be towards duties and taxes. Thus, the claims under Items 2(a), 2(b) & 29 were considered totally against the duties and taxes and Nil award has been published, as duties and taxes have not been considered payable separately under the contract. However, if Claims under 2(a), 2(b) & 2(e) include amount other than, due to, taxes and duties, the Claimant and the Respondents should deal it separately as the same has

not been considered during the arbitration.”

5. The Claimant /respondent challenged the award under Section 34 of the Arbitration & Conciliation Act, 1996 and this Court after considering the award and the clarification of Arbitrator dated 24.10.2000 observed as under:-

“From the aforesaid, it is evident that the learned arbitrator has not applied his mind and given a finding in respect of claims Nos. 2(a) and (b) as to whether they include any element of amount due towards supply of equipment or not and whether they are entirely in respect of claim for duties and taxes. Moreover, the learned arbitrator has not applied his mind to the issue whether any part of the said claims is admissible, if it does not pertain to a claim for duties and taxes.

Counsel for the petitioner states that the petitioner does not dispute, the finding of the Arbitrator that the claimant is not entitled to claim any amounts towards duties and taxes separately. He, however, submits that the Arbitrator ought to have determined whether the amounts claimed under the Claim Nos. 2(a) and (2(b) were only towards duties and taxes, or included the amounts due under the contract for supply of equipment, and if so, whether the petitioner was entitled to payment of such amounts.

Once the claims had been referred to the Arbitrator, he was obliged to deal with all of them, since it was not anybodies case that any of the claims were not arbitrable or were excepted matters. The arbitrator admittedly has not examined the aforesaid aspects of claim Nos. 2(a) and 2(b).

In view of the aforesaid, I remit the award to the

learned Arbitrator with the direction that he should decide whether the claims under claims 2(a) and (b) pertain only to a claim for duties and taxes and if not, whether the amounts claimed under these heads other than the amounts claimed towards duties and taxes are sustainable or not. Since claims 2(e) and (f) are claims for interest on the amounts claimed under claim Nos. 2(a) and (b), in case the learned Arbitrator comes to conclusion that the petitioner is entitled to any amounts under claim Nos. 2(a) and (b), the learned Arbitrator would also consider the issue whether the petitioner-claimant is entitled to any interest, and if so at what rate, and for what period."(emphasis added)

6. After the award was remitted back, the learned Arbitrator in the award dated 2nd January 2008 had directed a payment of Rs.12,30,831/- to the respondent. This amount was claimed and received by the petitioner as MODVAT from the Government / Tax Department. The Arbitrator also allowed a claim of Rs.20,000/- to respondent as compensation towards packing charges and an interest @ 18% per annum on these amounts. Regarding MODVAT learned Arbitrator observed that as per the contract all duties and taxes were payable by the Claimant. The Claimant was not supposed to pay over and above the payable taxes, thus the MODVAT refund received by the petitioner was payable to the claimant. Regarding packing charges of Rs.20,000/-, the learned Arbitrator observed that the Claimant had given no details/ proof of having spent the extra amount on special packing required for or transfer of the goods ordered by the respondent. The Claimant submitted that collection of proof of packing charges would delay the matter. In absence of documents, it was not possible to ascertain the amount spent by the claimant, so a token compensation of Rs.20,000/- was awarded to the

claimant on this count.

7. The petitioner has assailed the award on the ground that the learned Arbitrator while awarding MODVAT had travelled beyond the contract. It was decided by the Arbitrator that all taxes including excise tax, sales tax etc were payable by the Claimant as the price was inclusive of the taxes. The MODVAT refund received by the petitioner could not have been passed over to the claimant because it was received by the petitioner under the MODVAT Rules and MODVAT refund was payable only to the petitioner since the price paid by the petitioner to the respondent was inclusive of excise duty. Under no stretch of imagination the MODVAT benefit was transferrable to the Claimant/ respondent and the learned Arbitrator who had already decided that the claim regarding duties and taxes were not sustainable, could not have awarded the amount of MODVAT refund received by the petitioner to the respondent. It is further submitted that refund of MODVAT amount was not even claimed by the claimant in its claim. The Claimant had only claimed refund of excise and sales tax on the plea that the claimant was forced to enter into the contract inclusive of excise and sales tax and other governing duties contrary to the assurance given to the claimant during the negotiations.

8. The award of Rs.20,000/- as compensation has also been challenged on the ground that awarding of this amount was totally hypothetical, without any basis and documents and no compensation could have been awarded. The claim of packing charges was not sustainable at all as the packing was included in the contract. There was no evidence led by the claimant in respect of the packing charges and therefore no award could have been

made.

9. In response to the objections taken by the petitioner, the respondent /claimant has stated that the objections were barred by limitation. The award was made on 2nd January 2008, the objections could have been filed within 90 days i.e. period provided under Section 34. It is submitted that even the extendable period of 30 days also expired. The application filed on 3rd July 2008, therefore, was beyond the period of limitation.

10. It is not denied that the claimant had moved an application under Section 33 of the Arbitration & Conciliation Act, 1996 for rectification of the award dated 2nd January 2008. However, the Claimant took the stand that communication of the arbitrator dated 19th June 2008 on the rectification application cannot be the starting point of limitation. The limitation period has to be counted from the date of the award. Regarding objections on MODVAT etc, it is submitted that the learned Arbitrator had rightly awarded the MODVAT amount to the claimant/ respondent. The Claimant was entitled for the MODVAT amount since the claimant had paid the excise duty on goods. Any claim received by the petitioner under MODVAT was liable to be passed over to the claimant/ respondent.

11. Section 34 (iii) of the Arbitration & Conciliation Act, 1996 reads as under:

“ (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under

section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

12. It is apparent that the limitation for filing the objections starts from the date on which the request under Section 33 of the Act has been disposed of by the Arbitral Tribunal. It is an undisputed fact that the request under Section 33 was disposed of by the Arbitrator in this case on 19th June 2008. The objections were filed on 3rd July 2008. Hence, the objections are well within the limitation.

13. Before entering into the contract, there was a long correspondence between the parties regarding excise duty, sales tax etc. The petitioner had made it clear that the price quoted by the respondent must be inclusive of all taxes i.e. excise duty, sales tax on the indigenous portion of supply. It is clear from the letter dated 12th July 1996 sent by petitioner to respondent which reads as under:-

"Yours request for allowing Excise Duty/ Sales Tax on the indigenous portion of supply and also to handover certain critical components to you after importing them from M/s. ELHA has been examined by this office. It is to inform you that it is not possible to consider your request.

You are, therefore, requested to submit unconditional acceptance of the subject contract within 15 days of the issue of this letter. Please note that if unconditional acceptance is not received within 15 days, the contract shall be cancelled at your risk and cost."

14. Respondent gave its consent to unconditional acceptance of the contract and thereby agreed that the price quoted by the respondent shall be inclusive of all taxes i.e. excise duty, sales tax etc on indigenous portion of the supply. Thus under the contract price was inclusive of all taxes and it was the responsibility of the respondent to bear the taxes i.e. excise duty etc on the supply made by it and the petitioner was to pay the price quoted and nothing more. It is for this reason that the learned Arbitrator in the award dated 5th October 2000 has decided that all claims made by the respondent in respect of the taxes etc were not tenable as respondent with open eyes agreed that the price was inclusive of the taxes. It is surprising that after making this observation, the learned Arbitrator directed a sum of Rs. 12,30,831/- to be paid to the respondent. This amount of Rs.12,30,831/- does not even form part of the claim of the respondent. In its claim, the respondent had not made a claim of refund of MODVAT. The respondent had only asked for the excise duty etc paid by it. This claim was rejected. The refund to the petitioner was under the Modvat Credit and Capital Goods Procedure as notified by the Union of India (Tax Department). Under this Scheme if any excise duty is paid on capital goods by a person, the person can claim credit on duty paid on capital goods used by it in terms of Rule 57(q) to 57 (u). The credit of duty paid on capital goods was permissible only if it has been paid on or after 1st March 1994. Thus, the benefit of MODVAT could be availed by the petitioner only because the petitioner had incurred capital expenditure in acquiring machines since the petitioner was entitled for credit on excise duty paid on the machines. The capital goods have also been defined under the Central Excise Rules and included machinery, plants, equipment, apparatus, appliances etc. MODVAT cannot be claimed by a

person who manufactures the capital goods and supplies it to others. The credit of MODVAT is provided to encourage industrialization, modernization of industry etc. The MODVAT Rules were not applicable to the respondent since the respondent was manufacturer of the articles and was liable to pay the excise duty once the articles leave the factory of respondent. If the respondent outsourced certain articles and the prices paid by the respondent on those articles were inclusive of excise duty, the respondent independently could have claimed MODVAT from the authorities but the respondent could not lay claim on the MODVAT credit as entitled to the petitioner as the price charged by the respondent from the petitioner was inclusive of excise duty in terms of the contract.

15. It is settled law that the Arbitrator is bound by the contract entered into between the parties and cannot create a new contract. Since in this case, it is an undisputed fact that the respondent had agreed to supply the goods at a price which was inclusive of excise duty, the learned Arbitrator could not have travelled beyond the contract and directed the petitioner to pay the MODVAT benefits, acquired by it, to the respondent. The award passed by the Arbitrator also shows that the learned Arbitrator had in fact travelled even beyond the scope of order dated 22nd May 2007 passed by this Court. In that order, this Court had specifically stated that the Arbitrator has not applied its mind whether any part of the claim made by the respondent does not pertain to claim for duties and taxes and was admissible. The respondent in the application under Section 33 made by it to the Arbitrator had made it clear that apart from refund of taxes, the respondent had laid a claim against the petitioner regarding price of the goods. It was not the case of the respondent that respondent was entitled to amount received under MODVAT by the

petitioner. It is apparent that the learned Arbitrator mis-conducted himself and passed the impugned award dated 5th January 2008 contrary to the contract between the parties. The award passed by learned Arbitrator regarding payment of Rs.12,30,831/- by the petitioner to the respondent is not tenable.

16. The Arbitrator has awarded Rs.20,000/- as token compensation. There is no claim of payment of compensation made by the respondent. The respondent had laid claim @ 1% of the price of the goods as packing charges. The Arbitrator has categorically observed that no proof has been given by the respondent for incurring packing charges. Despite the fact that no proof was given by the respondent qua incurring of special packing charges, the learned Arbitrator awarded a lumpsum compensation of Rs.20,000/- without any basis and evidence. I consider that this part of the award of the Arbitrator passed merely on the basis of hunch, is totally illegal and is liable to be set aside.

17. In the result, I allow this petition and the award dated 5th January 2008 passed by the Arbitrator is hereby set aside. In the facts and circumstances of the case, parties are left to bear their own costs.

April 22, 2009
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SHIV NARAYAN DHINGRA J.