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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: July 08, 2009
Date of Order: July 13, 2009

+OMP 357/2009

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13.07.2009

**Subash Ahuja Sole Proprietor of M/s
Nawab Consultants for Ideas**

...Petitioner

Through: Mr. Sandeep Sharma, Advocate

Versus

Union of India

...Respondent

Through:

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. The petitioner has filed this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ("the Act" for short) assailing an award dated 25th February 2009 whereby the claim of the petitioner was rejected by the learned Arbitrator.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner's tender for revolving chairs for a sum of Rs.73,86,277/- was accepted. The petitioner had deposited earnest money of Rs.1,92,313/- along with tender. As per the terms and conditions of the tender, the petitioner was to give performance bank guarantee within 15 days of acceptance of his tender. The tender was accepted on 28th April 2006 and a letter was written to the petitioner to submit performance bank guarantee for a sum of Rs.3,69,314/- as per the terms and conditions of the contract within 15 days

from the date of issue of letter. Thus, the performance bank guarantee was to be given by 13th May 2006. The time for giving performance bank guarantee was extendable by seven days. The petitioner sought extension and it was extended up to 20th May 2006. However, the petitioner failed to give performance bank guarantee even by extended period. The respondent, therefore forfeited the earnest money vide letter dated 25th May 2006. After forfeiture of the earnest, the petitioner raised a dispute and the same was referred to the arbitrator. The learned arbitrator after noting the facts as stated above and noting that the petitioner had failed to give performance bank guarantee within the stipulated period dismissed the claims of the petitioner including the claim for refund of earnest money.

3. It is argued by learned counsel for the petitioner and it is so stated in the objections as well that learned arbitrator did not address the right issue. According to him, the issue in this case was whether the petitioner was to supply the Godrej chairs or other equivalent chairs. Counsel for the petitioner contended that the tender provided either Godrej make chairs or equivalent chair. The petitioner submitted a sample chair after his tender was approved. This sample was to be cleared by respondent. Unless the sample was not cleared by the respondent, the petitioner could not have given the performance bank guarantee. It is also submitted that though the petitioner had got the performance bank guarantee ready but the same was not submitted because the sample was not cleared and, therefore, the petitioner was not bound to give performance bank guarantee.

4. Learned counsel for the petitioner has failed to bring to my notice any clause of the contract or tender saying that the respondent was supposed to

clear the sample after acceptance of tender and before acceptance of the performance bank guarantee. If the petitioner had quoted for the chairs as per the tender, the petitioner had no reason to get a sample approved in advance before giving the performance bank guarantee. He should have given the performance bank guarantee and then supplied the sample or the chairs as per the contract and if the chairs, despite being as per the terms and conditions of the contract, were rejected /not accepted, then the petitioner could have raised a dispute about the supplies being in accordance with the contract but wrongfully rejected. The petitioner could not have raised a dispute about the sample/quality of furniture before giving performance bank guarantee. The dispute about sample/ quality of furniture could have been raised only after the petitioner had given performance bank guarantee and then supplied the material. The respondent forfeited the earnest money only because the petitioner failed to fulfill the term of the contract of furnishing performance bank guarantee. The earnest money was not forfeited on any other ground. No dispute in respect of quality of furniture or sample had arisen in this case. The learned arbitrator therefore rightly held that the issue of clearance of sample or quality of sample was not a relevant issue and was not even referred to the learned arbitrator.

5. No other objection has been raised by the petitioner. The objection raised by the petitioner is not covered under Section 34 of the Act neither it is as per the contract. I, therefore, find that this petition under Section 34 is not maintainable and is liable to be dismissed. The petition is accordingly dismissed in limine.

July 13, 2009
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SHIV NARAYAN DHINGRA J.