

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

Date of Reserve: 15.4.2009

Date of Order: April 24, 2009

OMP No. 670/2007

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24.4.2009

Union of India
(Sr. Divisional Engineer-V, DRM Office) ... Petitioner
Through: Mr. S.R.Narayan, Advocate

Versus

M/s N.K.Sharma & Company ... Respondent
Through: Mr. Chetan Sharma, Sr. Advocate with
Mr. M.S.Ahluwalia, Advocate

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

By this petition under Section 34 of the Arbitration & Conciliation Act, 1996, the petitioner has filed objections against the award dated 20.8.2007 given by the Arbitral Tribunal in respect of the dispute between the parties.

2. Brief facts relevant for the purpose of deciding this petition are that the respondent was awarded a contract of replacement of worn out pipes along with laying of new PVC pipeline for water supply between Ram Nagar Complex and Qutub Road Complex on 16.10.2002 at an overall cost of Rs.34,47,399/- The work

was to be completed by 15.2.2003. The respondent started work and the first running bill of the respondent was released for a sum of Rs.10,43,025/- after deduction of rebate, income tax and surcharge etc. with the certificate that the work was carried out to the satisfaction of the petitioner. The bill included cost of supply of PVC pipe measuring 4833.95 m. The petitioner granted an extension upto 15.7.2003 for completion of work, without penalty, and a corrigendum was issued to the contract. The total value of contract was also enhanced to Rs.41,17,951.28 due to increase in scope of work in connection with water supply. There was another corrigendum to the contract and the value of the works was enhanced to Rs.42,79,191.57. The second running bill of the contractor was prepared by the petitioner for Rs.16,35,077.33, which included cost of supply of PVC pipe measuring 5393.75 m. The second running bill of the respondent was approved but the amount of second bill was not released. The contention of the respondent/claimant had been that even in respect of second bill, a certificate was given that the work had been executed as per specifications. However, the second bill was put in cold storage since competitors of the claimant made some complaints against him. The respondent however was not asked to stop the work and continued to do the balance work at site. The respondent pleaded that he completed the work as per contract in spite of his second bill having not been released. The petitioner later raised an objection about the quality of PVC pipes and alleged that PVC pipes were not of the specified quality.

3. The petitioner's case had been that two samples of PVC pipe were collected and sent to Shri Ram Institute for Industrial Research, Delhi for testing. The test conducted on these samples viz. PN-1 & PN-2 showed that the samples were not of the required quality as the samples, when put on internal hydrostatic pressure test at 27degree C for one hour, got burst during the test. It is submitted that after the test report dated 31.10.2003 was released; a letter was received from General Manager (Vigilance) by the petitioner directing the petitioner to recover an amount of 7.78 lac from the respondent/contractor for supply of substandard PVC pipe, from the due payment of CC-II on account of bill and amount available with the petitioner. Thus, this recovery was made from the other due payments payable to the contractor.

4. The learned Arbitral Tribunal considered the grounds of non-payment of the bill by the petitioner viz. failing of the pipe during testing and came to the conclusion that test results of Shri Ram Institute for Industrial Research, Delhi were not applicable to the claimants. It was observed that the PVC pipe which the claimant was supposed to use was to have outside diameter of 110 mm and wall thickness of 1.1 mm as per item no. 2145(j) of Northern Railway Standard Schedule of Rates SOR-1996. The test report was silent about the outside diameter and wall thickness required for withstanding internal hydrostatic pressure. The learned Arbitral Tribunal concluded that the samples were sent with incomplete specifications for tests which were required to be conducted on them. The test reports were also incomplete. They elaborated that when the petitioner sent

samples PN-1 & PN-2 to the laboratory for “physical test” there was no mention of basic essential parameters like wall thickness, test pressure, class of pipe and whether the pipes were to be used for “internal work” or “external work”. These details were required to be mentioned to the testing laboratory. It also observed that the two test reports in respect of the two samples did not specify the required details like at what pressure the pipe, of what wall thickness, burst during the test, what was the wall thickness of the samples to which class of pipe they belonged. There was no mention in the test reports as how much internal hydrostatic pressure was applied at 27 degree C for one hour because it was different for pipes of different specifications and it was different for pipes used in “internal works” and “external works”. The learned Arbitral Tribunal gave detailed reasons as to why the test results were not applicable in this case. I find no reasons to disagree with the Arbitral Tribunal on this count.

5. After concluding that test results were not applicable the learned Arbitral Tribunal regarding claim no.1 observed that the amount of second running bill and the amount of total work done by the claimant came to Rs.30,09,800.53 however, since the claimant had claimed only Rs.21,00,000/-, the Arbitral Tribunal awarded maximum of Rs.21,00,000/-. The petitioner has assailed this award on the ground that sample of PVC pipe used by the claimant failed in laboratory, so the quality of work was not in accordance with the contract and petitioner was not liable to pay for spurious quality. Against claim no.2, of Rs.7,00,000/-, the Arbitral Tribunal awarded a sum of Rs. 4,20,000/-. The petitioner has assailed the awarding of this

amount of Rs.4,20,000/- against cost of material on the ground that cost of material was included in the running bill and no separate cost of material could be awarded regarding substandard material lying on the site. The petitioner was not liable to pay for material dumped at site and not used, rather petitioner made a counter claim of Rs.10,00,000/- since this dumped material continued to occupy space in the Railway Stores from July, 2003 to March, 2007.

6. A perusal of statement of claim filed by the claimant/respondent would show that the respondent filed 08 claims. Claims no. 1, 2 & 3 were clubbed together by the respondent for Rs.31,00,000/-. The claimant explained these three claims in its claim petition together by referring to the running bills raised by the claimant and work done. The claimant concluded that the total amount payable to the claimant under these three claims came to Rs. 29,91,532.07 which included work done till end. Surprisingly, the learned Arbitral Tribunal went even beyond the claims. The total amount receivable by the claimant was stated as Rs.29,91,532.07 against all the three claims, the Arbitral Tribunal came to the conclusion that the amount payable against claim no.1 alone was Rs. 30,09,800.53 but since the claimant had restricted its claim to Rs.21,00,000/- they were allowing only Rs.21,00,000/-.

7. The claimant in its claim petition had not stated that he was entitled to payment of Rs.7,00,000/- against material lying with the petitioner. The running bills included cost of material and that was the reason that the claimant dealt with claims no. 1, 2 & 3 together and the claimant only dealt with running bill, work done and the amount payable to him. He had not separately claimed the price of PVC pipe. I

therefore, consider that the learned Arbitral Tribunal without any basis and without any justification separately considered the amount of Rs.7,00,000/- towards PVC pipe which was not even the case of the claimant and allowed Rs.4,20,000/-. He, thus, mis-conducted himself. I therefore, disallow this part of the award.

8. There is no infirmity in the rest of the award made by the learned Arbitral Tribunal. The learned Arbitral Tribunal has come to the conclusion that the report of Shri Ram Institute for Industrial Research was not relevant and was not applicable in this case. The samples neither were drawn properly nor were the samples sent with proper specifications and instructions. I do not find any reason to substitute my own opinion against the opinion of the learned Arbitral Tribunal. It is settled law that this Court does not sit as a Court of appeal over the judgment of the Arbitrator. The Arbitrator is the judge of facts and law both.

9. In view of my above discussion, the award passed by the learned Arbitral Tribunal is modified to the extent that the claimant is entitled to Rs.21,00,000/-, along with simple interest of 12% p.a. from the date of publishing of the award till payment of the amount.

April 24, 2009
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SHIV NARAYAN DHINGRA, J.