

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

+ **OMP No. 40/2010**

22nd January, 2010.

M/S GEE INTERNATIONAL

...Petitioner

Through: Dr. G.LAL, Advocate

VERSUS

UNION OF INDIA & ORS

....Respondents

Through:

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?
3. Whether the judgment should be reported in the Digest?

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

1. By this petition under Section 34, the petitioner challenges the Award dated 31.10.2009 of the sole Arbitrator.
2. The counsel for the petitioner has challenged the findings of the Arbitrator with respect to Claim No.2(b), Claim No.2(d)(ix), Claim No. 4, Claim No.5, Claim No.8 and Claim No.10.

3. Claim No.2(b) is a dispute with respect to the award of the substituted work. The originally contracted work was with respect to providing of precast RCC manhole covers which was substituted with SFRC manhole covers. The Arbitrator has given a finding of fact that an analysis of rates showed that payments ought to have been at Rs.431.87 per manhole cover however by inadvertence and mistake in the second running bill, payment was made at Rs.834.35 for each manhole cover. The Arbitrator has therefore held that the petitioner cannot take advantage of the mistake committed in payment. No factual challenge was laid before me as to why the analysis of rates of Rs.431.87 was incorrect and why the mistaken rate of Rs.834.35 per manhole cover is correct. There is, therefore, no illegality or perversity so far as the finding qua this part of the Award is concerned. The objection in this regard is rejected.

4. Claim No.2(ix) was with respect to claim of clearing of the road surface. The Arbitrator has given a finding that claimant has not filed any details of measurements for the quantity of 9000 sq. m. for which claims are made under this head by the petitioner. During the course of hearing, I asked the counsel for the petitioner to show me from the measurement book where this work is recorded to which the counsel for the petitioner stated that the petitioner cannot be blamed for the measurements not being recorded in the measurement book. I cannot

understand this argument of the counsel for the petitioner because the Arbitrator has given a finding that no such work, for which claim is being made has in fact, been done to the extent of 9000 sq. m. and consequently, the Arbitrator has rejected this claim. To upset such finding as perverse it was necessary to show that as per the Measurement Book such work was recorded as being done, and which is not being shown. Thus, no illegality or perversity in this regard can be said to have been committed by the Arbitrator for this court to interfere with this part of the Award. The objection with regard to this claim is also rejected.

5. Claim No.4 was on account of claim of interest of the petitioner for the amount withheld by the respondent with respect to the third running bill. The Arbitrator has in fact awarded this amount in favour of the petitioner and has granted interest at 8% per annum. I, therefore, do not understand that what is the dispute all about. The counsel for the petitioner sought to invite my attention to Claim No.4 as made in the statement of claim which reads as under:-

“CLAIM NO.4:

While paying 3rd running account bills on 15.6.2006 the Respondents withheld Rs.1,09,261/-. The aforesaid amount was withheld without any rhyme and reason. The claimant was deprived of the use of this amount and hence is entitled to claim 18% interest. It is requested that the claim may please be decided in favour of the claimant. Interest is claimed from 15.6.2006 till the date of actual payment on Rs.1,09,261/-.”

These six lines of Claim No. 4 is again nothing but a claim for interest for amount which has been withheld and which has been allowed by the Award accordingly. I, therefore, do not find that the counsel for the petitioner is in any manner justified in arguing that in view of the aforesaid para of the statement of claim there is some sort of contradiction in the Award. The objection to this claim is therefore rejected.

6. Claim No.5 was made by the petitioner before the Arbitrator for damages on account of machinery and labour cost. The admitted fact is that the contract was rescinded in 18.7.2006. Under this claim the vouchers which were filed for claiming of the salary paid to the labour and the charges of the machinery, were 68 in number, and were in fact found not to be of before 18.7.2006 but of the subsequent period between 7.12.2006 to 7.8.2007. The Arbitrator has then observed while noticing over-writing on the vouchers that there does not arise any question of any mistake of the dates because mistake in dates can occur once or twice but not continuously in all the 68 vouchers. The Arbitrator has therefore held that these vouchers were prepared in one go at the same point of time for claiming of charges. No perversity or illegality can therefore be attributed to this finding of the Arbitrator. Objection with respect to this claim is also rejected.

7. Claim No.8 of the contractor was the claim for loss of profit. This loss of profit has been denied by the Arbitrator to the contractor by very succinctly referring to the gist of the legal position under Section 73 of the Contract Act, 1872 and by holding that the petitioner, except filing an arithmetic calculation, has not proved the loss by showing that the men and machinery could have been use in any other contract for earning profit. The following paragraph of the Award is relevant in this regard.

“2.8.3 To provide legal cover to the claim of loss of profit for prolongation of contract, claimants have taken shelter under section 73 of the Indian Contract Act, 1872. Claimants have not placed any material on record to establish that had done planning to take up new works but had to resort to mid-course correction due to the prolongation of the work in question. What needs to be demonstrated is that preparations were made to take up some more works but the resources allegedly blocked in the work in hand came in the way to taking up new works. Claimants want to earn profit without making any effort and investment. This would amount to ‘unjust enrichment’. It is well settled in law that even if the actual extent of loss cannot be determined, the party claiming compensation is entitled to succeed only on establishing that some loss was actually sustained. All that claimants have done is to calculate the projected loss only on the basis arithmetical calculations. No evidence of having actually suffered some loss has been brought on record. Thus claimants have failed to substantiate the claim legally as well as on the basis of facts and figures. I, therefore, do not award any sum of money against this claim.”

Surely such clear cut finding cannot in any manner be said to as illegal or perverse. Once the contractor fails to file any proof, surely, an Arbitrator is fully justified in dismissing a claim which was only hypothetical. Objection to this claim is also rejected.

8. Claim No.10 is the cost of Arbitration. Costs are in the discretion of the forum before which the proceedings are conducted. The Arbitrator has denied the cost of the proceedings to the petitioner. I do not find any illegality with regard to disallowing of cost to the petitioner.

9. In view of the above, I do not find any merit in the objection petition of the contractor which is dismissed with costs of Rs.25,000/- to be paid in favour of the Registrar General of this Court for being utilized towards Juvenile Justice within a period of two weeks from today.

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10. Since the petition is dismissed, this application does not survive and is disposed of as such.

VALMIKI J.MEHTA, J

January 22, 2010

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