

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

+ **OMP No.50/2010**

25th January, 2010.

UNION OF INDIA Petitioner

Through: Mr. Sachin Datta and Ms. Poorva
Nanawati, Advocates

VERSUS

M/S TRADING ENGINEERS (INTERNATIONAL) PVT. LTD.
...Respondent

Through: None

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?

% **JUDGMENT (ORAL)**

VALMIKI J.MEHTA, J

+ I.A.No.903/2010 in OMP No. 50/2010

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Exemption sought is granted subject to all just exceptions.

Application is disposed of.

OMP No. 50/2010

1. By this petition, under Section 34 of the Arbitration and Conciliation Act, 1996, the petitioner challenges the impugned Award 21.10.2009 passed by the sole Arbitrator. The dispute which arose between the parties is with respect to whether the transformer supplied is DY-11 and not a YD-11 transformer which ought to have been supplied and whether the petitioner therefore could have retained the 10% balance price payable.

2. By a judgment dated 10.9.2008, in OMP no. 393/2005, an earlier award passed in the same dispute between the parties was set aside leaving the parties open to seek recourse to Arbitration Agreement in accordance with law. In the earlier judgment dated 10.9.2008, this court (S. Ravindra Bhat, J) observed that the issue of the specifications of the transformer was not correctly considered by the Arbitrator as certain vital correspondence was not considered by the Arbitrator. Accordingly, the Award was set aside and the parties were entitled to take fresh recourse to Arbitration proceedings in terms of the Arbitration agreement. It is therefore now the present Award has consequently come to be passed.

3. By the impugned Award, the Arbitrator, after considering the entire evidence, which was led before him, has arrived at a finding of fact that the transformer which was supplied was not DY-11 but YD-11. There is a huge difference between DY-11 transformer and YD-11 transformer. While the DY-11

transformer is for stepping up of the voltage and YD-11 transformer is for stepping down of the voltage. The Arbitrator has referred to the evidence which is filed before him including the letter of the manufacturer of the transformer to hold that the transformer in question was a YD-11 transformer, and not DY-11 transformer. The Arbitrator has also arrived at a finding of fact that the transformer in question was the transformer YD-11 and only a wrong name plate was affixed. The Arbitrator has further given a finding of fact in the Award that the respondent had duly offered to get the transformer checked in all terms as per the specifications of the AT.

In view of the above, the Arbitrator has passed the impugned Award after duly noting, recording, discussing and thereafter rejecting the stand of the present petitioner that the transformer was not supplied in terms of the contract. Therefore, the Arbitrator has allowed the balance payment of 10% amount which was withheld by the present petitioner with respect to the subject contract.

4. Mr. Datta, before me, urged the following contentions:-

(i) The Arbitrator did not proceed on the basis of any fresh pleadings, and proceeded on the basis of the records of the old case.

(ii) The Arbitrator has wrongly arrived at a finding that the transformer is YD-11 inasmuch as the transformer was DY-11 according to certain letters of the petitioner which are pointed out by Mr. Datta.

5. So far as the first contention of Mr. Datta is concerned, I find that the same is wholly misconceived. In fact, no such objection is even taken in the petition under Section 34. It is therefore, quite clear that the parties must have agreed before the Arbitrator to continue the case from the stage where it was in the earlier proceedings i.e the old pleadings etc. in the old arbitration proceedings, because, refileing of the entire pleadings and the documents would have simply amounted to duplication of the record. I also note that this Court put a query to the counsel for the petitioner as to whether they had objected in the arbitration proceedings by moving of an application before the Arbitrator that old record should not be considered. The counsel for the petitioner was however forced to admit that no such objection was raised or any application stating so was moved before the Arbitrator. Accordingly, I find that no fresh pleadings were required to be filed in the present Arbitration proceedings and the objection is rejected.

6. The main issue which was urged was with regard to the finding of the Arbitrator that the correct equipment has been supplied. The Arbitrator in the Award has discussed the various letters etc and has thereafter given the findings from paragraphs 13 and 14 of the Award. It would be appropriate if I refer to the said two paragraphs of the Award, namely paragraphs 13 and 14, which encapsulates the conclusions as arrived at by the Arbitrator. These paras read as under:-

“13. I have gone through the documents, as filed by the both parties, as also the documents as specifically directed by the Hon’ble High Court to be considered. After going through the entire set of documents in my considered opinion what had actually transpired between the parties was that initially as per the terms of the Contract the transformer which was supplied by the Claimants was required to set up voltage from 415 Volts to 11 KV. Type of Transformer as per original AT was stated to be Dy-11. However, on representation by the Claimants, the transformer was changed from Dy-11 to Yd-11 transformer, as a Dy-11 transformer is deployed for stepping down the voltage and for stepping up the voltage a set up transformer i.e Yd-11 is used. The aforesaid suggestion of the Claimants was duly accepted and vide Annexure C-2, the Respondents incorporated the aforesaid amendment, vide their letter dated 12.09.1991, and the Claimants were directed to supply transformer Yd-11 instead of DY-11 transformer, which amendment was placed as item No.8 in the aforesaid letter. That, the inspection of the transformer and the DG Set was carried out of both the aforesaid DG set and the transformer. However, the transformer was rejected, by a telex message dated 27.05.1994 as

“REFER DGS&D AT NO. PE/1/102/142/08.02.90/E1 COAD/TRADING/240 DATED 02 JAN 91: INSTALLATION OF 750 KVA DG SETS AT MINIERAY AT PORT BLAIR (.) TRANSFORMER CAPACITY 750 KVA VECTOR GROUP Y.D.-11 415 V/11000 V IS TO BE PROVIDED AS PER AT(.) WHEREAS AT SITE VECTOR GROUP D.Y.-11 SUPPLIED WHICH IS NOT ACCEPTABLE (.) REQUEST IMMEDIATE REPLACEMENT (.)-ACCORD TOP PRIORITY”.

That as per the version of the Respondents, the Claimants instead of Yd-11 transformer and supplied a Dy-11 transformer and thus the transformer as supplied by the Claimants was rejected by the aforesaid telax message. However, the Claimants, vide letter dated 28.06.96 informed the Respondents that the transformer had rightly been supplied i.e. Yd-11 transformer had been supplied and it is only a wrong name plate which has been affixed on the Transformer. The aforesaid was conveyed by the Claimants to the Respondents, vide their letter dated 28.06.94, which letter is Annexure C-26 to the claim petition. The Claimants also enclosed alongwith the aforesaid letter, a letter dated 28.06.94 received by the Claimants from their supplier of transformer i.e. M/s Kanohar Electricals Pvt. Ltd. dated 19.06.94 wherein the supplier duly stated to the effect:

“Dear Sir,

In reference to your above letters, it is to inform you that above transformer has been manufactured as per approved drawing, order specn and amendment issued thereafter.

Since most of the transformers are supplied having Vector group DY-11, therefore, in case of this transformer, due to typographical error it was printed DY11 in place of YD 11 on the test report.

It seems that symbol of Vector group and connection diagram on name plate were not changed as per required vector group i.e YD11.

You are requested to advise your representative to return the name plate supplied with the transformer to make necessary amendments as per Vector group of transformer, if required.

Thanking you,

Yours faithfully,
For KANO HAR ELECTRICALS PVT. LTD.”

It is pertinent to mention here that the aforesaid letter of M/s Kanohar Electricals Pvt. Ltd. was in response to the letter of the claimants dated 04.06.1994, where-by the claimants had referred to the telex message of the respondent rejecting the transformer of the claimants as being wrongly supplied.

That in response to the aforesaid letter of the claimants dated 28.06.96, the Director General of Supply and Disposals vide letter dated 26.10.1995 which is Annexure C-7 (which letter was not considered by the previous arbitrator) agreed with the claimants and confirmed that the transformer which had been supplied, was supplied as per the amendment AT i.e. YD-11 transformer with HV winding and Store had been supplied and that the transformer as supplied was in conformity with the terms of the amended contract. It appears that the respondents then after being satisfied with the supplied transformer being YD-11 Transformer in terms of the amended AT, raised another issue as to whether with respect to supply of the transformer by the claimants whether the supplied transformer can run parallel with Dy-11 Transformer which stood already installed. That, the claimants vide letters dated 15.11.1996 and 13.11.1997 did try to clear their position and situation, yet the respondents pressed for an amount of Rs.7,49,500/-, towards amount paid for purchasing a transformer from the market.

It is also apparent that the second issue which was raised by the respondent as to whether the Yd-11 Transformer as supplied by the claimants could run parallel to the already installed Dy-11 Transformer, the same was clarified by the respondents itself in their letter dated 20.07.1998 which is Annexure C-12 to the Claim Petition. The claimants have also filed various letters written by the claimants to the Non-claimants repeatedly clarifying that the Transformer was in conformity with the terms of AT and also reiterated vide various letters that they were ready to cable the transformer and show that the transformer could run in terms of the AT. The aforesaid stands of the claimants qua the Transformer is

established to be correct on a perusal of the concluding paragraph of the letter as filed and relief upon by the respondents themselves dated 16.05.2001 wherein officiating Addl. C.E., vide letter dated 16.05.01 has written to the effect.

“ It is, therefore, requested to impress upon the firm to depute rep for confirming the serviceability of transformer and ascertaining the correct vector group of transformer as existing on site in the presence of DG rep Calcutta and user rep so that the feasibility of using transformer can be decided and accordingly clearance can be considered”.

It is letter dated 16.05.01 which unambiguously shows that the respondents were ready to consider the same Transformer which had all throughout been rejected by the respondents for one reason or the other and that too in the year 2001. It is also an admitted fact that the Transformer is still lying at Port Blair.

The Claimant has also pointed out that document titled as C-12 was also not taken into considered by the previous Arbitrator, which provides that as per IS:2026 YD-11, transformer can run parallel with DY-11 transformer. A combined reading of the aforesaid, proves that the Transformer as supplied by the claimants was Yd-11 and could run parallel with DY-11 transformer. Thus, both the grounds as alleged by the respondents were incorrect and stood rejected/contradicted by the own letters of the respondent. Further, a perusal of the previous proceedings shows that the respondents had themselves admitted to the effect that the transformer was supplied in terms of the AT and there was/is no infirmity in the supplied transformers.

14. It is further established that qua the supply and installation of the DG Set there is no ambiguity and thus the Respondents are liable to pay an amount of Rs.10,39,693, which amount has admittedly not been paid by the Respondents to the Claimants, despite the Claimants being legally entitled to the same as per the own admissions of the Respondent which admission of the Respondents is evident from the following observation/conclusion by previous arbitrator which was based on the admission of the respondents themselves.

“It is an admitted fact by the respondent during the hearing that there is no dispute in respect of the commissioning and final inspection of the DG Set. The 10% balance price of the DG Set comes at Rs.10,76,693.00, 10% of the contract price and 100% of erection charges-Rs.10,39,693.00, which is ‘admittedly’ due.

It is also a matter of fact that the Respondents while inspecting the DG set approved of the same, and the same is found ‘admitted’, in the Final Inspection Report, which is annexed to the claim petition, as AnnexureC-5.”

(Emphasis provided)

7. It appears therefore two objections were raised by the present petitioner before the Arbitrator, of the transformer being DY-11 and not YD-11 and also whether the transformer can run parallel to another transformer DY-11 which was already installed earlier. The Arbitrator has given both the findings against the present petitioner and in fact has relied upon certain admissions of the petitioner itself that the transformer in question is YD-11 and not DY-11 and also that it can run parallel to DY-11.

8. An Arbitrator is a designated fact finding authority. Before an Arbitrator, both the parties file respective evidences, which they seek to rely upon in support of their prayers and conclusions. The Arbitrator thereafter is entitled to weigh the respective evidence and come to a finding. Unless and until this finding is shown to me to be perverse or illegal or against the provision of the Contract, this Court cannot interfere with the findings of an Arbitrator under Section 34. Merely because two views are possible, and the Arbitrator holds one plausible view, and the court may want to adopt another plausible view, this will not entitle the court to interfere with the Award and hold that the view of this court should take preference to the another plausible view of the Arbitrator. The contentions of Mr. Datta that the correspondence and the documents of the present petitioner ought to have been preferred, is an issue of balancing and considering of the evidence which is in the realm of the jurisdiction of the Arbitrator and which the Arbitrator has done.

In view of the paragraphs 13 and 14, which exhaustively sets out the respective contentions, documentary evidence, rationale and the conclusions of the Arbitrator, I find that the Award is neither illegal nor perverse or violative of the contractual provisions.

9. In view of the above, I do not find any merit in the objection petition which is therefore dismissed.

VALMIKI J. MEHTA, J

January 25, 2010

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