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IN THE HIGH COURT OF DELHI AT NEW DELHI

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OMP No.285/2000

5th February, 2010

M/S. MELLCON ENGINEERS PVT. LTD.

...Petitioner

Through: Mr. Arun Birbal, Advocate.

VERSUS

M/S. BHUSHAN STEEL & STRIP LTD.

....Respondent

Through: Mr. Rajesh Banati, Advocate.

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. During the course of hearing of this objection petition, the only issue which was strongly urged for consideration of this Court, was with regard to the direction of the Arbitrator whereby the petitioner was asked to refund the price of the subject machinery to the respondent herein. It was contended by Mr. Arun Birbal, appearing on behalf of the petitioner, that this issue was suo moto taken up by the Arbitrator and the petitioner did not have an opportunity to meet the same. The counsel for the petitioner contended that if opportunity

was given, it could have been shown that the respondent was not entitled to the refund of the price inasmuch as the respondent had taken benefit of depreciation in its income tax returns with respect to the price of the machinery. If the respondent, therefore, had taken benefit of depreciation and consequently paid lesser tax, the respondent would not be entitled to refund of the price of the subject machinery because that would amount to double benefit to the respondent. Accordingly, this Court on 9.12.2009 passed the following directions:

“During the course of arguments, in this petition it has transpired that under the impugned Award, the petitioner was directed to refund the price of the machinery on the ground that the machinery was defective. This was not a prayer and the pleading of the respondent before the Arbitrator and the Arbitrator appears to have given this relief suo moto to the present respondent who was the claimant in the arbitration proceedings. This case was adjourned for today for the purpose of the respondent getting instructions as to what was the amount for which depreciation has been claimed in the tax returns filed by the respondent. The counsel for the respondent states that since the record is old record, immediate details are not available. Accordingly, as a last opportunity, this case is adjourned for four weeks subject to the condition that the respondent shall file an affidavit supported by the documents/accounts of the company as also its income tax returns to clarify the position as to whether any depreciation has been claimed in the tax returns with respect to the cost of the machinery which has been ordered to be refunded by the impugned Award.

List on 5th February, 2010.”

2. The respondent has now filed in this Court an affidavit in which it is stated that as per its income tax returns, no benefit of depreciation with regard to the subject machinery was taken. Accordingly, there does not now remain the issue of any double benefit to the respondent. Accordingly, the Award dated 24.8.2000 is sustained. I may only state that challenge to an Award under Section 34 is on limited grounds. Before an Award is set aside, it has to be

established that it is illegal or violative of the contractual provisions or the findings are so perverse that it shocks the judicial conscience. I have gone through the Award and this matter was argued over several dates. The sum and substance of the Award is that the subject machinery supplied by the petitioner to the respondent was found to be defective. This is a finding of fact and I cannot alter this finding of fact unless the finding is perverse. No perversity was shown to me during the course of hearing. The Arbitrator has in detail reproduced the respective contentions of the parties, dealing with the same, given appropriate reasons and has thereafter proceeded to give directions in the operative portion of the Award. Some of the relevant paragraphs of the Award are as under:

“18. The material question which needs to be decided is as to whether there were any inherent defects in the said three dryers or whether the defects occurred due to misuse or mishandling of the said dryers. From the date of commissioning of the dryers at the steel rolling mill of the claimant, there admittedly have been repeated complaints of unsatisfactory functioning of the dryers which were attended to by the experts of the respondent and reports in respect of every visit were prepared in between the period 19.4.1997 to 2.1.1998.

23. The expert was cross-examined at length by the learned counsel for the respondent. The expert has disclosed his qualifications, experience and his field of activities. It is not possible to agree with the respondent that the expert lacked any academic qualification or adequate experience. The expert was not aware of the fact that these dryers were being fed air from a compressor of capacity of 3000 CFM. As soon as this fact was brought to his notice he immediately opined that it is not good system. He admitted that 3000 CFM compressor is used for throwing air in the system of 1500 CFM like the dryers in question and in absence of any provision for channelizing the air flow and regulating the quantity in each dryer, it is possible that a dryer of capacity of 1500 CFM might get over-loaded and another dryer simultaneously functioning may not get sufficient air.

28. The question is as to whether the respondent whose obligation under the contract was to give proper dryers, has fulfilled this obligation or not. The dryers definitely and admittedly were not giving the expected performance as per contract as the compressors were becoming defective

and gas was leaking and in case such defects were appearing due to mishandling or misuse by the claimant, the respondent's officials would have indicated so in any of the numerous reports given by them. Thus it has to be held that the dryers in question were not satisfactory and the respondent failed to fulfil its obligations under the contract for supplying the proper dryers. Mere fact that the dryers were manufactured as per technical specifications given by the claimant, is not enough as the dryers were required to give satisfactory performance also as per clause 11 of the purchase order.

30. There is no material produced by the respondent to show that it got checked its design and shortcomings as per said assurance. In case these defects in air dryer were appearing on account of mishandling or misuse the respondent would not have failed to point to the claimant in writing at least after the said joint meeting.

42. Thus I make the award as follows:

- (1) That the respondent shall pay to the claimant Rs.9,39,600/- within two months.
- (2) On the failure to pay the amount within two months, the respondent shall pay interest at the rate of 12% on the said amount from the date of award till payment.
- (3) The parties shall bear their own costs.
- (4) That the claimant on receipt of the amount of the award, shall return the three dryers in question in the condition of "as it where is" basis to the respondent.
- (5) Other claims and counter claims are rejected."

3. The Award in this case has awarded interest @ 12% per annum simple. The Supreme Court in a recent chain of judgments reported as ***Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority & ors.***2005 (6) 678, ***McDermott International Inc. Vs. Burn Standard Co. Ltd.& ors*** 2006 (11) SCC 181, ***Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd.*** (2006) 7 SCC 700 and ***Krishna Bhagya Jala Nigam Ltd. Vs. G.Harischandra***, 2007 (2) SCC 720 and ***State of Rajasthan vs. Ferro Concrete Construction Pvt. Ltd*** (2009) 3 Arb. LR 140(SC) has held that on account of the liberalized interest regime and the changed economic scenario

there is consistent fall in the rates of interest and Courts should award lesser rates of interest. This Court has therefore been awarding interest @ 9% per annum simple consistently. In the facts and circumstances of this case, therefore, I reduce the rate of interest as granted by the Award from 12% to 9% per annum simple. I am, however, not changing the period for which the interest has been granted by the Award.

4. In view of the aforesaid, I do not find any merits in the objection petition which is dismissed.

VALMIKI J.MEHTA, J

February 05, 2010
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