

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

+ **FAO No. 224/2003**

% **2nd July , 2014**

UNION OF INDIA Appellant
Through: Mr. Jasvinder Singh, Advocate.

VERSUS

M/S. J.D. CONSTRUCTION AND ANR. Respondents
Through: Mr. Vikaram Nandrajog, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Section 37 of the Arbitration & Conciliation Act, 1996 against the impugned judgment of the court below dated 17.8.2002. By the impugned judgment, the court below has dismissed the objections which were filed by the appellant/objector/Union of India against the Award of the arbitrator dated 24.9.2001.

2. It may be noted that limited objections were filed by the appellant/objector and the Award as a whole was not challenged. The Award allowed certain claims of the respondent herein (claimant before the Arbitrator) and certain amount towards the counter claim of the appellant

herein (who was the respondent and the counter claimant in the arbitration proceedings).

3. The facts of the case are that the respondent no.1 was given a contract for designing and construction of RCC overhead tank of 40,000 litre capacity of NZP New Delhi. The total value of the contract was Rs.5,32,520/-. Respondent no.1 completed construction of the overhead tank but there were disputes and differences with respect to certain incomplete and defective work. The appellant rescinded the contract acting under clause 3 of the contract and got the minor incomplete work completed and defective work rectified from another agency. The arbitrator has passed the Award allowing various claims of the respondent herein and also allowing counter claim of the appellant herein for a sum of Rs.36,572/- towards the cost of doing minor incomplete work/rectification work.

4. The case of the appellant before the court below as also before this Court was that in addition to the amount of the counter claim which was awarded to the appellant for a sum of Rs.36,572/- towards small left over items and rectification, appellant was also entitled to forfeit the security deposit of Rs.53,253/-.

5. The issue which is called for decision thus is that whether the appellant in addition to being allowed the claim of Rs.36,572/- towards

small left over items and rectification work can be allowed to forfeit the amount of security deposit of Rs.53,253/-again towards the same heads of works.

6. In order to appreciate the case of the appellant herein before the arbitrator with respect to forfeiture of the security deposit, the following paragraph of the reply to the claim petition requires to be referred to:-

“Claim No.10:- For Rs.54,000/- approx. for release of security deposit.

Since the claimants did not carry out the work as per agreement, and their agreement has been rescinded by the Govt., their full salary deposit recoverable under the contract is liable to be forfeited.

Under clause 3 of the agreement when the contractor has made himself liable for action for rescission of his contract, then under clause 3(a) of the agreement the President of India shall have powers to determine or rescind the contract as aforesaid of which termination or rescission notice in writing to the contractor under the hand of the Engineer-in-charge shall be conclusive evidence. Upon such determination or rescission the full security deposit recoverable under the contract shall be liable to be forfeited and shall be absolutely at the disposal of the Government if any portion of the security deposit has not been paid or received it would be called for and forfeited.

The security deposit money so far deducted from the bills of the claimants is Rs.46863/-. Since the tendered amount is Rs.5,32,530/- total security deposit to be recovered from the claimants is Rs.53,253/- i.e a balance of the Rs.63900/- is yet to be recovered from the claimants since their work has been rescinded by the Government vide letter No.54(1)/CEDII/CCU/166 dt. 29.1.2001 (Exbt R14). As such it may be seen that on the contrary the claimants are required to deposit the balance amount of the security deposit with the respondents which shall be recovered from their final bill. Hence, it is prayed to the learned arbitrator that the claim of the claimants be rejected.” (underlining is added)

7. A reading of the aforesaid para shows that the appellant claims forfeiture of the security deposit on account of rescinding of the contract under clause 3. Effectively, therefore the claim was made for adjustment of the security deposit on account of the defective work and incomplete work having been got done from another agency.

8. The arbitrator awarded to the appellant/UOI its claim of cost of execution of left over items and rectification by giving the following conclusions:-

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14.Counterclaim- Respondents claim an amount of Rs.73,430/- for balance work and rectification work. The claim was later modified to Rs.35,532/-. The respondents further claim an amount of Rs.50,000/- towards costs.

14.1 The claimants gave the details of the final bill as prepared by them. They showed the recovery of Rs.53253 as recovery towards levy of compensation under clause 2 and a recovery of a sum of Rs.36,572 as the expenditure incurred on completion/rectification through another agency. After making adjustments for other amounts found payable, they arrived at the net figure of Rs.35532 as their claim. While arriving at this figure, the respondents also took the amount of security deposit of Rs.53253 recoverable as already recovered.

14.1.1. There is ample evidence on record that the claimants did not take the respondents' request for completing the balance small items and for rectification of defects pointed out by respondents from time to time and in the joint inspection on 24.8.2000, seriously. It has been amply proved that the respondents had to resort to execution of those items through another agency at the risk and cost of the claimants. Respondents have further given the details of their expenditure by

way of payment to the other agency entrusted with this job of execution of small left over items and for rectification. They have given the details of a total expenditure of Rs.45,946/- out of which they have preferred the claim for Rs.36,572/- as recoverable from the claimants on this account.

14.1.2 I, accordingly, award the amount of Rs.36,572/- in favour of the respondents on this account. (I do not consider it necessary to make a finer distinction between the amount spent on rectification of defects in the original work and the extra items after allowing the claim, as I did, for payment for extra items in favour of claimants to the extent considered admissible and after taking note of the fact that the respondents' claim is for an amount which is already less than the total amount they spent by way of payment to the other agency engaged under clause 3).”

9. It is trite that for the same heads of claims, amounts cannot be awarded twice over. The appellant has already been awarded damages of Rs.36,572/- on account of respondent herein not doing the work of certain small left over items and rectification work. Hence, further amount of Rs.53,253/- cannot be granted to the appellant under the same head in the nature of forfeiture of the security deposit. Sections 73 and 74 of the Contract Act, 1872 provide for damages in the alternative. Liquidated damages under Section 74 of the Contract Act cannot be claimed in addition to variable damages which are granted under Section 73 of the Contract Act for the same head of damages. Once for the head of damages incomplete work and defective work an amount of Rs.36,572/- is granted under Section 73 of the Contract Act, the appellant was not entitled to claim further

amount of liquidated damages under Section 74 of the Contract Act, 1872 for the sum of Rs.53,253/-.

10. At this stage, I may note that the appellant is satisfied by the Award of Rs.36,572/- towards small left over items and for rectification work as this part of the claim awarded in favour of the appellant by the arbitrator has not been challenged i.e the appellant is not claiming an enhancement to the counter claim allowed for the amount of Rs.36,572/- by challenging the Award for this purpose.

11. In view of the above, I do not find any error in the judgment of the court below dismissing the objections under Section 34 of the Act. The appeal is therefore dismissed, leaving the parties to bear their own costs.

JULY 02, 2014
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VALMIKI J. MEHTA, J.