

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

+ **OMP No. 389/2001**

**6<sup>th</sup> January, 2010**

M/S AUTOMOBILE CORPORATION OF GOA LTD. ...Petitioner

Through: Ms. Surekha Raman, Advocate

**VERSUS**

M/S DELHI TRANSPORT CORPORATION ....Respondent

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. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996, whereby the petitioner, who had agreed to supply and fix bus bodies to the respondent, on the chassis supplied by the latter, is challenging the Award dated 11.8.2001 of the sole Arbitrator.

2. I would take up the arguments qua each claim which has been very ably urged by the counsel for the petitioner.

3. At the outset, the counsel for the petitioner has urged that the Award decides issues which are beyond the scope of reference. I note that no such objection was taken by the present petitioner before the Arbitrator that disputes are beyond the scope of reference and hence cannot be arbitrated upon. In the case titled as *M/s Deconar Services Pvt. Ltd. Vs. National Thermal Power Corporation* being OMP No. 262/2000 decided on 16.12.2009, I have had an occasion to consider two aspects which squarely applies to this case. The first aspect is that an issue which has not been raised before the Arbitrator cannot be raised for the first time before the Court. The second aspect, I have dealt with is that as per the judgment of the Supreme Court reported as *Inder Sain Mittal Vs. Housing Board Haryana (2002)3SCC 175* once a person appears in the arbitration proceedings and takes a chance of Award going in his favour, then, he cannot turn around and raise an objection as to the jurisdiction of the Arbitrator, once the Award is passed against him. Accordingly, on both these counts I am unable to agree with the objection raised by the counsel for the petitioner that the Award is beyond the scope of reference.

4. The first issue which has been urged pertains to Claim No.8. The issue before the Arbitrator and the claim accordingly filed was that the claimant/respondent was not entitled to the loose items of the bus chassis, and which chassis was provided by the respondent to the petitioner after fitment thereon of the bus bodies. Clause 14 of the contract dated 4.6.1998 in this regard is relevant and the same reads as under:-

“The Contractor will have to return back the loose items/fitment supplied/provided on the chassis but not used in the fabrication of bus bodies to the Corporation alongwith the completed vehicles.”

In view of Clause 14, it is therefore beyond any cavil that the loose items of the chassis in fact belonged to the respondent and not to the petitioner. It is not an issue that such loose items or chassis were not returned by the petitioner to the respondent. These parts are of a huge amount of Rs.67,33,881/-. I see no reason to interfere with the Award of the Arbitrator by which he has awarded such an amount in case the petitioner does not return the necessary items within 15 days of the date of the issue of the Award. It is also not disputed that these items have not been returned to the respondent within 15 days after passing of the Award. The counsel for the petitioner has very strenuously urged that after the contract dated 4.6.1998 was entered into between the parties, and which was signed by both the parties, and pursuant to which the present petitioner acted in terms thereof, the petitioner appears to have written certain letters whereby the petitioner claimed that this Clause 14 was not found in the earlier contract dated 6.4.1998 and therefore, the petitioner should not be bound by the Clause 14. This argument is, merely stated to be rejected, because once a contract, which is a bilateral act, is entered into, then, no party, by an unilateral act can seek to, alter the agreed terms and conditions of the contract. The only way in which a bilateral contract can be altered is by an agreed novation of the same, and, I do not find that there is any agreed novation, and nor is that the case of the counsel

for the petitioner, and which merely is, as stated above, that by writing letters, the aforesaid Clause 14 would not apply. If I accept the contention of the counsel for the petitioner, then, sanctity and solemnity of the final contractual document can be whittled down by an unilateral act of writing of letters by a party and surely which is not the legal position. Accordingly, I do not find any merit with respect to the challenge to Claim No.8.

5. The next objection which has been taken up was with respect to grant of liquidated damages under Claim No.1 to the respondent by the Arbitrator. The liquidated damages have been granted at Rs.400 per bus per day. The counsel for the petitioner canvassed that as per para 11 (ii) of the terms and conditions of the tender, it is the date of inspection which is a date of delivery and since inspections have been done before the scheduled/prescribed dates under the contract therefore it should be held that there is no delay in the supply by the petitioner to the respondent. The said clause relied upon by the counsel for the petitioner reads as under:-

“ii) For the purpose of this clause delivery of the completed bus shall be treated as having been effected on the date on which the inspection is carried out. The mere fact that the buses may be made ready for inspection shall not be considered as completion of delivery unless delay in arranging inspection is caused by the Corporation.”

Once again a reference to the written statement filed by the petitioner before the Arbitrator does not show that such an objection in this manner has been taken before the Arbitrator that merely on inspection, the

delivery stands completed. Even assuming this to be so, this argument has no legs to stand upon because this clause is with reference to the subject matter that if the respondent delayed inspection, then, delay in delivery should not be attributable to the petitioner. This is clear from a reading of the complete paragraph in question. In any case, it is not the stand of the petitioner that actual deliveries were made to the respondent before the prescribed/scheduled dates as per para iii (running page 10) of the contract by which the buses were to be delivered in lots every 30 days and the last lot in the fortnight after the penultimate delivery. I may state that though the counsel for the petitioner obviously did not refer to Clause 11, this clause of the contract is indeed relevant because it prescribes that both delivery and inspection have to be at Delhi and not at Goa as was sought to be contended by the counsel for the petitioner. The aforesaid para 11 of the Contract dated 4.6.1998 reads as under:-

“11. The final inspection of the completed bus body/bodies be done at Delhi before effecting delivery of the completed vehicle at Central Workshop-1, of the Corporation at B.B.Marg, Delhi-9. In case, any defects/deficiencies/discrepancies are observed after the receipt of vehicle at DTC Delhi, the same shall be removed by DTC at your cost without giving any notice.”

In any case, the Arbitrator is the final fact finding authority and I do not find any perversity whatsoever in the approach of the Arbitrator for this court to interfere within the parameters of the law under Section 34. Though, only the view as taken by the Arbitrator is correct that the deliveries were not

done by the prescribed dates and hence liquidated damages were payable, even assuming for the sake of argument, if I accept the contention of the counsel for the petitioner, yet the objections have to fail, because, the Arbitrator can take one plausible view, and which if done, the court is not entitled to interfere with the Award merely because an alternate view can also be canvassed. Therefore objection with respect to Claim no.1 is also accordingly rejected.

6. Claim Nos. 2 and 3 awarded by the Arbitrator are basically towards defects and deficiencies in the bus bodies supplied by the petitioner. The Arbitrator has arrived at a finding of fact that there were defects and deficiencies. This finding of fact has been arrived at by the Arbitrator by noticing that the defects and deficiencies were observed at the time of final inspection carried out in the presence of the representatives of the present petitioner. The Arbitrator has also referred to relevant reports which have been countersigned by the representatives of the present petitioner and which show the agreed defects observed by the inspecting team. Further, the Arbitrator has referred to the various test reports of a Government Lab. Test House and the bills for payment with respect to getting the material tested and also for the replacement of the substandard material used in the bus bodies fabricated by the present petitioner. The Arbitrator has therefore, allowed 50/70% of the amount as claimed by the respondent.

I may note that the Arbitrator has for no apparent reason reduced the total claim by 30/50%, which logic is not understood, however, since there are no

objections filed by the respondent, the Award in this regard has to stand. While so observing, I may also note that even with respect to Claim No.1 where liquidated damages have been awarded by the Arbitrator, he has only awarded 50% of the liquidated damages without giving any reasoning. Once again since there are no objections by the respondent to the Award, this Court can do nothing except sustaining the Award with respect to 50% of the amount awarded.

Accordingly, there cannot be any valid basis for challenge to Claim Nos. 2 and 3 as awarded for the defects and deficiencies in the bus bodies as supplied by the petitioner to the respondent.

7. The next Claim No.4 is with respect to the warranty period defects. The counsel for the petitioner argued that when delivery of the buses was taken, no such defects were pointed out. I have completely failed to understand this argument. A warranty clause is with respect to warranty against defects if the goods are used and not when the goods are taken in a brand new condition from a supplier. Not only this, the Arbitrator has referred to, in this regard the four letters written by the respondent to the petitioner whereby the petitioner was asked to come and rectify the defects but the petitioner failed to do so. Once again while awarding this claim, I may note that the Arbitrator has awarded only 50% amount claimed by the DTC, though once again without any rationale whatsoever, but since as stated above, there are no objections of the DTC

nothing can be done except sustaining 50% of the amount awarded under this claim.

8. In view of the above, I do not find any merit whatsoever in this petition which is dismissed, leaving the parties to bear their own costs. Let a copy of this judgment be sent to the Chairman of the DTC, to bring to his notice the negligent lack of representation on behalf of the respondent during the hearings of the objections.

**VALMIKI J.MEHTA, J**

**January 06, 2010**

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