

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

+ **OMP No. 8/2010**

11th January, 2010

CEMENT CORPORATION OF INDIA LTD.

...Petitioner

Through: Mr. Arvind Kumar Gupta, Advocate
VERSUS

M/S VASWANI INDUSTRIES LTD. & ANR.

....Respondents

Through: Nemo.

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 has challenged certain findings of the Arbitrator in the Award dated 24.10.2009.

2. The facts of the case are that the petitioner owned a Railway Siding at Mandhar in the State of Chhatisgarh. Petitioner allowed this railway siding to be used by the respondent herein on payment of monthly charges for a period of one year. Under this contract, the agreement could have been terminated by either of the party on giving one month's notice. The respondent herein used

the railway siding and paid charges from January to May, 2006. However, because of an accident in April, at the unmanned railway crossing, the only road which provided access to the railway siding, was closed by the railways. In view of this position, the respondent could not use the railway siding regularly, and could use it only intermittently. In fact, the Arbitrator notes that the respondent had to construct a katcha road from the agricultural fields to reach the railway siding.

3. The following issues were framed by the Arbitrator:

Issue No.1.

Whether work order dated 14-12-2005 being Annexure R.W.1/1 annexed to the affidavit of the Respondent's witness amounts to a "Licence" as defined by section 52 of the Indian Easements Act, 1882 or a "Lease" as defined by section 105 of the Transfer of Property Act?

Issue No.2.

Whether after the closure of the only motorable approach road to Railway siding exchange yard, Mandhar, passing through unmanned level crossing it had become impracticable for the Claimant to effectively use the Railway siding exchange yard as per the terms and conditions incorporated in the work order?

Issue No. 3.

Whether the Claimant's letter dated 01-09-2006 addressed to the Respondent being Annexure C/13 to the statement of claim of the Claimant amounts in law to be a deemed revocation of the licence granted by the Respondent for co-using the Railway siding exchange yard, Mandhar?

Issue No.4

Reliefs and Costs

4. The Arbitrator in his detailed Award, which runs into 18 pages, has examined the facts, contentions, issues and the legal position and has thereafter

given his findings on each issue. From internal page 6 of the Award to internal page 9, the Arbitrator has recorded the undisputed facts which have emerged in the present case, and which are as under:-

5. UNDISPUTED FACTS:

Based on the pleadings of the parties and the oral and the written submissions submitted before me the following undisputed facts emerged:-

(a) The present arbitral proceedings arise out of order/contract/agreement (work order) contained in letter No. 39/05/11(4)/05-MMO dated 14-12-2005 addressed by the Respondent to the Claimant. This document was filed by the Respondent along with its affidavit-in-proof as Exhibit R.W.1/1. The aforesaid order/contract/agreement (work order) had been issued by the Respondent against their Tender No.11(4)/05/MMO.

(b) The aforesaid Tender No. 11(4)/05/MMO was subject to Special Terms & Conditions forming an integral part of the contracts. The present arbitral tribunal has been constituted as per Clause 13.1 of the Special terms and conditions. These special terms and conditions are contained in part-III and they over ride and prevail upon the conditions given in Part-1 & II of the tender document. By special condition No.2, sub para 3 the Respondent (CCI) had reserved the right to induct any other party for using the railway siding on mutually agreed terms without reducing the liability of the successful Tenderer to make the agreed lump sum payment. The relevant portion of sub para 3 of condition No.2 of the special terms & conditions is reproduced hereunder:-

“However, CCI reserve the right to induct any other party for using the Railway siding on mutually agreed terms but in no case the monthly lumpsum amount as agreed payable will be reduced.”

(c) As per condition No.6 of the work order it was the responsibility of the claimant to obtain No Objection Certificate for the operation of the Railway siding at Mandhar from the concerned Railway authorities and to furnish the same to CCI, Mandhar. As per condition No.10 of the work order the effective date of contract/lease will be from the date of receipt of “No Objection Certificate” from the Railways for use of the Railway siding and submission of security deposit of Rs.10,00,000.00 (Rupees Ten Lakhs) in the form of Demand Draft in favour of CCI Mandhar. The Security Deposit of Rs. 10,00,000.00 was refundable without interest after three months of the satisfactory/successful completion of the lease period.

(d) In the case on hand the Claimant had obtained the requisite No Objection Certificate from the Chief Commercial Manager, S.E.Railway

Bilaspur vide its letter dated 31-01-2006 addressed to the Manager, MM, CCI, New Delhi. This letter has been filed as Annexure C/1 with the statement of claims filed on behalf of the Claimant. It is noteworthy that by this letter the Railway administration had granted no objection to CCI to permit the claimant to co-use exchange yard at Mandhar.

The security deposit of Rs.10,00,000.00 was deposited on 01-02-2006 and as such the contract/work order commenced on 01-02-2006 and was valid till 31-01-2007. This important fact has been admitted by the Respondent in para 3 of their statement of claim filed before the Hon'ble Tribunal.

(e) The Claimant vide its letter dated 01-09-2006 filed as Annexure C/13 to their statement of claim had informed the Respondent that they had decided that they cannot continue to use the railway siding due to blockage of approach road w.e.f. 25-04-2006 by the Railway Administration. By this letter after releasing the Railway siding in favour of the Respondent w.e.f. 01-09-2006, the Claimant had also sought refund of security deposit.

(f) The only approach road to the Railway siding exchange yard at the relevant point of time passed through an unmanned Railway level crossing which had been closed to heavy vehicular traffic w.e.f. 25-04-2006 by the Railway Administration due to some accident involving human life by putting up girders. This fact is admitted by the Respondent's witness Sh. Ravindra Singh in his cross-examination in unnumbered para 4, which reads as follows:-

“It is correct that there is only one motorable road for approach to Mandhar Exchange Yard which passes through unmanned Railway crossing. It is correct that Railway Administration has put up the restriction on the crossing by putting the guarders to prevent ingress, egress of heavy vehicular traffic, however, the light traffic and tractors were passing.”

(g) The Respondent's witness Mr. Ravindra Singh further admits in penultimate para of his cross-examination that after giving the letter dated 01-09-2006 being Annexure C/13 Claimant had permanently stopped using the exchange yard. In the same sub-para the witness further admitted that during the currency of the work order in favour of Claimant the Respondent was entitled to allow any third party also to use the exchange yard.

(h) The bunch of documents filed as Annexure C/8 (Colly) which have not been denied by the Respondent further established that after the closure of the unmanned Railway level crossing w.e.f. 25-04-2006 to heavy vehicular traffic by the Railway Administration, the Claimant had tried its level best for the re-opening of the closed unmanned level crossing by the Railway Administration by approaching the District Collector and the concerned Railway Authorities.

(i) The Claimant has paid the monthly bills raised by the Respondent towards handling charges for the months of February, 2006 to May, 2006.

(j) The Claimant did not use the Railway siding exchange yard at all during the month of June, 2006 due to closure of the unmanned Railway crossing by the Railway Administration and therefore, the Claimant did not pay the handling charges for this month to the Respondent.

(k) The claimant used the Railway siding exchange yard during the month of July, 2006 by constructing a temporary kutcha road through the paddy fields of the Villagers and accordingly paid the monthly bill minus tax for the month of July, 2006.

(l) The Respondent had vide its letter dated 02-08-2006 refused to waive the monthly handling charges for the period during which the Claimant was prevented from using the Railway siding exchange yard due to closure of the unmanned level crossing after the accident by the Railway Administration.

(m) In reply to the Respondent's letter dated 02-08-2006 being Annexure C/11 the Claimant had vide its letter dated 11-08-2006 again requested for the Waiver of the lease rent/handling charges for a total period of 45 days during which the Claimant was prevented from using the Railway siding exchange yard due to closure of the nearby unmanned level crossing by the Railway Administration.

(n) By condition No.4 of the work order dated 14-12-2005 (exhibit R.W.1/1) the Claimant had agreed to pay the old dues of Railway Administration against the Respondent in twelve equated monthly instalments of Rs.2,89,188.00 each."

5. On issue no.1, the Arbitrator has given a finding that the relationship between the parties was of a licensor and licensee and not of a lessor and lessee. The Arbitrator has referred to the provisions of Indian Easements Act, 1882 and Transfer of Property Act, 1882 along with the celebrated judgments of the Supreme Court on this aspect as regards when can a contract between parties fall under the category of a lease or a license. The Arbitrator has come to a finding that the relationship between the parties was that of a licensor and

licensee because the present petitioner was entitled to co-use the railway siding along with the respondent. The relevant findings of the Arbitrator in the Award are as under:-

“If we apply the above principles to the facts and circumstances of the present case I have no hesitation in strongly holding that the transaction between the parties to the present arbitral proceedings arising out of work order dated 14-12-2005 being Annexure R.W1/1 was a mere licence and not a lease for the reasons set out hereunder:-

(i) the Railway siding exchange yard, Mandhar, was the property of the Railway Administration and had been leased out by the latter in favour of the Respondent on lease.

(ii) The Respondent with the permission and no objection of the Railway Administration allowed the Claimant to co-use the said Railway siding exchange yard for a period of one year commencing from 01-02-2006 and expiring on 31-01-2007 (emphasis supplied).

(iii) Vide letter Annexure C/1 the Railway Administration had not given permission to sub-lease the Railway siding exchange yard in favour of the Claimant but had only permitted the Claimant to co-use the Railway siding exchange yard.

(iv) From sub-para 3 of para 2 of the special terms and conditions of the tender as also from the admission of the Respondent’s witness Mr. Ravindra Singh, the Respondent had reserved to itself the right to induct third parties to co-use the Railway siding exchange yard alongwith the Claimant. Thus, it is clear that legal possession of the Railway siding exchange yard always remained with the Respondent as the Licensor.

(h) Therefore, notwithstanding the fact that both the parties to the work order had used the words “Lease” or “lease rent” in their correspondence, this Tribunal holds that the transaction represented by the work order was in law a licence as defined by section 52 of the Indian Easements Act and not a lease as defined by section 105 of the Transfer of Property Act.”

Accordingly, I do not find any error in the findings of the Arbitrator holding that the relationship of the parties was only of licensor and licensee and not lessor and lessee.

6. The main issue which was urged before the Arbitrator was with regard to the liability of the respondent to pay the charges for the period from July to August, 2006. The petitioner claimed payment of the entire monthly charges whereas the respondent denied its liability to pay the charges on account of the fact that it could not use the railway siding for a substantial period on account of an accident at an unmanned railway level crossing on 25.4.2006 which led to loss of human life and as a result of this accident the railway authorities closed the only approach road to the railway siding, and consequently, the respondent herein could not effectively and completely use the railway siding as per the contract. The relevant findings of the Arbitrator in this behalf are as under:-

“8. FINDINGS ON ISSUE NO.2.

(a) As per the admission made by the Respondent’s witness Mr. Ravindra Singh in his cross-examination there was only one motorable approach road to the Railway siding exchange yard, Mandhar, passing through unmanned Railway level crossing which had been permanently closed down to heavy vehicular traffic by the Railway Administration on 25-04-2006 after an unfortunate accident involving human life at the said unmanned Railway level crossing. This fact has also been verified by this Tribunal during the spot inspection on 13-06-2009.

(b) In view of the above the Tribunal holds that after the accident on 25-04-2006 at the nearby unmanned Railway level crossing the Claimant was prevented from effectively using the licenced Railway siding exchanged yard, Mandhar, as per the terms and conditions incorporated in the work order.”

In view of the undisputed facts, I do not find any fault whatsoever in the finding of the Arbitrator that the respondent was prevented from effectively using the licenced Railway siding at Mandhar.

7. The counsel for the petitioner has very strenuously urged before this Court that by virtue of Clause-1 of the contract dated 14.12.2005, the monthly charges were payable for use up to 6 rakes. According to the counsel for the petitioner therefore since there is a finding that certain rakes were in fact unloaded during the month of June therefore, the counsel contended that the entire charges must be paid by the respondent.

8. I note that the Arbitrator has gone into this issue in detail and after considering all the relevant facts and circumstances inter alia of : provisions of the contract, the fact that the Railway siding could not be used for certain periods, the fact that the respondent had to make a katcha road to reach the railway siding; and therefore the Arbitrator has accordingly denied the complete monthly charges to the present petitioner. The relevant portion of the Award in this regard is as under;-

“(b) It is again a matter of record that due to closure of unmanned railway level crossing by the Railway Administration, the Claimant could not effectively use the Mandhar Railway siding during the months of June, 2006 to August, 2006. This would be clear from the fact that during the months of June and August the Claimant could unload only 3 wagons each and during the month of July could unload only 4 wagons against the minimum quota of 6 rakes (see Annexure-RW-1/3). Therefore, the Respondent is not entitled to any amount on account of handling charges at a full rate for the period June, 2006 to August, 2006. Under the peculiar circumstances, during the months of June, 2006 to August, 2006, the Claimant used the Mandhar Railway siding by constructing a kutchra road through nearby paddy fields at great capital expenditure and incurred additional expenses in transporting the goods to their factories. The Claimant accordingly had legally claimed waiver of handling charges for a total period of 45 days out of the total period between June, 2006 to August, 2006. It is again a matter of record that the Claimant had paid full amount of handling charges for the month of July, 2006, at the contractual rate. Thus, out of the total period of June, 2006, to August, 2006, the Claimant is liable to pay handling charges only for a period of 15 days which works out to Rs.10,82,500.00. Thus, on account of arrears of

handling charges for the period June, 2006, to August, 2006, the Respondent is entitled to a total sum of Rs.10,82,500.00 for a total period of 15 days. Since the Claimant had revoked the licence w.e.f. 01-09-2006 the Respondent is not entitled to any handling charges for the period 01-09-2006 to 31-01-2007. Similarly since the Claimant could not effectively use the Mandhar Exchange Yard from June, 2006 onwards till termination of the licence w.e.f. 01-09-2006, the Claimant is not liable to pay the future instalments of the Railways dues payable by the Respondent to the Railways.”

9. The Arbitrator was surely entitled, in view of the facts as were found by him, to arrive at the findings of apportionment and the proportionate reduction in the monthly charges. The Arbitrator being entitled to has rightly reduced the charges for use of the railway siding considering effective user, ineffective user and also non-user. The Arbitrator has arrived at a finding of fact that during the months of June to August, the respondent could unload only three wagons each against the minimum quota of 6 rakes. The Arbitrator has further noted that the respondent has paid the complete charges for July, 2006. The Arbitrator has therefore finally for the period from June to August, 2006 awarded the petitioner charges only for 15 days after taking into account the payment of the complete period for the month of July, 2006. This is surely a very just, equitable and a justified legal approach.

10. It is settled law that if two views are possible from a situation an Arbitrator is fully entitled to take one plausible view. The detailed Award shows that Arbitrator was justified in taking one plausible view which he has taken. Merely because another view is possible, as is contended by counsel for the petitioner, does not entitle this Court to interfere with the findings arrived at

by the Arbitrator. The scope of challenge to an Award in a proceeding under Section 34 is no longer res-integra. This Court can interfere with an Award only if the Award is illegal or it is against the contractual provisions or it is so perverse that it shocks the judicial conscience. I do not find that the Award is in any manner illegal in view of what has been stated above. Also it cannot be said that the Arbitrator has acted against the contractual provisions because there is a finding of fact that the respondent could not use the Railway siding on account of the only approach having been closed by the Railway authorities. There is no perversity also in apportioning the periods for user and payment for the months of June to August 2006 and which has been done by the Arbitrator. The Arbitrator has in my opinion acted both in terms of law and facts of the case. If the respondent has been prevented, and which is a finding of fact, from using the Railway siding, then it was surely entitled to seek reduction of the monthly charges. Once the Arbitrator has done this, I do not think that this Court ought to or even can interfere with such conclusion in an Award under Section 34 of the Arbitration and Conciliation Act, 1996.

11. The last issue argued by the counsel for the objector is that the Arbitrator has committed an illegality in awarding payment to the respondent of the lease tax paid by the petitioner to the Government. There are two reasons why this argument has to fail. Firstly, the Arbitrator has recorded that the provision of law for making such deduction was not shown to the Arbitrator. Even before this Court, no provision was shown. Secondly the said tax was payable only if

the contract in question was a lease and not a licence. The Arbitrator has held, and rightly, that the contract between the parties was not of a lease, but of a licence. Therefore, if the petitioner, has wrongly deposited tax, which it was not to, the respondent cannot be blamed. In any case the petitioner on the basis of the Award can apply for refund of the tax wrongly deposited, this objection is therefore also rejected.

12. With the above observations, the present petition is dismissed, leaving the parties to bear their own costs.

VALMIKI J.MEHTA, J

January 11, 2010

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