

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

Date of Reserve: July 01, 2009  
Date of Order: July 03, 2009

**+ OMP 338/2009**

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**03.07.2009**

**SAMHO GUNYOUNG CO. LTD. .... Petitioner**

Through : Mr. Debo K. Deori, Adv.

Versus

**FLAKT (INDIA) LTD. & ORS. .... Respondent**

Through:

**JUSTICE SHIV NARAYAN DHINGRA**

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

**JUDGMENT**

1. By this petition under Section 34 of the Arbitration and Conciliation Act, the petitioner has assailed an award of the Tribunal dated 15<sup>th</sup> January, 2009 whereby the Tribunal allowed the claim of the respondent in respect of balance amount of milestone payment to the tune of USD72,730/- and INR39,04,510.03 and also allowed a claim of USD18,045/- and INR2,66,460/- against vat and service tax not refunded. Tribunal awarded 12% interest on these amounts from the date they became due and payable, in case the amounts were

not paid within 15 days of the passing of award, till realization. The Tribunal also directed the petitioner to pay balance 25% of the retention money of the claim and costs of arbitration proceedings.

2. The respondent/claimant had entered into a sub-contract with the petitioner, called as 'TVS sub-contract' and the petitioner had deducted an amount of USD72,730/- and INR39,04,510.03 out of the payments due towards the respondent and had also not refunded vat and service tax in terms of contract and had not paid remaining retention money to the tune of 25% which resulted into invocation of the Arbitration agreement by the respondent and passing of the award by the Tribunal in favour of the respondent. The contention of the counsel for the petitioner is that the sub-contract entered into between the petitioner and the respondent though was a lumpsum contract inclusive of all taxes, royalty, custom duties (other than custom duties, i.e., basic custom duty, CVD and SAD of specified imported items which were not payable under the special exemption notification under the Customs Act, 1962 as described in terms of payment, Annexure-4), excise duty and other duties, still the petitioner was entitled to make deductions in case of an

eventuality of deviation in the custom duty rates. The petitioner contended that it was entitled to deduct the amount on account of exemption of custom duty enjoyed by respondent under different notifications. The contracted lumpsum price entitled the petitioner to make recoveries of the amounts recovered from the petitioner by Samsung, on back-to-back basis.

3. The learned Arbitral Tribunal considered the contract between the parties and the specific clauses regarding custom duty and came to conclusion that the petitioner's assumption that the fixed lumpsum price under the sub-contract was variable as per custom duty, was factually not correct. It was observed that there was no component of custom duty in the fixed lumpsum price agreed under the contract nor there was any incidence of custom duty charged and paid to the Government thereafter in respect of any of the imports into the country under the contract. The Tribunal also observed that the petitioner neither pleaded nor proved if any amount towards the exemption of custom duty was adjusted by the principal contractor (Samsung) from amount payable to the petitioner. It was also observed that the petitioner had failed to produce on record the invoices raised by Samsung on

them having a component of custom duty, unlike the invoices raised by the respondent on the petitioner. The Arbitral Tribunal thus came to conclusion that the petitioner was not entitled to deduct the amount from the bills of respondent and allowed the claim of the respondent regarding these deductions. There is no dispute that the claimant/respondent was entitled for vat and service tax refund and during the arbitration proceedings, the petitioner had admitted a part of the claim and undertaken to release the said amount to the respondent/claimant at the earliest and as and when the same was received by the petitioner from the principal director.

4. It is not disputed that the retention money to the tune of 25% was not paid to the claimant/respondent because of the alleged adjustments made by the petitioner and the Tribunal allowed the claim to that extent as well.

5. The petitioner has assailed the award on the ground that the Tribunal had not treated the parties with equality and acted against the elementary principle of natural justice and fair play. It is also submitted that the Tribunal had not given reasons or justification for the conclusions arrived at and there was no link between the material placed on record before the Tribunal by the petitioner and the conclusions arrived at. It is

also submitted that the Tribunal failed to appreciate that 'TVS sub-contract' agreement was entered on 6<sup>th</sup> June, 2003, i.e. after Samsung (principal employer) had negotiated the price with the respondent. The respondent did not disclose to the Tribunal as to when the price was negotiated by Samsung and when Samsung asked the respondent no. 1 to enter into firm sub-contract with the petitioner. Thus, the award given by the Tribunal was unfair.

6. The petitioner and the respondent had entered into a written contract between them. Samsung was not a party to the contract. It was for the petitioner to consider the contract carefully at the time of entering into it. If the petitioner had entered into a contract at the instance of Samsung (principal employer), that cannot be a ground to hold that the contract between the petitioner and the respondent was a back-to-back contract and whatever deductions were made by Samsung from the petitioner's bills are liable to be borne by the respondent. The contract between the petitioner and the respondent is an independent contract and is governed by its own terms and conditions. Unless and until the contract provided that it was a back-to-back contract and all deductions made by Samsung from the petitioner would be the

responsibility of the respondent, the petitioner could not make those deductions from the respondent. The learned Arbitral Tribunal considered the terms of the contract between the parties and taking into account the terms of the contract passed the award.

7. It is settled law that under Section 34 of Arbitration and Conciliation Act, this Court does not sit as an appellate court over the decision of the Arbitral Tribunal and cannot re-appreciate the evidence and arrive at a different conclusion. The Arbitral Tribunal is a judge of the facts and of law and has right to interpret the contract between the parties. This Court cannot substitute its own opinion against the opinion of the Arbitral Tribunal regarding quality, quantity and appreciation of the evidence, import of the documents and interpretation of the contract between the parties. The Court can interfere only under the circumstances as enumerated under Section 34 of the Arbitration and Conciliation Act 1996. The petitioner in this case had challenged the award only on vague and unspecified grounds. Though the award analysed the contract between the parties and gave detailed reasoning, still it is alleged that the award is an unreasoned award. The award has considered what were the relevant documents effective between the

parties and required to be considered, still the allegation is made that the Arbitral Tribunal had not considered the documents. The proceedings before the Arbitral Tribunal as filed by the petitioner show that both the parties were given equal and adequate opportunity to present their case before the Tribunal, still the allegations are made by the petitioner that the Tribunal did not treat the parties equally.

8. I find that none of the grounds made by the petitioner in the petition is tenable. I also find that the challenge to the award made by the petitioner is not sustainable under Section 34 of the Arbitration and Conciliation Act. The petition is hereby dismissed.

**July 03, 2009**  
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**SHIV NARAYAN DHINGRA J.**