

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Civil Revision No.7294 of 2010 (O&M)

Date of decision: 30.04.2015

& Civil Revision No.7510 of 2010 (O&M)

Union of India through Commander Works Engineers Ferozepur,
Cantt., and another.

... Petitioners

versus

M/s Prabhat Kumar & Brothers, Engineers and Government
Contractors, 21 Karwa House, The Mall, Ferozepur Cantt., through
its partner Shri Prabhat Kumar, and others.

.... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Ashwinie Kumar Bansal, Advocate,
 for the petitioners.

Mr. Manohar Lall, Advocate,
for the respondents.

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

K.Kannan, J.

1. Both the civil revisions address the same issue on a point raised by the Union that an Arbitrator who renders an award against express terms of the contract between the parties ought to be taken as misconducting himself and the award passed against express contractual terms cannot be legally sustained and would require to

be set aside. Both the cases arise out of a situation of assessment of damages for the delay caused to the contractor for completing the works, consequent on the inability of the Union to deliver the site or other circumstances that required extension to be given beyond the time which was contemplated for completion.

2. It is an admitted case that the contract period stipulated was one year for completion but they were extended from time to time by invoking a provision for extension under Clause 11A (vii) that allowed for an extension to be given for any other cause which was in the absolute discretion of the Accepting Officer that was beyond the contractor's control. The argument advanced is that the contract period was extended by the Union not on account of the contractor's default and there was a contractual term itself that provided as to how the matter will be dealt with. The relevant clause is reproduced as under:-

"11(C). No claim in respect of compensation or otherwise, however, arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted."

3. The contention is that in terms of Clause 11(C), the contractor was barred from raising any claim for compensation for delay in completion of works. There had been other claims as well but the entire focus of attention was only with reference to the claim

for damages which was raised in claim No.8 in C.R. No.7294 of 2010 and claim No.3 in C.R. No.7510 of 2010.

4. I notice that there has been a cleavage of opinions with reference to the very same same Clause 11(C) by the decisions of the Supreme Court as well as by decisions of this Court. Two decisions of the Supreme Court have directly adverted to Clause 11 (C) which are: **Ramnath International Construction Pvt. Ltd. Versus Union of India and another-AIR 2007 SC 509** and **Oil and Natural Gas Corporation Versus M/s Wig Brothers Builders and Engineers Pvt. Ltd.-2010(13) SCC 377**. In both these decisions, the point at issue was the liability of the Union to pay damages for delay caused in completion of works and a resort to Clause 11(C) was made to fend off a claim by the contractor. In the former decision, there had been a reference made to the judgment of the Supreme Court in **Ch. Ramalinga Reddy Versus Superintending Engineer 1999(9) SCC 610** which was a Three Member Bench decision of the Supreme Court. In the latter decision in **Oil and Natural Gas Corporation case** (supra), the reference had been made to the judgment in **Ramnath International Construction Pvt. Ltd. Versus Union of India and another-AIR 2007 SC 509**. The decision in **Ch. Ramalinga Reddy's** case did not have Clause 11(C) itself but it was with reference to a claim for damages caused for additional work done and the Court was considering the effect of Clause 6 Part

VII of the General Conditions of Contract which read as under:-

"No extra payment would be made for baling out water for dewatering. Having regard to these terms of the contract between the parties, it is difficult to accept the submission that the appellant had encountered hard rock due to tank nearby which had not been disclosed in the tender documents and that is why he was entitled to the extra rates as claimed. The High Court was right in pointing out that the contract expressly stated that no payment could be made on account of the lack of acquaintance of the contractor with the work site, he having been deemed to have satisfied himself in respect thereof before having quoted the rates. The arbitrator was bound by the contract between parties and to decide the claims referred to him in the light thereof. His award being found to be contrary to the plain terms of the contract, it was liable to be set aside to that extent. The award in respect of claims 3 and 7 was, therefore, rightly set aside. Claim 6 was in respect of "payment of idle labour charges."

5. Though this clause is not a reproduction of Clause 11 (C), it had the effect of protecting one of the contracting parties to be liable for any damages if there was additional cost incurred for

any additional work. The Supreme Court, however, relied on Three Member Bench decision in **Ramnath International Construction Pvt. Ltd.** (supra) and **Oil and Natural Gas Corporation**(supra). The Supreme Court in **Oil and Natural Gas Corporation**(supra) was considering typically a claim for damages for delay and the Court was holding:-

"In view of the above, in the event of the work being delayed for whatsoever reason, that is even delay which is attributable to ONGC, the contractor will only be entitled to extension of time for completion of work but will not be entitled to any compensation or damages. The arbitrator exceeded his jurisdiction in ignoring the said express bar contained in the contract and in awarding the compensation of Rs.9.5 lakhs"

6. Clause 11(C) also came for consideration before this Court in two other decisions by different Benches, both of which make reference to the judgment of the Supreme Court. They are the decisions in **M/s Manohar Lal and Sons Versus Union of India and others** in C.R. No.2796 of 2000 dated 03.08.2010 (Per Hemant Gupta J.). The Court was holding in a situation where the objection was placed that the State had not given any evidence regarding the non-entitlement of damages and the Court reasoned:-

"....There is no dispute in respect of the terms of the

agreement or the fact that there was extension granted by the respondents. Even if no evidence has been led by the respondents, it does not bar the jurisdiction of the Court in examining the claim of the petitioner to find out whether such claim is within the jurisdiction of the Arbitrator."

7. In yet another decision of this Court in C.R. No.5042 of 2003 dated 10.07.2014 titled "**Union of India and another Versus M/s Sanjeev Builders and another**" (Per Rakesh Kumar Jain, J.). The Court was referring to Clause 11(C) and made reference also to the judgments in **Ramnath International Construction Pvt. Ltd.** (supra) and **M/s Manohar Lal and Sons**(supra) and held that contractor was not entitled to any award for delay in completion of works by invoking Clause 11(C).

8. Contrary to these citations which the learned counsel appearing for the petitioner was referring to, the counsel for the respondent also refers me to a judgment of the Supreme Court in **Asian Techs Ltd. Vs. Union of India and others 2009(4) Arb. L.R. 89(SC)**. The Supreme Court was considering the effect of delay in completion and the resultant increase of cost of labour, fuels, materials etc. by efflux of time. The Court held referring to Clause 11(C) and earlier judgment of the Supreme court in **National Insurance Company Limited Versus Boghara Polyfab Pvt. Ltd.**

(2009) 1 SCC 267 that even in the case of issuance of full and final discharge/settlement voucher/no due certificate, the Arbitrator or Court could go into the question whether the liability had been satisfied or not. Referring to yet another ruling of the Supreme Court in **Board of Trustees for the Port of Calcutta Versus Engineers-De-Space-Age (1996) 1 SCC 516**, the Court approved of the observation that Clause 11 could only prohibit the department from entertaining the claim, but it did not prohibit the arbitrator from entertaining it. The counsel would point out that this judgment was taken to be the basis of a claim emanating from a contractor for damages caused for the delay in completion of work in **Union of India and others Versus Puran Chand and another in Civil Revision No.4217 of 2002**. This Court had benefit of being cited the decision of the Supreme Court in **Ramnath International Construction Pvt. Ltd.** (supra) and **Asian Techs Ltd.** (supra).

9. It shall be judicial impropriety for a subordinate court to hold any decision of the Supreme Court as not binding. If there has been an attempt of this court to reconcile the seeming differences, then I lend support of my own view for a learned Judge who has made such an exercise. The decision in **Civil Revision No.4217 of 2002 in Puran Chand's case** (supra) was, therefore, really one such decision where the seemingly conflicting views have been noticed and the view has been expressed that the preponderance of law is

only that the escalation of costs could be granted and 11(C) cannot fetter the right of an Arbitrator to pass such an award. I will, therefore, make no deviation from the view expressed by the court below that the claim made for escalation was justified.

10. There is also an argument made that the court will not award more than 9% interest in the absence of a specific contract. In this case, the Arbitrator has awarded future interest at 15%. The commercial rate of interest is still higher and if we must take note of even the provision under the Civil Procedure Code that makes the award of interest possible in commercial transactions to the rates which the commercial banks lend. I will not find that it would be appropriate to make an intervention with reference to the rate of interest. I will not find any scope for an intervention.

11. The orders passed by the court below are sustained and both the revisions are dismissed.

(K.KANNAN)
JUDGE

30.04.2015
sanjeev/pankaj