

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

FAO No.1564 of 2007 (O&M)

Date of decision : 28.10.2015

State of Haryana

...Appellant

Versus

M/s Bumi Hiway and ors.

...Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

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

Present: Mr. Naveen Sheoran, D.A.G. Haryana.

Mr. Jagjit Singh, Advocate for the respondent No.1.

AMIT RAWAL, J. (Oral)

The State is in appeal against the order dated 11.09.2006, whereby objection filed under Section 34 of the Arbitration and Conciliation Act, 1996 against the award dated 30.07.2005 and revised/corrected award dated 29.08.2005, has been dismissed.

Mr. Naveen Sheoran, DAG, Haryana submits that Court below, much less, the Arbitrator has not appreciated the fact that claim was made by incompetent person. The dispute was never referred to the Adjudicator as per provision of Clause 24 and 25 of the terms and conditions of the contract. The claim of the contractor in response of the additional costs of dewatering was rejected by the Engineer and the Contractor did not seek reference of the same to the Adjudicator, thus, it had attained finality. The award was against the public policy inasmuch as that Clause 3.4.4 of the

contract agreement stipulated that the Contractor has to make his own arrangements for dewatering from the working area at his own costs and the unit rates for each item of the work quoted by the Contractor shall include the cost of dewatering and thus prays that award, much less, order is liable to be set aside.

Mr. Jagjit Singh, learned counsel appearing on behalf of Contractor submits that matter was referred to the Adjudicator who is none else but Officer of the Chief Engineer, Rank. As per the calculation, he adjudicated the claim to the tune of ₹116 lacs. However, said amount was not agreeable to the State and the matter was referred to the Arbitration Tribunal. The Arbitration Tribunal consisting three Chief Engineer and on the basis of the evidence brought on record gave a award of ₹122.49 lacs. The scope of interference vis-a-vis objections under Section 34 is limited. None of the objections would reveals that it was within such parameters. Even the High Court while sitting in appeal would not assume the role of Expert in determining the dispute which was purely within the domain of the Expert. The award of the Arbitrator is based upon compliance of principles of natural justice as both the parties had given adequate opportunities to file their respective claims, much less, rebut the same and thus prays for dismissal of the appeal.

I have heard learned counsel for parties and appraised the paper book.

As per the Bidding Notification dated 08.04.1999, approximate value of the work was ₹16,25,00,000/-. The respondent-M/s Bumi Hiway was lowest tenderer. Clause 1.16 of the Contract agreement provides that

there is sub-soil water level problem. It was mentioned that no separate payment was to be made to the Contractor for dewatering and the rates quoted by the Contractor for various items which includes cost of dewatering.

Since, Contractor insisted for claiming the costs of additional watering charges as per Clause 36.1, the appointment of the Adjudicator was to be made by Secretary to the Government of Haryana, Irrigation Department. Despite being requested, the Adjudicator was not appointed finally but after persistent request, same was appointed. By that time, contractual work had already been completed and the project was dedicated to the nation. Thus, in my view the alleged objections to the claim of the Contractor, which was liable to be referred to the Adjudicator within 40 days would pale into insignificance. The Arbitrator on the basis of the material brought on record ordered that Contractor is entitled to expenses of dewatering being a compensation event as per Clause 44 of the terms and conditions of the contract, which provided that, if the compensation event would include additional cost or prevent the work being prevented to be completed before the intended completion date, the contract price shall be increased or intended completion date be extended and it will be the domain of the Engineer to decide as to whether and how much the contract price has to be increased. Since the matter was already referred to the Chief Engineer who decided compensation to the tune of ₹116 lacs, but the same was not accepted by the State of Haryana, which entailed into reference of the matter to the Arbitration Tribunal.

The Arbitration Tribunal after noticing the entire documents on record gave the award. The details of which is extracted hereinbelow:-

“1. Award

The claimant has put up a claim for additional dewatering as under:-

a)	<i>POL used for pumps</i>	<i>1,23,39,351/-</i>
b)	<i>Hire charges of pumps</i>	<i>56,10,110/-</i>
c)	<i>Bore-hole making charges</i>	<i>4,71,429/-</i>
	Total	1,84,20,890/-
d)	<i>Add for preliminary enabling storage, establishment over Head at 15%</i>	<i>27,63,133/-</i>
e)	<i>Add for cost of spares, repairs and pipe for outlet discharge disposal of water at 2%</i>	<i>3,68,418/-</i>
f)	<i>Add profit 10%</i>	<i>1,84,208/-</i>
	Total	2,17,36,649/-
g)	<i>Add income tax + sales tax @ 4%</i>	<i>6,69,466/-</i>
	Total cost	2,26,06,115/-
	<i>Less cost of 45BHP Pumping (-)</i>	<i>685982/-</i>
	Net additional cost	21920113/-

2. The respondent employer has indicated an analysis of alleged cost of dewatering at page 26 of their final submissions and the analysis is reproduced as under:-

<i>S.No.</i>	<i>Component of cost</i>	<i>Amount in lacs</i>
a)	<i>Alleged cost of POL based on dewatering and de-escalated to base cost level</i>	<i>92.58</i>
	<i>(refer SOC page No.41-47 and Annexure-F)</i>	
b)	<i>Hire charge of pumping equipment etc. (at base cost)</i>	
	<i>(refer Annexure-H)</i>	<i>40.66</i>
c)	<i>Bore hole making charges (at base cost)</i>	

$$\frac{(100-13.052*1/2=)}{100}$$

Price escalation of labour up to Aug 2001
is 13.05% of deescalating, escalation up
to mid time has been considered so
13.05/2% cost has been reduced for
deescalation 4.40

Sub Total 137.56

- d) Add cost of spared, repairs pipes for
Outlets discharge and disposal water etc.
@2% (as per sac page 41 to 47)
Total (alleged cost of dewatering
at base cost) 140.07

3. As indicated in Annexure C of the final submission
made by respondent the cost of dewatering as per
estimated quantitative tender rates comes to Rs.34,49,093/-

4. After considering the statement of claim and
statement of defence we award as under:-

Abstract of cost of dewatering (Rs. In Lacs)

- i) Cost of POL on dewatering
(de-escalated from the value in SOC 92.50
- ii) Expenditure on hire charges of pumps as
de-escalated to base cost 40.66
- iii) Bore holes making charges as de-escalation
to base cost = $4.71 * (100-13.052/2)/100$ 4.40
- Sub Total 137.56
- Add cost of spares repairs pipes
For outlet discharge and disposal of
water @ 2% 2.75
- Total escalation 140.31

B. Overall average price escalation

Total bill of last IPC = 23,29,41,256

Price escalation paid = 1,95,00,757

$$\begin{aligned}\text{Overall price escalation} &= 1,95,00,757 * 100 / 2329414256 \\ &= 8.37\%\end{aligned}$$

C.	Cost of dewatering including price escalation	
	140.31x1.0837	152.14
D.	Cost of dewatering as per executed	
	Quantities and at approved (as adjusted)	
	rates	34.49
E.	Balance dewatering cost not	
	covered	117.65
	152.14.34.49	
F.	And for income tax and sales tax	
	@2.2% and 2% respectively	
	(2.47+2.25)	4.72
	Total	122.37

Award

We therefore award Rs.122.37 lacs under Section 31/6 of the arbitration and conciliation Act, 1996.

Interest

The claimant has reported the date of completion of the work as 21.08.2001 As per clause 43.1 of the condition of contract, the payment against the claim of additional dewatering shall be due within 28 days of each certificate i.e. by 18.09.2001 12% rate of interest as per clause 43.1 of the agreement is allowed.

I) We therefore allow interest @ of 12% as per agreement clause 43.1 conditions of the contract from 19.09.2001 to 30.07.2005 (date of award)

II) From 31.07.2005 till date of final settlement interest allowed is @ 7% However no interest is payable if the settlement is done within 90 days from the date of award."

It is now a settled law that as to under what circumstances the award has to be interfered with. The question which has now been raised in

the aforementioned appeal has already been answered by the Hon'ble Supreme Court in catena of judgments, wherein, it has been laid down that until and unless the award suffers from illegality or for want of reasons as statutorily prescribed under Section 31 (3) of the Act, the same cannot be interfered with. In this context I intend to refer the judgments of Hon'ble Supreme Court in **Associate Builders Vs. Delhi Development Authority (2015) 3 SCC 49 and Navodaya Mass Entertainment Ltd. Vs. J. M. Combines (2015) 5 SCC 698.** In the aforementioned judgment the Hon'ble Supreme Court had culled out the ratio decidendi by holding that until and unless there is error apparent on the face of record or the arbitrator has not followed statutory legal position, it is only in these circumstances it would be justified interfering with the award. The High Court should not act as a Court of appeal and reappraise the material/evidence and embarked on a path by substitution in its own view. It is not the case of the appellant that the award is against the public policy or has violated the principles of judicial approach, much less against the statute and other provisions of Section 34 of the Act.

The award read as a whole is just, fair and reasonable. It is now a settled law that the Arbitrator or Committee is the sole judge of quality and quantity of the evidence before him and decide on the basis of the available evidence.

There is no illegality and perversity in the order.

Appeal is dismissed.

28.10.2015

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**(AMIT RAWAL)
JUDGE**