IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No.4482 of 2011 (O&M)
Date of decision : 03.11.2015

State of Haryana ...Appellant

Versus

M/s Shiv Shankar Construction Co. and another ...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. Ashwinie Kumar Bansal, Advocate with
Mr. Saurav Kumar, Advocate for the appellant.

Mr. Naresh Markanda, Sr. Advocate with
Ms. Kavita Markanda, Advocate for respondent No.1.

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AMIT RAWAL, J. (Oral)

The State of Haryana is in appeal under Section 37 of the Arbitration and Conciliation Act, 1996 against the order dated 18.03.2011, whereby objection filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as 'the Act'), for setting aside of the award dated 19.07.2008, has been dismissed.

Mr. Ashwinie Kumar Bansal, learned counsel appearing on behalf of the appellant submits, that award of the Arbitrator is perverse, fallacious and exorbitantly high compensation awarded inasmuch as that it has exceeded its jurisdiction in awarding the compensation against the terms and conditions of the Contract. For the purpose of maintenance of the road, the contract envisaged the sum of ₹12,000/- per KM per year, whereas the Arbitrator has awarded ₹45,000/- per KM per month against ₹1,000/- per KM per month. There is duplication of the period of 6 months which escaped from the notice of the Arbitrator and thus it has resulted into undue enrichment. The Contractor had been submitting bills at the rate of ₹1,000/- per KM per month. Even after diversion had taken place, the same was being entertained. Thus Contractor could not claim the sum of ₹45,000/- per KM per month. Yet the Arbitrator accepted the claim of the Contractor. The award of the Arbitrator was challenged by filing objections and objections have also been dismissed and Objecting Court has not adjudicated any of the objections in its letter and spirit, thus, there is non-application of mind, much less, lacking reasons.

Mr. Naresh Markanda, learned Senior Counsel assisted by Ms. Kavita Markanda, Advocate for respondent No.1 submits, that for strengthening, upgradation and maintenance of the road from Palwal to Hassanpur (Haryana), contract was entered into between the Chief Engineer (Roads), Haryana PWD (B&R) Department, Chandigarh and Contractor on 22.01.2004. During the subsistence of the contract, the Railway Over the Bridge was sanctioned on a road between Palwal and Aligarh Highway. Accordingly, traffic was diverted to the road which was under the contract. The Passenger Car Unit (PCU) before the diversion of the traffic was 3364 per day. However owing to the diversion, PCU increased phenomenally to 20537, which included the heavy trucks, commercial vehicles etc. in essence, the cost of maintenance of the road increased manifold and in this regard many letters were exchanged and the Department acknowledged the diversion. Since the matter could not be resolved and the Contract contained the resolution of dispute through the appointment of the Arbitrator, the matter was referred to the Arbitrator. The Arbitrator in order to resolve the dispute nominated two members Committee for inspecting the PCU and gave 31 maintenance report and as per the said reports, the expenditure incurred for maintenance of the road came to ₹63884 per KM per month. Even the Executive Engineer of the Department gave an independent analysis report and as per his calculations, the cost of maintenance of road was arrived at ₹50,554/- per KM per month. Yet the Arbitrator ignoring the aforementioned fact awarded a sum of ₹45,000/- per KM per month. He further submits that scope of entertaining the objections is very limited. In view of ratio decidendi culled out by various judgments of the Hon'ble Supreme Court, none of the objections raised were falling within the provision of Section 34 of the Act and prays for dismissal of the appeal.

I have heard learned counsel for parties and appraised the paper book as well as record of the arbitration proceedings.

Mr. Bansal, learned counsel for the appellant has laid heavy reliance upon para No.13.4 of PMGSY (Prime Minister Gram Sarak Yojna) Package No.HR 03-03 (Instructions to Bidders), where it has been mentioned that rates and prices quoted by the Bidder shall be fixed for duration of the contract and shall not be subject to adjustment. He further drawn the attention of this Court to paragraph Nos.36 and 38 of the General Conditions of the Contract to contend that payment of the contractor will be for the routine maintenance of the work on receipt of bill of either month and not in the manner as has been entertained by the Arbitrator. The variation in the items was not permissible which was permissible actually was not applicable and, therefore, condition No.34 of the General Conditions would not come into play. The bills submitted by the Contractor were at the rate of ₹1,000/- per KM per day. Same was entertained and payment was made. I am of the view that it would be appropriate to reproduce relevant portion of the award, while dealing with the rival contentions of the parties.

> *"To make an independent of the cost of repairs and maintenance of part Contract Road for one month, I with the consent of both parties appointed a committee of two experts, one expert nominated by each the claimant & the respondent. It was decided that the two experts would jointly supervise and monitor on full time daily basis the work of repairs and maintenance of the Part Contract Road and submit weekly reports of the repairs and maintenance earned out giving full details, the extent & quantity of the work done including the quantities and costs of the various materials consumed, labour both skilled and unskilled deployed along with their wages, the details and cost of the supervisory staff, the tools, plant Sc machinery deployed etc by the claimant.*
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> *The said Committee of two experts filed 31 daily reports in the prescribed format in respect of the actual repairs & maintenance done by the claimant during the period 14.12.2007 to 13.01.2008 giving full details & measurement of the work done by the claimant each day, the details and quantities of the materials consumed, skilled & non-skilled labour deployed, equipment and machinery used and the expenditure incurred on them. As per the reports submitted by the Committee the actual total expenditure incurred on the repairs/maintenance of the*

Part Contract Road from Km. 0.00 to Km. 9.20 by the claimant: from 14.12.2007 to 13.01.2008 is Rs.5,87,733/- and total area of the patch work repairs done is 512.0 m2. The actual cost of repairs & maintenance per Km. therefore comes to 5,87,733/9.2 = Rs.63.884/- per Km. per month.

The Respondent Executive Engineer has separately vide his note dated 25.02.2008 (Annexed hereto as Annexure E) analyzed the rates of materials as used in the repairs and maintenance done under the joint supervision of the respondent and claimant and analyzed the rate for 20 mm thick premix carpet on patch work as Rs.92.20 per m2. The respondent has also worked out the, cost of patch repairs done from 14.12.2007 to 13.01.2008 under the supervision and control of the aforesaid committee of two experts as Rs.4,65,095/- against Rs.5,87,979/- as reported in the joint reports submitted by the representatives of the respondent & the claimant. The cost of repairs & maintenance per Km. as per the analysis by the respondent Executive Engineer comes to 4,65,095/9.2 = Rs.50,554 per Km. per month.

However as rightly contended by the Respondent Executive Engineer, the normal reports and maintenance of the Part Contract Road would not have been as efficient as done during the period of one month from 14.12.2007 to 13.01.2008, therefore factoring in the inefficiency at the rate of 70%, I assess the justified rate of repairs & maintenance of the Part Contract Road as .70 x 63884 = 44,719 say Rs.45,000/- per Km. per month.

This is less than Rs.50,554/- as analyzed by the Respondent Executive Engineer for the said period of one month and Rs.51,630/- claimed by the claimant. So I award a rate of Rs.45,000/- per Km. per month to the Claimant for *the maintenance & repairs of the Part Contract Road. "*

The plea of Mr. Bansal, Advocate that the Arbitrator has diverted the terms and conditions of the contract is, thus not acceptable. Once the Department did not object to the appointment of the Committee, in essence, gave the consent, the appellant is estopped to raise such plea.

It is a matter of record that contract was awarded and construction was completed on 31.05.2005, whereas the Railway Over Bridge, as noticed above, was sanctioned on April 2005. Since the contractor was to maintain the road for five years at the rate of ₹12,000/- per KM per year, but the cost of maintenance increased manifold owing to increase in Passenger Car Unit from 3364 to 20537 and accordingly, the road became bumbly and uneven. The maintenance cost of the road, as per the Arbitrator increased manifold. The members of the Committee also gave the report on the same lines. In case, there was any duplication of the payment of the bills for the period of 6 months, nothing prevented the appellant to file the application seeking rectification of the award as per provision of 33 (1A) of the Arbitration and Conciliation Act, 1996. However, such remedy has not been availed & only objection in the routine manner has been filed.

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.

Accordingly, the present appeal is dismissed.

This Court has come across of many litigation at the stage i.e. UHBVN, Executive Engineer, PWD Department Haryana, Bharat Sanchar Nigam Ltd., State Procurement Agency, MARKFED, Punjab State Warehousing Corporation, HUDA, PUNSUP etc. and in all cases, it has been seen that the State is embroiling into the litigation without addressing the genuine or ingenuine claim of the Contractor. It is very strange that specifications for laying of the road is being approved by the Senior Officers, which as per the experience is not up to the mark. The onset of the various season is almost on entire road and whitewashed and the soil surface is visible and this practice is being followed since time and immoral.

In my view State has not endeavour to make any concerted efforts in improvising the quality and maintenance of the road, much less, any change in the specification so that the Contractor is bound to lay the road as per the sanctioned specifications. In case, such effective measures have taken before entering into the Contract, litigation may not end but it would be minimised.

Since I have already dismissed the appeal but however I am in pain to give following observations:-

I deem it appropriate to issue directions to Chief Secretary and concerned Chief Engineers of the State and as well as the Project Director of the National Highway Authority of India, to come out with the proposal of improvising the conditions of the road not only condition but improvising the maintenance in laying of the roads and as well as maintenance keeping in view of PCU factor.

Let this copy of the order be sent to the Chief Secretary, Haryana, Project Director, National Highway and Chief Engineer, Road, PWD Haryana for effective compliance and report.

03.11.2015 **(AMIT RAWAL)**
pawan **JUDGE**