

IN THE HIGH COURT OF PUNJAB AND HARYANA

AT CHANDIGARH

FAO No.1621 of 2014 (O&M)

Date of decision: 01.04.2015

Union Territory of Chandigarh

..... Appellant

versus

Sutlej Construction Limited and another

..... Respondents

CORAM: Hon'ble Mr. Justice Kuldip Singh

Present: Mr. Sanjeev Sharma, Senior Advocate with
Mr. Ashish Rawal, Advocate for the appellant
Mr. P. S. Rana, Advocate for respondent No. 1

- 1. Whether Reporters of Local Newspapers may be allowed to see the judgment ?*
- 2. To be referred to the Reporters or not ?*
- 3. Whether the judgment should be reported in the Digest?*

Kuldip Singh, J.

Appellant has filed this appeal against order dated 23.7.2013, passed by learned Additional District Judge, Chandigarh, vide which application under Section 34 of the Arbitration and Conciliation Act, 1996 (in short, 'the Act') for setting aside the award dated 18.12.2003 was dismissed.

Facts of the case are that vide memo No.201 dated 5.1.1996, the respondent No.1- Sutlej Construction Limited, Chandigarh was granted the contract of earth work excavation and loading into trucks and unloading for the purpose of widening of approach road of Sukhna Choe on Chandigarh Kalka Road, Chandigarh. It was stipulated in the said memo that earth is to be lifted from the first source near the regulator and the same will be

taken through trucks from Golf side and lead will be paid not more than 5 kilometre. After the earth from source No.1 i.e. near the regulator is exhausted then on the written intimation given to the appellant for getting permission from the Superintending Engineer for lifting earth from the second source i.e. beyond the regulator, reduce rate of 4 kilometre will be paid. The contractor did not fulfill the contract and consequently, the same was terminated on 12.11.1996. Therefore, the contractor requested for appointment of Superintending Engineer as Arbitrator under Clause 25A of the agreement. Since no action was taken, the objector moved to the Civil Court for appointment of Arbitrator and accordingly, the Civil Judge (Senior Division), Chandigarh, vide order dated 31.7.2002 appointed Shri R.N.Singal, retired District & Sessions Judge as Arbitrator. The Arbitrator held that the contract was illegally terminated. Before the Arbitrator, following claims were made:-

- 1. Balance payment accruing from the last running bill-
Rs.2,00,014/-*
- 2. Payment due on account of transportation or earth not
measured by department - Rs.1,11,231/-*
- 3. Payment due on account of less lead paid –
Rs.95,400/-*
- 4. Idle hour charges of heavy earth moving machinery
and labour deployed on the machinery –
Rs.31,22,280/-*
- 5. Payment due on account of earth eroded by heavy
rains due to non compaction of earth and leaking water
pipelines – Rs.1,69,206/-*
- 6. Payment on account of loss of profit on balance work –
Rs.90,835/-*

7. Loss due to prolongation of work – Rs.12,80,000/-

8. Litigation expenses – Rs.25,000/-

The department also filed counter claim, claiming Rs.8,01,808/- as liquidated damages and the expenses incurred by it for completion of work. It also claimed Rs.20 lacs on account of the loss due to delay in completion of work. Arbitrator allowed claim No.1 and allowed Rs.1,20,299/- + Rs.32000/- deposited by way of earnest money. Claim No.2 was rejected. Claim No.3 was allowed to the extent of Rs.65,076/-. Claim No.4 was allowed and Rs.7,74,375/- were allowed. Claim No.5 was rejected. In claim No.6, a sum of Rs.45,435/- was allowed. Claim Nos.7 and 8 were also rejected. The counter claim was also rejected. Interest @ 12% per annum was also allowed. Total award for Rs.10,37,185/- was passed.

The appellant filed objections against the award passed before the learned Additional District Judge, Chandigarh, which were rejected.

I have heard learned counsel for the parties and have also carefully gone through the file.

Learned counsel for the appellant has relied upon the authority Oil and Natural Gas Corporation Limited v. Western Geco International Limited, (2014) 9 Supreme Court Cases 262 and pressed that since the Arbitrator has misconducted and passed the award beyond the terms of agreement, therefore, this Court can interfere to set aside the same.

On the other hand, learned counsel for respondent No.1

has placed reliance on authority Pr.Shah, Share and Stock Brokers Private Limited v. B.H.H. Securities (P) Ltd., (2012) 1 Supreme Court Cases 594 and has pressed that the Court cannot substitute its reasoning given by the Arbitrator nor reasoning by the Arbitrator can be re-assessed or re-appreciated.

There is no denial of fact that the contract was awarded on 5.1.1996 and that the same was terminated on 12.11.1996 as the work was not completed as per directions. Memo No.202 dated 5.1.1996 allotting the work goes to show that the scope of work was as under:-

1. *Earth excavation work as per item No.1*
2. *Loading into trucks and unloading.*

Earth was to be unloaded within 5 kilometre from source No.1 and within 4 kilometre from source No.2. There was absolutely no condition that spreading of the earth brought to the site, was to be done by the department nor it was stipulated that obstruction in the disposal area due to overhead lines and poles is to be removed by the department. There was also no condition that the lighting arrangement at the excavation site was to be made by the respondent or that the work was also to be done at night. It was also not stipulated that the compacting of the earth so unloaded shall be done by the department. The department had not specified any space for unloading of the earth. It was stated that it was to be unloaded and the charges upto 5 kilometre shall be paid. The Arbitrator misconducted himself by assuming as if the work of construction of some highway is being done where the compacting of

the earth is required to be done. In fact, the earth was to be removed from the Sukhna Choe and unloaded at the place specified in the memo dated 5.1.1996. No compacting was required nor any facility of lighting at the disposal site was to be provided. The spreading of the earth was not to be done by the department as it was not stipulated in the contract. It was for the contractor to see where he is to unload the earth. Therefore, the Arbitrator misconducted and misdirected himself by going into the controversy which is not part of the terms of the contract and erred in concluding that the contractor is entitled to compensation for failure of the department to deploy adequate machinery for compacting of the earth excavated and brought to the site by the contractor and for not providing sufficient dumping space due to which plant and machinery of the claimant remained idle. Since the work was not completed within stipulated period, the department was within its right to terminate the contract. Therefore, there is no question of loss of profit to the contractor. The department could levy the penalty for not executing the work and this was to be deducted from the running bills of the contractor.

It also comes out that in order to properly appreciate the evidence, the Arbitrator did not discuss many material letters. The department had produced the letters (Annexure R1 to R11). It goes to show that correspondence with the parties started on 19.2.1996 itself. Vide letter (Annexure R1), the department had asked the contractor that it is incorrect that the machinery of compaction is not available at site, rather progress of the contractor is not upto the mark. He was requested to ensure the carriage of earth from

Sukhna Lake to the site of the work will be completed within the time limited allowed. He was warned that no extension of time limit will be granted. Then other letter (Annexure R2) dated 30.10.1996 shows that till then as many as 6 letters were written to the contractor between 21.3.1996 to 4.10.1996, requesting him to accelerate the work and show the progress within seven days to complete the remaining work, failing which he was warned that action against him will be taken under clause 3(b) & (c) of the Contract Agreement and entire balance work will be got done at his own risk and costs. Despite several warnings when the contractor did not complete the work, his contract was terminated. Not only this, the contractor had also written several letters. One such letter dated 19.1.1996 shows that the contractor wrote to the department that the work could not be started earlier due to rain and slippery haulage roads. It was further intimated that site is not free from obstructions as there are many over head lines passing over the disposal area of earth. The department was requested to get the over head lines shifted. A similar request was also made in letter dated 23.1.1996. The department was requested to install flood lights at the disposal site so that work could be done round the clock.

As already discussed, there was no stipulation in the agreement that the flood lights at the site shall be provided by the department. It was also not stipulated that work will also be done at night. In another letter dated 18.3.1996, the contractor had intimated that due to heavy rain the work was suspended. It was not possible for the running of tippers and other machinery due to slippery

haulage road on the excavated site and disposal site. In another letter dated 21.3.1996, it was intimated that the tippers started sinking on excavation site as well as disposal site. Therefore, work was suspended and machinery is standing idle. Another letter dated 14.8.1996 shows that the contractor wanted the equipment and supervisory staff from the department. It was stated that the work was resumed on 10.8.1996 but again suspended for want of compaction machinery and supervisory staff.

As already discussed, the department was not required to provide the supervisory staff nor it was required to spread or compact the earth so unloaded.

The Arbitrator also ignored the fact that earth of Sukhna Choe is fertile and even if there is inadequate dumping space, it could be sold at high price in open market.

The above noted discussions clearly show that the Arbitrator went beyond the terms of the agreement and ignored the material letters exchanged between the parties and misdirected himself in holding that flood lights were to be installed by the department, spreading and compacting of the earth work at the disposal site was to be done by the department. The letter dated 5.1.1996 clearly shows that earth was merely to be lifted and unloaded.

In this way, I hold that the arbitration award is not sustainable in the eyes of law and is liable to be set aside. The contract was rightly terminated and the department rightly imposed the penalty. As such, the present appeal is allowed. Award dated

18.12.2013 passed by the Arbitrator is hereby set aside and so is the judgment dated 23.7.2013, passed by learned Additional District Judge, Chandigarh.

01.04.2015

gk

**(Kuldip Singh)
Judge**