IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

FAO No.3695 of 2013 (O&M)
Date of decision: 01.12.2015

Housing Board Haryana ... Appellant

Vs.

Madhukar Mittal 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. Ashwani Talwar, Advocate
for the appellant.

Mr. P.S.Rana, Advocate
for respondent No.1.

AMIT RAWAL J. (Oral)

Appellant-Housing Board is in Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') against the dismissal of its objections under Section 34 of 1996 Act for setting aside of the Award dated 20.09.2010.

Mr. Ashwani Talwar, learned counsel appearing on behalf of the appellant submits that as per additional condition No.3 of the contract agreement dated 03.08.2006, royalty sales tax, excise duty, octroi or any other tax or levy shall be paid by the contractor directly to the respective departments in accordance with their rules and regulations. Since a dispute arose between the parties to the lis, the matter was referred to the Arbitrator. Besides other claims, the main thrust before the Arbitrator was whether it was the liability to pay service tax, in case, the demand raised by the competent authority of housing board or of the contractor. He further submits that the contract was entered between the parties on 03.08.2006, whereas, service tax was introduced on 16.06.2005 and there was no clarity as regards the applicability of the service tax on the Haryana Housing Board, qua the charges of service tax vis-a-vis plot allotted by HUDA or by any other means. He further submits that the terms and conditions of the agreement are sacrosanct. The terms and conditions of agreements entered into by Haryana Housing Board with other contractors cannot be looked into for the purpose of adjudication, even if different agreement entered into between the parties and thus, prays for setting aside the award vis-a-vis fastening of liability of payment of service tax upon the Housing Board.

Mr. P.S.Rana, learned counsel appearing on behalf of contractor/respondent No.1 submits that various other agreements specified that in case any demand is raised by the Commissioner Service Tax, it would be the liability of the Haryana Housing Board. In this regard, he produced on record various agreements including the agreement entered into between the Housing Board with his clients for some other work. There was no clause of charging of service tax rather there was a great confusion in the office of Housing Haryana

Board vis-a-vis applicability of service tax and in this regard, drawn attention of this Court towards letters dated 07.01.2007 Ex.R-3 and 16.01.2007 Ex.R-4, written to the Executive Engineer. He further submits that Chief Engineer had written a letter to the Executive Engineer, Housing Board, in case, where the Board has to bear the tax as per contract agreement, the contractors were directed not to deposit the Service Tax and reply to the concerned authorities directly and in case, service tax is levied then they should file an appeal before the higher authorities of the concerned department and the Board will only consider their request for reimbursement of Service Tax after the decision of the Tribunal. He further submits that owing to the contents of the aforementioned letters, demand of service tax was challenged by the Contractor before the Customs Excise and Service Tax, Appellate Tribunal by depositing a sum of Rs.20 lakhs and Tribunal vide order dated 09.07.2015 reduced the amount of service tax calculated at 33% of Rs.8,80,52,533/- with cumulative tax benefits and penalty under Section 78 was also modified to be equal to the payment so calculated. As per the order, the adjudicating authority was directed to recalculate the demand along with interest and on receipt of the demand, the service tax was liable to be deposited within a period of 30 days. Rightly so, the Arbitrator has fastened the liability of payment upon the Housing Board and the scope of interference under Section 34 of 1996 Act is limited and therefore, the Objecting Court considering that the objections, aforementioned, vis-a-vis charging of the service tax does not fall within the realm of Section 34 rightly dismissed the objections.

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

It would be apt to reproduce Additional condition No.3 of the agreement, which read thus:-

> *"Royalty sales tax, excise duty, octroi or any other tax or levy shall be paid by the contractor direct to the respective department in accordance with their rules and regulations enforce from time to time, without any liability to the Housing Board Haryana."*

Contents of the letter dated 08.01.2007, Ex.R3 read thus:-

> *"To the Executive Engineer,*
>
> *Housing Board Haryayan,*
>
> *Panchkula/Karnal/Rohtak/Gurgaon/Faridabad.*
>
> *Subject: Payment of service tax by Housing Board Haryana.*
>
> *The matter regarding payment of service tax has been considered by the Competent Authority and clarified by the Financial Adviser of the Board, that no service tax will be applicable in case of land/plots allotted by HUDA to the Board or the plots carved out by the Board on the land allotted by HUDA on a plottable area basis. Because those colonies does not fall under the definition of a*

residential complex as defined in Chapter V of the Finance Act, 1994(Photocopy attached).

In case where the Board has to bear the service tax as per contract agreement, the contractors be directed not to deposit the service tax and will reply to the concerned authorities as explained above. In case, still service tax is levied then they should make an appeal to the higher authorities of the concerned department and the Board will only consider their request for reimbursement of Service Tax after the decision of the Tribunal.

It is clarified that in case the land has been allotted by HUDA under Group Housing Board Scheme, the Service Tax is payable.

Your are, therefore, requested to acknowledge the said letter and inform all the contractual agencies under registered cover.

Sd/-
Executive Engineer (HQ)
For Chief Engineer
Housing Board Haryana, Panchkula

Endst. No.HBH//CE/2007/1 Dated 08.01.2007

Copy of above is forwarded to the Chief Accounts Officer, HBH, Panchkula for information and necessary action.

Sd/-
Executive Engineer (HQ)
For Chief Engineer
Housing Board Haryana, Panchkula"

No doubt, the contents of the letter authorized the contractor to challenge the demand, if any raised by the adjudicating authority and rightly so, challenged by the contractor, whereby, Appellate Tribunal reduced the amount directing the objecting Court to recalculate the amount but the fact remains that the terms and conditions of the agreement have to be seen for adjudication of the dispute. The terms and conditions of the contract agreement (supra) clearly specified the imposition of any tax upon the contractor. Thus, in my view, the terms and conditions of other agreements, much less, independent agreement entered into between the Housing Board and the present respondent would be meaningless and cannot be looked into. Since the respondent-contractor has already challenged the demand and has been able to succeed to some extent, in my view, award of the Arbitrator fastening the liability for payment of service tax upon the Housing Board is not correct, much less, is not sustainable. Had there been any change in the circumstances with regard to imposition of service tax, the contractor would be within its right to seek issue of agenda or corrigendum *vis-a-vis* terms and conditions of the contract agreement. Having failed to do so, in my view, terms and conditions of the agreement cannot be debated by taking the aid of conditions of other agreements.

Keeping in view these factors, I am of the view that award of the Arbitrator vis-a-vis claim No.1 fastening the liability of the payment of service tax upon the Housing Board is hereby set aside and rest of the claims of the contractor, are upheld.

Accordingly, the appeal is partly allowed.

(AMIT RAWAL)
JUDGE

December 01, 2015
savita