

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

FAO No. 4491 of 2013(O&M)
Date of decision : August 13, 2015

**State of Punjab through its Chief Engineer Punjab PWD B&R
Branch, Patiala**

..... Appellant

Versus

M/s Larsen and Turbo Ltd. and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Sanjay Joshi, Senior counsel-Spl.Engagement
Mr. S. S. Sandhu, Advocate
for the appellants.

Mr. Amitesh Chandra Mishra, Advocate and
Mr. Vishakha Poonia, Advocate
for respondent No.1.

1. Whether reporters of local papers 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?

Amit Rawal, J (oral).

The challenge in the present appeal is to the
impugned order dated 1.5.2013 passed by the Additional District

Judge, Patiala whereby objections filed by the appellant-department against the award dated 20.4.2009 has been dismissed.

Mr. Sanjay Joshi, learned counsel appearing on behalf of the appellant submits that grievance of the appellant viz-a-viz claim No.1 that the Arbitrator exceeded its jurisdiction in awarding damages as the contractor did not file any claim towards the cost of escalation, thus, prays that the impugned award viz-a-viz claim No.1 is liable to be set aside, much less the objection are liable to be allowed.

Learned counsel for respondent No.1 submits that the award of the Arbitrator is in consonance with the terms and conditions of contract and there is no deviation from the same for interference, much less scope of filing of objections is limited as per the provisions of Section 34 of the Arbitration and Conciliation Act, 1996. The order declining the objections is fair, legal and justified.

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

On going through the contents of the award it is apparent that the Arbitrator while determining the compensation applied Hudson's formula. Even otherwise, damages had been granted by taking into consideration the extension of time as well as additional costs which add to the contract. The operative portion of the award is extracted hereinbelow:-

“It is well understood that in construction contracts overheads are recovered from the business as a whole and where completion of contract is delayed, the

contractor generally claims to have suffered loss from the diminution of his income from the job and hence the turnover of his business. It is also an admitted fact that as a result of delay he is forced to prolong his stay on the same site. His resources (such as working capital, key personnel) are blocked and he is unable to move elsewhere. There is clear loss of business opportunity.

The consequences of delay is not just extension of time, but may also be enhanced cost of performance. For example, Sub Clause 6.4 says that if by any reason the Engineer is unable to issue drawing or instruction and as result the contractor suffers delay and or incurs costs he shall be entitled to extension of time as well as the additional cost to be added to his contract price. Similar provisions has been given in regard to failure to give possession of site (Sub clause 42.2.) Failure to determine the enhanced cost at the relevant time does not wash away the spirit and force of the contractual provision.

Even otherwise learned Additional District Judge, has while dealing with the objections, extensively dealt with the objections. The operative part of the same reads thus:-

“I have considered this objection raised by learned counsel for the petitioner against award of the tribunal under claim No.1 of respondent/claimant, but do not find any merit in the same. It has been wrongly claimed by learned counsel for petitioner that respondent/claimant had never asked for additional costs at the time of seeking time extension. In this regard, respondent/claimant had placed on record of arbitrator various letters sent by it from time to time for seeking extension of time in the execution of work. Reference

here may be made to letters issued by respondent to petitioner on 22.1.95, 25.1.96, 26.9.97, 4.10.97, 15.1.98, 7.3.97, 4.10.97 and 9.2.98. Perusal of all these letters mentioned above and various other letters on record shows that respondent/claimant had invariably shown its intention to claim additional cost for execution of work due to extension in time and it had also been informed that due to the delay, respondent/claimant would have to incur extra cost. At that time, petitioner never raised any objection and had never stated that it had no intention to pay additional cost for extension of time. As such it cannot be said that respondent/claimant had never asked for additional costs at the time of seeking extension of time as has been provided under Clause 6.4, 12.2, 42.2 and 69.4. Perusal of these letters further shows that respondent/claimant had never dispensed with or remit the performance of the promise made to it by the petitioner as has been envisaged under section 63 of the Indian Contract Act and claimed by counsel for petitioner. As far as provisions contained in Section 55 of the Indian Contract Act are concerned, the same are not applicable to the facts of the present case in my considered opinion. Perusal of agreement entered into between the parties shows that time for execution of work could be extended on various grounds. Actual extension of time granted by petitioner at the time of execution of work also shows that time was never essence of the contract in this case. Even if it is taken that time was of the essence of contract between the parties, respondent/claimant had shown its intention to claim extra cost for extension of time by writing letter from time to time as has been discussed above. Section 73 of the Indian Contract Act provides for the mechanism of ascertaining compensation to be awarded in case of a breach of contract. Apart from

various other conditions under which compensation can be granted under section 73 of the Indian contract, one condition is that damages which naturally arise in the usual course of things from a breach can be granted under this section. On going through award passed by learned Tribunal regarding claim No.1, it is clear that learned Tribunal had granted only those amounts which arose naturally in the usual course of things. It has been clearly observed by learned Tribunal while assessing the amount of loss that due to delay in execution of work and extension of time, loss is caused to the contractor on account of diminishing of profits and loss of other work due to paucity of funds. Such loss as assessed by learned Tribunal is natural loss which occur to a contractor due to extension of time.”

On going through the observations made above, I am of the view that both Arbitrator and court below has taken into consideration various factors, much less letters written by the contractor to the department for taking care of the enhanced cost and the department has not taken any action thereon which resulted into raising of the dispute and ultimately arbitrator resolved the same by awarding damages under claim No.1.

It is now a settled law that as to under what circumstances the award has to be interfered with. The question which has been now 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 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 embark on a path by substituting 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 Arbitrator has dealt with the dispute which was contemplated and within its scope. The parties to the *lis* had participated in the proceedings and were given proper notice not only with regard to the appointment of the Arbitrator but viz-a-viz proceedings. Thus, in my view the award of the Arbitrator does not suffer from any illegality in as much as the Arbitrator who is expert has dealt with the matter and decided the claim of respective claimants to the parties to the *lis*.

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

In my view, no error of law arise from the award. The award is perfect and justified and all the objections filed against

the same were wholly misconceived.

There is no merit in the aforementioned appeal.

The appeal is accordingly dismissed.

(AMIT RAWAL)
JUDGE

August 13, 2015
archana