IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No.3172 of 2015 (O&M)
Date of decision : 11.09.2015

S.K. Kohli, Sole Proprietor, Kohli Construction Company

...Appellant

Versus

Shakun Infrastructure Development Ltd., Solan & anr.

...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. D.S. Patwalia, Sr. Advocate with
Ms. Divya Sharma, 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 appellant has invoked the jurisdiction of this Court by filing an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as 'the Act') against the impugned order dated 06.01.2015 passed by the Additional District Judge, Chandigarh, whereby objections filed under Section 34 of the Act against the award of the Arbitrator dated 28.04.2013, have been dismissed.

Mr. D.S. Patwalia, learned Senior Counsel assisted by Ms. Divya Sharma, learned counsel appearing on behalf of appellant submits that as per Clause 44 of the agreement, in case of any dispute or differences arisen between the parties, the Arbitrator shall give a separate award in respect of each dispute or difference referred to him and was mandatorily required to decide each dispute in accordance with terms of the contract and give reasoned award. He submits that on perusal of the award, the reasons are conspicuously wanting, accordingly, objection under Section 34 was filed by invoking the provision of Section 31(3) of the Act and thus, objections are within the parameters of Section 34 read with Section 31(3) of the Act.

He further submits that learned Additional District Judge has disregarded the fact that interference into the arbitral award by the Court is only warranted if the same is arbitrary, much less, erroneous. The Arbitrator acted in a most biased manner, inasmuch as that Arbitrator, had held ex parte proceedings by changing the date of hearing in the absence of the counsel for appellant. Additional District Judge erroneously observed that Objecting Court, cannot re-examine or sit in appeal on award passed by the Arbitrator, but the fact remains, that Arbitrator has not adjudicated all the claims in a fair, impartial but, in unbiased manner and thus, the award is apparently illegal against the public policy. In support of his submission, he has relied upon judgment rendered by Hon'ble Supreme Court in *Oil & Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., 2003(2) R.C.R. (Civil) 554.*

During the course of hearing, he also pointed out that party had mutually agreed on 28.05.2008 to abandon the work with immediate effect and, therefore, there was no dispute between the parties, thus, impugned order suffers from illegality and perversity and objections ought to have been allowed and award suffers from want of reasons and is not sustainable in the eyes of law.

Mr. Naresh Markanda, learned Senior Counsel assisted by Ms. Kavita Markanda, learned counsel appearing on behalf of respondent No.1 submits that total cost of the construction was ₹34 crores and the work of ₹14.02 crores had been done, whereas the developer had made the payment of ₹16.36 crores to the Contractors and thus, there was an overpayment of ₹2.33 crores. It was agreed by both the parties for constitution of Committee of two persons namely Ranjit Singh Kohli, Architect and S.S. Juneja, Retired Chief Engineer for the purpose of evaluation and measurement. Since the Contractor had disputed the report of the Committee, much less, submitted that there was variation in the order of the Department, the Arbitrator had allowed the contractor for rechecking of the work by Daya Singh, Retired Sr. Engineer who physically, in the presence of both the parties, conducted the measurement of the area of the flats. The Arbitrator, on the basis of the aforementioned measurement rather gave the observation in favour of the contractor. In this regard, he has drawn attention of this Court to the award of the Arbitrator, who while dealing with claim No.2 granted the difference of ₹35.49 lacs, ₹5.41 lacs in favour of the contractor and while dealing with objection No.1, the Arbitrator found that there was variation of ₹15.80 lacs in favour of the Contractor and on the basis of the analysis of the report of the Committee and the measurement done by the experts, found that sum of ₹1,68,55,687.00/- was due towards developer namely SIDL under claim No.2, but in the penultimate paragraph after deducting ₹48,63,653/- awarded the claim of ₹1,19,92,034/- alongwith 12% p.a. simple interest w.e.f. 02.08.2008 to the date of award and further ordered in case such awarded amount along with interest was not paid within a period of 90 days, the Contractor has been directed to pay future simple interest at the rate of 18% p.a. from the date of award.

He further submits that Contractor claimed the schedule of payment under Annexure-II but the Arbitrator awarded under Annexure-III which is much more. In support of submission, he has relied upon judgment of Hon'ble Supreme Court in *P.R. Shah, Shares and Stock Brokers Pvt. Ltd. Vs. B.H.H. Securities Pvt. Ltd. and ors. (2012) 1 Supreme Court Cases 594,* to contend, that the Arbitrator-Tribunal cannot make the use of personal knowledge of the fact of the dispute, but can certainly use the experts or technical knowledge or the general knowledge of institution particular dispute in deciding the matter. In the present case, the Arbitrator appointed was none else, but Hardayal Gupta, Retired Supdt. Engineer, the Sole Arbitrator and even the assistance of the experts as noticed above was also taken for effecting measurement. There is no illegality and perversity in the order. Objections filed do not conforms to the parameters of Section 34 of the Act and, therefore, are liable to be dismissed.

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

After appraising the paper book and as well as record of the Courts below and, much less, of the Arbitrator and on going through the Award, it is noticed that Arbitrator who is none else, but an expert has given detailed reasons and decided the difference in the variation in favour of the contractor, and after taking into note the exact measurement found that developer had paid excess amount than the work, had, actually been done for and thus, Arbitrator ordered refund of ₹1,19,92,034/- alongwith 12% p.a. simple interest.

There is no dispute to the ratio decidendi culled out by Hon'ble Supreme Court in Oil & Natural Gas Corporation Ltd. (Supra), wherein it has been held that while reading Section 34 co-jointly with the other provision i.e. Section 28 and 31(3) of the Act, the award of the Arbitrator has to be reasoned one. The Arbitrator has dealt with each and every claim separately strictly in consonance with the provision of Clause 44 of the agreement and found that claim of the contractor was less, whereas as per the measurement, it was more but on analysis found that developer had paid payment in excess.

It would be apt to reproduce the relevant paragraph of the award, which read thus:-

> *"KCC has objected to the evaluation done by the committee of Sh. R.S. Kohli (Architect) and Sh. S.S. Juneja (Retd. CE) on the ground that this committee has applied Annexure-II of Schedule of payments for the work of flats, stilts, Mumty, Machine Room etc. whereas as per agreement rates for payment for the flats should have been applied for as per Annexure-II and for stilts, Mumty, Machine Room etc. Annexure-III should have been applied.*
>
> *I agree with KCC's objection and have assessed the advantages/disadvantages on account of application of Annexure-III for stilts, Mumty etc. as under:-*

Sr. No.	Block	Balance work of Stilts as measured by Committee (Rs. In lacs)	As assessed by Arbitrator (Rs. In lacs)	Variation (Rs. In lacs)
1	B-2	8.94	6.14	2.80
2	B-3	11.75	8.15	3.60
3	C-1	5.54	1.54	4.00
4	C-2	6.69	4.20	2.49
5	C-3	6.81	5.31	1.50
6	C-4	11.07	6.07	5.00
7	C-5	13.01	7.41	5.60
8	C-6	12.84	6.64	6.20
9	C-7	14.69	10.39	4.30
	Total	91.34	55.85	35.49

The difference of Rs.35.49 lacs goes in favour of KCC.

So far as the assessment in respect of C-12 to C-16 executed up to foundation/stilt level is concerned, the same as evaluated by the Sr. Engineer Sh. Daya Singh, taking into account his measurements done in the presence of both the parties, has evaluated the extent of the work done to Rs.89,54,291/- based on the provision as per Annexure-III, I agree with the valuation of Sh. Daya Singh, and difference is worked out as under:-

Sr. No.	Block	Balance work	Work done according to Committee (Rs. In Lacs)	Value of the work as checked by Sn. Er.	Variation with ref. to Committee (Rs. In lacs
1	C-12	1,79,96,446 /-	20.63	23,10,925/-	2.48
2	C-13	92,66,261/-	12.42	16,14,500/-	3.72
3	C-14	1,79,46,298 /-	20.62	24,17,940/-	3.56
4	C-15	1,79,06,179 /-	21.53	23,10,926/-	1.58
5	C-16	1,91,66,566 /-	8.93	3,00,000/-	(-)5.93
	Total		84.13	89,54,291/-	5.41

The difference of Rs.5.41 lacs goes in favour of KCC.

During the written/oral arguments KCC has pointed out the following drawbacks in making calculations of the balance work:-

1) Against Serial No.4 of Annexure II only one item namely 'work completed up to roof level' is provided whereas the committee of the Architects has added items such as 'Lift, Street Light, DG set etc.' in addition to Roof casting, resulting in a loss of Rs.58,31,657/-.

2) Non-reflection of cost of components of 'Boundary Wall', underground water tank and overhead reservoir' in blocks C-12 to C-16.

The right procedure was to work out the cost of the items not covered in the schedule for payment, their percentage should have been deducted at the end without prejudice to all the executed items of work and proportionate cut should have been applied on all the items. In this particular case the Committee has applied the cuts in the fully completed work of casting up to roof level, resulting in loss to KCC.

3) KCC has also pointed out mistake in the calculations although it should have worked out the same.

I have considered the above objections in detail and have assessed the implications of the same as under:-

***Objection No.1:-** I agree with the arguments of KCC that the committee should have applied proportionate cut for the items not provided for in the schedule of payment and accordingly I have assessed the implications of the same while applying the proportionate cut on the value of flats only as in the case of stilts, there is no such implication involved as under:-*

Sr. No.	*Block No.*	*Variations on a/c of cost as a result of adding items such as DG set, street light, lift etc. (Rs. In lacs)*
1	*B-2*	*1.70*
2	*B-3*	*1.70*
3	*C-1*	*Nil*
4	*C-2*	*Nil*
5	*C-3*	*1.20*
6	*C-4*	*2.40*
7	*C-5*	*2.80*
8	*C-6*	*2.70*
9	*C-7*	*3.30*
	Total	*15.80 in favour of KCC*

Objection No.2:- *I have gone into the objection and it is emerged that the boundary wall and underground water tank and overhead reservoir are shown to have been completed up to 50% & 35% respectively under items No.24 and 27 of Annexure II of payment. However their cost has not been reflected in Block C-12 to C-16 to the disadvantage of KCC. The same is assessed as under:-*

Sr. No.	*Block No.*	*Cost of Boundary Wall items No.27 of Annexure II of payment (Rs. In lacs)*	*Cost of underground water tank & overhead reservoir item No.24 of Annexure II (Rs. In Lacs)*
1	*C-12*	*1.20*	*1.65*
2	*C-13*	*1.20*	*1.65*
3	*C-14*	*0.85*	*1.15*
4	*C-15*	*0.85*	*1.15*
5	*C-16*	*0.85*	*1.15*
	Total	*4.95*	*6.75*

Aggregate Total 4.95 + 6.75 = 11.70 lacs

This benefit goes to KCC.

Objection No.3:- *The calculation have been checked and it is observed that there are mistakes in the calculations in respect of Block C-2 & C-3. Against the value of work in respect of Block C-2 of Rs.34,24,398.00/- the rechecked* *value works out to be Rs.34,84,761.00/- i.e. a variation of Rs.60,000/-. It needs to be added in favour of SIDL, and for Block C-3 against the value of Rs.44,35,674.00/- the rechecked value works out to be Rs.43,25,349.00/- i.e. the difference of Rs.1,10,000/- which goes in favour of KCC. In short Rs.50,000/- goes in favour of KCC.*

The actual check of areas of flats of various blocks by Sh. Daya Singh Sr. Engineer is as under:-

Sr. No.	*Block*	*Area as per Committee in SQFT*	*Area as checked by Sh. Daya Singh in presence of both the parties in SQFT*	*Variation in SQFT*
1	*C-1*	*1194*	*1195.40*	*+ 1.40*
2	*C-2*	*1194*	*1186.89*	*(-) 7.11*
3	*C-3*	*1194*	*1194.00*	*No change*
4	*C-4*	*1194*	*1186.89*	*(-) 7.11*
5	*C-5*	*1194*	*1186.89*	*(-) 7.11*
6	*C-6*	*1194*	*1186.89*	*(-) 7.11*
7	*C-7*	*1194*	*1186.89*	*(-) 7.11*

The net result as per the rechecking works out to Rs.3.5 lacs in favour of SIDL. The overall result of above deduction/additions is as under:-

SIDL claims Rs.2,33,95,687/-

Rs.2,33,95,687/- (-) (35.49 + 5.41 + 15.80 + 11.70 + 0.50 (-) 3.50) = 65.4 Lacs) = Rs.1,68,55,687.00/-

I, therefore, award a sum of Rs.1,68,55,687/- in favour of SIDL for settlement of claim No.2 of SIDL and claim No.1 of KCC subject to overall effect as discussed hereinafter."

Objecting Court found that objections were not within the provision of Section 34 of the Act by holding that Court cannot substitute the view of the Arbitrator even if some evidence has re-appreciated was re-

read and the Court may arrive at a conclusion than the one arrived at by the Arbitrator. The appraisement of the agreement by the Arbitrator is a matter which Court should not question and reconsider. On perusal of findings rendered by the Arbitrator, I am of the view that Arbitrator has given the reasoned award and, therefore, contention that award suffers from want of reasons, is not only fallacious but not tenable and hereby rejected.

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.

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

There is no merit in the aforementioned appeal.

The appeal is accordingly dismissed.

11.09.2015 **(AMIT RAWAL)**
pawan **JUDGE**