IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

F.A.O.No.6215 of 2015 (O&M)
Date of Decision: October 20th, 2015

Dakshin Haryana Bijli Vitran Nigam Ltd., Hisar

...Appellant

Versus

M/s Svasca Industries (India) Ltd., Delhi, 48 K.M. Mill Stone Delhi, Mathura Road Village Pirthala Palwala, District Faridabad & another

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

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?

Present: Ms.Sonia Madan, Advocate,
for the appellant.

Mr.Ashwani Talwar, Advocate,
for respondent No.1.

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AMIT RAWAL, J. (Oral)

The appellant is in appeal against the impugned order dated 13.5.2015, whereby the objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "1996 Act") for setting-aside the arbitration award dated 16.8.2011, has been dismissed.

Ms.Sonia Madan, learned counsel appearing on behalf of the appellant submits that the Objecting Court has committed illegality and perversity in not adverting to all the objections and, therefore, there has been miscarriage of justice as the only remedy for the appellant was to raise the objections as envisaged under Section 34 of 1996 Act. She further submits that the arbitrator has committed an illegality in not assigning any reasons for rejecting the counter claim and rather has acted in a most bias and partial manner. She further submits that it is a fit case for remand as the Objecting Court has committed illegality in discharging its duty. She has drawn the attention of this Court to numerous letters exchanged between the supplier and the appellant to show that the supplier was negligent in delivering the material on time and, therefore, the Nigam imposed the penalty clause.

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

The Arbitrator, in my view, has assigned cogent reasons for declining the counter claim. Vis-a-vis the granting of the claim of the supplier, the Arbitrator has arrived at a finding that in case there was a defect in the transformers, the same have not been removed from the place of installation, much less, they are still lying in the custody of the appellant. The appellant could have issued a debit note vis-a-vis the defective transformers and got the same inspected from an expert and thereafter ought to have called upon the supplier to replace the same, however, no such exercise has been done. The orders have been passed much before the imposition of penalty and, therefore, in my view, such act of appellant was premature. The Objecting Court has been enjoined upon an obligation to decide the objections strictly as per the parameters laid down in Section 34 of 1996 Act. The objections noticed above, in my view, did not fall within the aforementioned parameters as they were general in nature. The

Arbitrator, while rejecting the counter claim, gave the following reasons:-

> "*Nigam's Counter Claims:-*
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> *The Nigam filed reply to the supplier's claim petition on 3.11.2009 but filed counter-claim on 21-5-2010. It is thus a delayed claim made after the supplier had furnished his evidence.*
>
> *The Nigam has demanded liquidated damages @ 5% of the value of undelivered transformers. The demand for Rs.20,97,507=50 on this account is not justified as the stoppage of supplies by the supplier has been found to be with a reason. It happened due to the many impediments created by the Nigam.*
>
> *The Nigam is also claiming a sum of Rs.1,78,50,353/- on account of the extra expenditure incurred on the purchase of the undelivered quantity of transformers. The differential cost (Rs.68,500/- reduced by Rs.48,052-86) amounting to Rs.20,447-14 has been adopted. There is no evidence to show that new transformers were actually purchased by the Nigam on the non-supply of the transformers by the supplier. The Nigam had issued a purchase order to M/s. Akal Electricals (P) Ltd for the purchase of 1000 transformers of 63 KVA on 6.3.2006 (vide Annexure CC-1). This order was placed much earlier than the inspection of the present supplier's transformers. The present supplier's transformers were inspected and rejected in the month of June. Therefore, the order was not placed with M/s.Akal Electrical (P) Ltd on account of the non-supply of transformers by the present supplier. It was perhaps to meet the pre-existing requirement of the Nigam. In this context, the purchases likely to be made in the month of March cannot be treated to be in the nature of risk purchase due to the default on the part of the present supplier. The plea put forward by the Nigam is thus misplaced and unjustified.*

The Nigam has also claimed a sum of Rs.1,54,730-21 per week on account of blockage of funds and assets. It is stated that due to non-replacement, the damaged and rejected transformers occupied valuable space in the Nigam's stores and also caused blockage of funds. The Nigam appears to have asked in the beginning the supplier to lift and replace 97 transformers. The supplier promptly lifted 41 transformers. Thereafter, the supplier opted to lift the remaining 56 transformers also (out of the lot of 97). But those were not available. There is nothing to show that 161 transformers were still lying damaged and were not lifted by the supplier. No evidence indicates the rejection and the non-lifting of 161 more transformers claimed to be lying in a damaged condition in the stores. There is absolutely no basis for claiming penalty on weekly basis for the blockage of space or funds of the Nigam.

Penalty amounting to Rs.8,62,539-04 on account of higher losses has also been claimed by the Nigam. The Nigam tested 97 transformers June, 2006 and 13 transformers in June, 2007. There is nothing to show that the testing was done with the help; of standard calibrated equipment. The loss has been calculated taking the life of the transformers as 25 years though its actual use on the system was about 2 or 3 years. The penalty has been levied without sufficient ground. Penalty was determined in the beginning at Rs.2,79,665/- and it was enhanced, on re-computation, to Rs.5,82,873/- after a month. The Nigam has now, in the counter-claim raised the amount of penalty to Rs.8,62,593-04. The penalty appears to be rising with each passing day. The Nigam has not removed the loss-giving transformers from the system. Many of the transformers are lying in stores and still penalty has been computed regarding those transformers also. The Nigam is also not just and fair in retaining the loss-giving transformers on the live system and accumulating the losses so as to recover penalty on

> *account of such losses. The inspections conducted and the losses determined by the Nigam have already been found to be not just, fair and within the terms of the contract.*
>
> *The Nigam has also claimed a sum of Rs.1,58,574.44 in respect of 66 transformers (41 lifted and 25 not lifted) @ 5% on the cost of those transformers. It is demanded on account of the financial burden put on the Nigam due to the testing and inspections of those transformers. There is no evidence to show any expenditure incurred on such inspections. There is also no provision to that effect in the contract. The claim, is,therefore, found to have no merit.*
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> *The Nigam's claim regarding the extension of the warranty period is also not acceptable in view of the impediments created against the supplies and replacements.*
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> *The Nigam is not entitled to claim encashment of the bank guarantee. Black listing of the supplier is also not found to be allowable. No litigation expenses are held to be payable to the Nigam.*
>
> *All the counter claims of the Nigam are, therefore, rejected."*

It is now a settled law that in what circumstances the award has to be interfered with. The question, which is 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 34 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 substituting its own view in support of the Arbitrator's 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 was 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. 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*.

In my view, 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.

I do not find any illegality and perversity in the impugned order. The appeal is accordingly dismissed.

October 20th, 2015 **(AMIT RAWAL)**
ramesh **JUDGE**