

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Civil Revision No.5770 of 2008

Date of decision: **25**.02.2016

M/s Harbans Singh Tuli & Sons Builders (P) Limited.

... Petitioner

versus

Union of India through Chief Engineer, Pathankot Zone, Pathankot.

.... Respondent

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. H.S. Tuli, petitioner in person.

Ms. Deepali Puri, Advocate,
for the respondent-UOI.

1. Whether reporters of local papers may be allowed to see the judgment ? **Yes.**
2. To be referred to the reporters or not ? **Yes.**
3. Whether the judgment should be reported in the digest ? **Yes.**

K.Kannan, J.

1. I have today disposed of two other civil revision petitions between the same parties relating to a contract for construction of 'married accomodation' at Nahan. The contract in the present case was awarded about 10 years later for construction of a 'married accommodation' at Dharamsala. The matter refers to claim arising out of cancellation of a contract and the tenability of the award by the arbitrator appointed under the Arbitration Act of 1940.

The revision is brought at the instance of the contractor against

rejection of certain portions of the claims by the Courts that were allowed by the Arbitrator. The Union itself has not challenged the award already passed in favour of the contractor and the rejection of the appeal by the lower Appellate Court. The minimal facts that are necessary are as follows:

I. Facts of the case:

2. On 30-3-1978 parties enter into contract for a provision of married accommodation at Dharamshala to be completed by 11.10. 1980. The petitioner contractor failed to execute the work as per terms and conditions of the contract citing increase in prices and other holdups. As a result, Union of India cancelled contract on 04.10.1980 and took over all stocks and material lying on site. The unfinished work had been got done by somebody else and completed on 15.11.1983. The petition complained of cancellation as unjustified and made claims for value of works done and also claimed damages through a reference to an Arbitrator. Many Arbitrators had been appointed and left office and finally on 18.03.1997, S.S.Goyal had been appointed as Arbitrator. An award had been passed by Sh. S.S.Goyal on 19.02.2001 vide which claims of the petitioners contractor were partly allowed and award of recoveries of ₹9,18,247.09 along with cost of ₹20,000/- with interest. The award had been submitted to Court, which issued notice of filing award to both parties. The award which was made

the rule of court accepted majority of claims and declined claim Nos. 2(K) and 2(L), which had been allowed by the Arbitrator and Claim No.2(M) was modified.

II. Lower Court Judgment:-

3. Raising the issue of whether Award dated 19.02.2001 was liable to be set aside, the court of first instance had held Award of claim No.2(K) relating to damages for alleged unlawful cancellation of the contract and claim No.2(L) relating to additional costs incurred for increase of prices of materials were not permissible and set aside. Claim No.2(M) was modified as under:

Instead of ₹4,55,860/-, it was reduced to sum of ₹2,18,657.12 and accordingly, made rule of Court. All other claims were upheld.

Both parties appealed against lower Court judgment.

III. Lower Appellate Court:-

4. Dismissing the appeals, the Appellate Court reasoned that;

i) In light of clause 70 of contract, Cause of action was taken to arise on 15.11.1983 when work was completed.

ii) Entertainment of claim by the arbitrator on disputes which were not permissible under the conditions and adjudication amounted to exceeding

jurisdiction and could be interfered while considering the question of making the award rule of the Court.

iii) As regards unreasoned award, limited jurisdiction of the Court in this case permitted it to lift the veil and to see whether arbitrator acted against contract in deciding the claims in question.

iv) As regards Claim No. 2(K), the damages on account of wrongful cancellation of contract quantified by contractor at ₹2,94,000/- but allowed by arbitrator ₹50,000/- only and denied completely by Lower Court. The lower Appellate Court held that petitioner-contractor was not entitled to any damages on this account and claim was rightly rejected having been allowed by Arbitrator against terms and conditions of agreement.

v) Claim No. 2(L): Regarding increase in price of material, the court reasoned hat it was rightly rejected being not permissible under contract as the contractor did not fulfill the requirements of the claim.

vi) Claim 2(M): Regarding payment of tools, plant, machinery, furniture and material lying at site at the time of cancellation, it was held that the award regarding this claim was not an interim award and was within the

purview of Section 41(b) read with second schedule of 1940 Act. The same was subject to powers of the Civil Court to decide its legality under Section 30. Upon cancellation, the contractor had been called upon for assessment of the cost of material and stores lying at the spot but he failed to do so. As a result, the Board of Officers rightly assessed the value, and thus valuation made by the Union will alone be the amount claimable. The Arbitrator had ignored the same and believed the unsupported valuation of the petitioner company, which was rightly set aside. Hence, no illegality in findings of lower court was found by the Appellate Court.

Regarding interest, no change was made to the lower Court order, thereby affirming the award of the arbitrator.

IV. Present disposition:

5. The scope for intervention for a Civil Court to a decision of an Arbitral Tribunal under the Arbitration Act of 1940 shall be restricted only to the grounds mentioned under Section 30 of the Arbitration Act of 1940 which reads as under:-

“30. Grounds for setting aside award. An award shall not be set aside except on one or more of the following grounds, namely:-

(a) That an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is other- wise invalid.”

6. In this case, the arbitral award makes plain and simple references to amounts which are awarded for the claims under various heads. No reasons have been given. Both the court of first instance and the Appellate Court have concurrently held, by making reference to the provision of the Arbitration Act and the decisions thereunder that the agreement between parties required no reasons to be given. If no reasons were given by the Arbitrator to the claims under various heads, the examination by a court could be only to ensure that the Arbitrator has not misconducted himself or that the award had been improperly procured or otherwise invalid. Clause No.30 (b) referred to above is admittedly not applicable, for, there was no order by a court to supersede an arbitration.

7. So considered if claim No.2(K) is for damages on account of wrongful cancellation and the Arbitrator has actually admitted such a claim to ₹50,000/- as against the claim of

₹2,94,000/- made by the contractor, then it must be understood that the Arbitrator was holding a cancellation of contract to be wrong and he was scaling down the quantum by a calculation, which though not revealed was applied by the Arbitrator. There could have been no scope for intervention by the court if neither of the grounds under clause (a) or (c) could be invoked. Indeed, there was not even a reference to a misconduct by the Arbitrator or that it had been improperly procured. The claim No.2(K) was rejected on the following reasons:-

(i) Clause 54 of the agreement stated that the contract may be cancelled after giving reasonable notice and if the government completed or decided to complete the work the decision made by C.W.E. would be final and binding. As per the trial Court once such a decision was made final and binding it was taken out of the Arbitrator's purview and hence it was held that the arbitrator was not competent to adjudicate upon this item.

(ii) The Lower Appellate Court held that the Union validly cancelled the contract under condition 54(d) of the agreement and agreed with the trial court finding stating that the award allowed by the arbitrator in this regard was against the settled terms and conditions of

the agreement.

These two grounds cannot simply be accepted as constituting a misconduct or improper procurement of the award. The reasoning was that Clause 54 of the agreement enjoined that the contract could be cancelled after giving reasonable notice. This was interpreted as though if a notice of cancellation was made, the cancellation was a matter of course. It will be an utter travesty of reasoning for a court to substitute the award of the Arbitrator. Cancellation of the contract itself was the cause of action for the arbitral reference and the claim before the Arbitrator could not be thrown out by reference to a clause that made possible a cancellation of contract under certain circumstance. If the Arbitrator had allowed for damages at a lesser sum than what was claimed, it must only be taken that the Arbitrator found no justification for a cancellation. That portion of the award could not have been set aside on the reasoning adopted.

8. Claim No.2(L) was in relation to increase in price of materials due to the conduct of the Union which contributed to the delay in finalization of the works. The Arbitrator had allowed the claim of the contractor to ₹1,20,000/-. This was set aside by the court on the following reasoning which could be formulated as follows:-

(i) The trial Court in light of condition 63 of the agreement (which stated *interalia* that C.W.E. was to

decide about amount to be allowed to the contractor on account of increase in prices) held that since the contractor did not lead evidence to show that he applied to C.W.E. for such payment of difference due to increase in price, the arbitrator was not competent to pass the award, his jurisdiction being barred under condition 63 of the agreement.

(ii) The Lower Appellate Court in upholding the trial court reasoning and rejecting the claim passed by the Arbitrator, relied upon certain requirements under condition 63 that the contractor was required to fulfill to seek the reimbursement, but did not. The Claim was therefore rejected as being not permissible under the terms and conditions of the contract.

I have gone through Condition No.63. It sets out an elaborate process that requires the contractor to furnish the details of variation in prices and the CWE would take a decision whose decision shall be final and binding. The CWE has also a power to decide if there was any delay attributable to the execution of the contract within the control of the Arbitrator, in which case, the amount claimed as increase in prices in materials would not be claimed. To the extent to which the redressal mechanism was also provided and the failure of the contractor to lead any evidence or make a statement that he

had applied to CWE for such payment, the award by the Arbitrator was truly on a head of claim that must only be reckoned as 'improperly procured or otherwise invalid'. I uphold the rejection of the claim made by the court of first instance, as approved by the Appellate Court also, on the ground that even in the grounds of revision, there is no contention raised that the contractor has ever applied to CWE for payment of the difference due to price in increase in terms of Condition No.63.

9. As regards the modification of claim permitted with reference to claim No.2(M) for the value of the tools, plants and machineries lying on site, the Arbitrator had allowed for ₹4,55,460/-. This was modified and it could be stated as under:-

Both the Courts below have reduced this claim on account of the Union's valuation of materials on site, disregarding the award of the arbitrator which was based on the valuation brought forward by the petitioner contractor. The Courts' reasoning was guided by condition 54 of the agreement which provided for the valuation done by the G.E. to be final and binding. Accordingly, the improperly secured claim of the petitioner was replaced by the value admitted to by the Union, and on this basis the Award was modified.

The court was modifying it on the basis of the valuation made by the

GE as per condition No.54 which stated the valuation to be final and binding. I have examined Condition No.54 which deals with cancellation of contract in part or in full for contractor's default. If the Arbitrator was allowing for damages for wrongful cancellation, he was literally ruling out the applicability of clause 54. It will be therefore illogical to apply clause No.54 that gives the assessment of GE to be final and binding, to prevail on the claim of the claimant and power of the Arbitrator to arbitrate. Consequently, the modification made by the courts below to the assessment made by the Arbitrator for claim No.2(M) was erroneous.

10. As regards the interest reduced to 9% by the court from the rate of interest awarded at 12% by the arbitrator, I find no error in the intervention made by the court in the light of the Supreme Court judgment in **State of Rajasthan Versus Ferro Concrete Construction Pvt. Ltd.-(2009) 12 SCC 1** where it qualified the award of interest at 18% by the arbitrator as constituting an error apparent on the face of the record. The court guided for future awards that reference to interest for *pendente lite* or future interest should always be 9% in light of the provisions of the Interest Act, 1978.

11. In the light of above, the civil revision partially succeeds in restoring the award passed by the Arbitrator with reference to Claim Nos.2(K) and 2(M). The rejection of the claim to Clause

No.2(L) by the two courts below stands confirmed. The reduction of interest rate at 9% per annum is also justified. The civil revision is partly allowed.

(K.KANNAN)
JUDGE

25.02.2016

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