IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Revision No.5863 of 2014
Date of decision: 06.01.2016

M/s J.J.H. Industries Limited presently known as Eri Tech Limited, through Mr. K. Mittal, its General Manager.
... Petitioner

versus

Punjab State Electricity Board, Patiala, through its Chairman, PSEB, The Mall Patiala, and another.
.... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Puran Singh Rana, Advocate,
for the petitioner.

Mr. G.S. Ghuman, Advocate,
for the respondents.
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1. Whether reporters of local papers may be allowed to see the judgment ? No.
2. To be referred to the reporters or not ?No.
3. Whether the judgment should be reported in the digest ? No.

K.Kannan, J.

1. The civil revision is in relation to proceedings initiated under the Arbitration Act of 1940. On a dispute arising out of a contract whereunder the petitioner was required to supply certain goods as ordered by the Electricity Board, there had been a complaint of breach by the Electricity Board and an award had been passed by the Arbitrator. The notice of award had been sent and the

Electricity Board had sought for a decree in terms of the award. On being served with notice from the court, the petitioner had filed an application for setting aside the award complaining of several defects in the award. The defects pointed out were that there had been no concluded contract; the terms of the arbitral agreement had not been read at the time when the petitioner signed; there had been a change of Arbitrator even after the initial appointment without his concurrence; the Arbitrator, who was appointed, was himself an employee of the Electricity Board and, therefore, not impartial; the award had been passed beyond the time which was allotted to him and hence, barred by limitation; and finally that the Arbitrator had also provided for interest which was not contemplated under the terms of the arbitral reference. The court had taken up each one of these issues and had confirmed the award. In appeal, the decision of the court of first instance was confirmed. It is against the two concurrent views of the courts declining to make any interference with the terms of the award that the revision has been preferred.

2. The case is to be examined from a limited perspective of the points which were urged before me. Several other points which were taken, such as, there had been a change of Arbitrator or that the employee himself had been appointed as an Arbitrator or that there was a bar of limitation or an award of interest which was not contemplated would not require to be dealt with because the counsel

restricted his contention only to certain issues which I have detailed hereunder. Rest of the objections which had been taken before the court of first instance had been dealt with properly and confirmed by the appellate court.

3. As regards the contention which was taken before me that there was no concluded contract and hence no arbitral reference is possible, I would find that there is no merit in such a contention. Through a letter dated 12.07.1977, the petitioner has clearly stated that they confirmed that they would be ready to execute the order if placed on them under *force majeure* clause, earnest money and damage for delay on delivery provided under the specifications. On this letter of confirmation, there has been again a communication sent on 02.08.1977 placing the details of specified items to be supplied and reiterating also the clauses relating to the consequences of breach. I have, therefore, no difficulty in seeing that there is a concluded contract and the contention that there had been no concluded contract for reference to arbitration is without any meaning.

4. The substantial objection was that when a notice had been issued on an alleged breach of contract for non-supply of goods on account of certain labour problems which the petitioner claimed that he had at his premises and hence was not in a position to comply with the terms, the contention is that when a notice was

issued by the Electricity Board stating that they were cancelling the contract and that they were entrusting the work with yet another person, it was stated very clearly that as per the market rate, PSEB had to incur an additional expenditure of ₹4.60 lakhs in the procurement of material from alternative source which might be deposited with the PSEB within 15 days from the date of issue of letter. The contention is that if the Electricity Board was making a demand for ₹4.60 lakhs, they were not justified in suddenly escalating the claim to an additional amount of ₹6 lakhs for damages, yet another ₹3 lakhs and odd towards delay and making a further claim of a subsidy said to have been lost by its inability to conclude the work, all aggregating to ₹17,41,090.96. The Arbitrator had literally allowed for every claim which was not even a subject of reference and, therefore, the Arbitrator has misconducted himself.

5. I have noticed that there was a claim made with reference to additional expenditure of ₹4.60 lakhs and that was the first notice. If in a claim made before the Arbitrator, the PSEB was also making reference to damages and for loss caused by delay, it must be observed that even the initial contract makes reference to the scope for consideration of claim for damages as well as for delay. I will not, therefore, find any mistake in the Arbitrator in awarding under all these heads, namely, of additional expenditure incurred, the damages incurred on account of having to suffer

consequential losses and also as to how the component of delay contributed to further escalation of costs. However, I have a serious doubt about the fact that there was any claim possible for a subsidy which the Electricity Board claimed that it could have obtained if the work had been completed within the time. I do not find that it was even contemplated by the parties. I have gone through the contract between the parties and there is no reference at all anywhere that if the goods had been supplied within a particular time, the Electricity Board had a prospect of securing some subsidies. Even in the terms of the contract as spelt out through the general instructions to be observed by the tenderers and the subsequent supply specifications, there are no references to knowledge as having been attributed to the petitioner that the Electricity Board was actually looking to claim some subsidies which it had lost by the non-fulfillment of the contract by the petitioner.

6. The principle of claim for damages is governed by Section 73 of Indian Contract Act, which is based on the rule in ***Hadley Versus Baxendale-156 ER 145*** decided in 1854. The rule is summarized as follows:-

> "The defendant is liable only for 'natural and proximate consequences of a breach or those consequences which were in the contract'. The above quoted phrases are words of art and usually represent two ways of

> expressing a single requirement. Proximate and natural consequences are those that flow directly or closely from the breach in the usual and normal course of events- those which a 'reasonable man' or a person or ordinary prudence would when the bargain is made foresee, as expectable results of later breach. The phrase 'in the parties' contemplation' normally means in the reasonable contemplation of the defendant. Thus understood, it has got only the same meaning as the companion phrase 'natural and proximate'. ....".

The Delhi High Court distilled the requirement further in ***Titanium Tantalum Products Limited Versus Shriram Alkali and Chemicals-2006(2) Arb. LR 366*** to say that 'the defendant is liable only for reasonably foreseeable losses-those that a normally prudent person, standing in his place possessing his information, when contracting would have had reason to foresee as probable consequences of future breach.

7. Normally the extent of interference by the court to an arbitral award will be restricted only to a misconduct on the part of the Arbitrator on any of the grounds as spelt out under Section 30 of the Arbitration Act of 1940. In this case, I would notice that a claim to subsidy that was said to have been lost and making it a part of the entitlement of the Electricity Board was not in the contemplation of

the parties nor was it even suggested that if there was a dispute, the said aspect would require to be also considered. I will, therefore, hold that the Arbitrator misconducted himself in so far as he provided also for a claim for a subsidy that was said to have been lost.

8. Consequently, I modify the award only to the extent that out of the total award of ₹17,41,090.96, the amount that was said to have been lost to the Board, namely, of ₹6,03,445.22 would require to be excluded from the aggregate of claims.

9. The award as affirmed by the decrees of the courts below would require to be modified to the extent specified above.

10. The civil revision is partly allowed and the decree shall stand modified to ₹11,37,645/- with interest as already awarded together with costs awarded to the respondents assessed at ₹5,000/-.

(K.KANNAN)
JUDGE

06.01.2016
sanjeev