IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No.2428 of 1995 (O&M)
Date of decision : 02.02.2016

Punjab State Electricity Board, Patiala

...Appellant

Versus

M/s Jai Hind Investments and Industries Private Ltd., Faridabad/New Delhi

...Respondent

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. M.L. Sarin, Sr. Advocate with
Mr. Vikas Chatrath, Advocate for the appellant.

Mr. Anand Chhibbar, Sr. Advocate with
Mr. Gaurav Mankotia, Advocate for the respondent.

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AMIT RAWAL, J. (Oral)

PSEB is aggrieved in appeal under Section 39 of the Arbitration Act, 1940 against the partial acceptance of their objections vide order dated 25.09.1995.

It would be apt to gave brief preface of the matter in controversy. Punjab State Electricity Board, Patiala erstwhile Board entered into the contract/agreement dated 19.07.1976 with respondent-M/s Jai Hind Investments and Industries Pvt. Ltd., Faridabad/New Delhi for supply of 60,000 PCO poles, 5000 poles from the ready stock and 55,000 to be manufactured by the company. In this regard contract dated 19.07.1976 containing various terms and conditions including resolution of dispute if any by the arbitration, was entered into. Since, the dispute vis-a-vis non-supply of the poles arose between the parties, the matter was referred to the Arbitrator for seeking a sum of Rs.10609773.31, details of which are given herein as under:-

> *"A) Compensation for non-supply of 42628 poles*
> *Rs.2522725.00*
> *B) Recovery on account of 220 defective poles supplied to Verka, Kapurthala and Jalandhar consignees*
> *Rs.2522725.00*
> *C) Recovery on account of defective poles supplied to Batala Consignees Rs.200.00*
> *D) Excess paid at Rs.191/- instead of Rs.187/- Rs.950/-*
> *E) Compounded interest at 18% p.a. from the date of breach of contract till the presentation of statement of claim*

From 2.11.78 to 30.4.91	*Rs.5773896.44*
From 1.5.91 to 31.7.91	*Rs.525521.10*
From 1.8.91 to 30.9.91	*Rs.370400.04*
From 1.10.91 to 31.12.91	*Rs.494679.95*
From 1.1.92 to 31.3.92	*Rs.515510.86*
From 1.4.92 to 31.5.92	*Rs.363869.93*
Total	*Rs.10609773.31"*

In response to the claim, the respondent company also filed their counter claim claiming the amounts, which has reproduced hereinunder:-

> *"A) 5% balance payment Rs.1,66,008.00*

B) Balance outstanding out of 95% payment

Rs.23,640.00

C) Interest 18% on the aforesaid outstanding from the date of bills upto 11/80 Rs.137490.00

D) Loss on account of forced sale of 15,000 poles at the rate of Rs.135/- per pole already manufactured for PSEB and not taken by them. Rs.697500.00

E) Loss of expected profit on 27500 poles at Rs.42/- per pole & interest at 18% for three years as per para 12.

Rs.1778700.00

F) Refund of security	*Rs.62300.00*
G) Costs of arbitration proceedings	*Rs.10000.00*
H) Interest from 1.12.80 to 31.7.92	*Rs.363869.93*

Total Rs.20956054.56

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The Arbitrator rejected the claim of the PSEB. However, while accepting the claim of respondent, awarded a sum of Rs.1086940/- along with interest at the rate of 18% p.a. from 10.06.1978 up to the date of the award. The matter was sent to the trial Court for making award Rule of the Court. The PSEB filed their comprehensive objections vis-a-vis their rejection of the claim and as well as acceptance of the counter claim. The Civil Judge vide order dated 25.09.1995 as noticed above, partly accepted the objection. It is in these circumstances, the aforementioned appeal has been filed.

Mr. M.L. Sarin, learned Sr. Counsel assisted by Mr. Vikas Chatrath, Advocate for the appellant, submits that award of the arbitrator is not only illegal, perverse, much less, lacking reasons as no documents tendered on behalf of PSEB has been looked into while rejecting the claim.

Though, the Civil Judge had accepted the objections in part but did not notice that the original claim of the company was to the tune of Rs.6,97,500/- as such, the Arbitrator could not have awarded a sum of Rs.10,86,940/- as noticed above. Though, Civil Judge has also accepted objection vis-a-vis awarding of phenomenal interest @ 18% p.a. but the fact remains that company had claimed interest w.e.f. 01.12.1980 whereas interest has been awarded w.e.f. 10.06.1978. Umpteen number of documentary evidence placed on record would show that PSEB had suffered losses on account of non-supply of the poles, though there was no purchase of the poles at the cost of the company. The foundation of the damages were as per the provision of Section 73 of the Indian Contract Act. Clause 10 of the agreement, ibid entitles PSEB to claim the damages. In support of his contention, he has relied upon following judgments to contend that where there is error occurred on the face of the record, objections under Section 37 of 1940 Act in toto was required to be accepted and not in part:-

1. *Associated Engineering Co. Vs. Government of Andhra Pradesh, AIR 1992 Supreme Court 232,*
2. *Maula Bux Vs.Union of India, AIR 1970 Supreme Court 1955,*
3. *Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava & ors. JT 1994(5) SC 195,*

He further submits that as per the terms and conditions of the agreement, price of the pole was fixed as 191 per pole FOR (Free On Rail) which including the element of insurance, excise, freight, packing, loading, forwarding, insurance charges tax etc. whereas the company had sold the pole to the Rajasthan State Electricity Board at the rate of Rs.135 per pole i.e. (at Ex Factory) price. This aspect of the matter has totally been ignored by the Arbitrator, therefore, claim of the company even to the extent of Rs.6,97,500/- was ex facie not maintainable. The interest factor on the aforementioned award was phenomenal as has caused unnecessary burden on the exchequer of the Punjab State Electricity Board, thus, prays for setting aside of the award. He has further, drawn attention of the Court that from the photocopy of the original award, it appear that there was interpolation as there was less spacing in the penultimate paragraph of the award. In this regard, specific objections vis-a-vis conduct of the Arbitrator was taken but the learned Civil Judge has completely overlooked the same, and thus there is illegality and perversity.

Mr. Anand Chhibbar, ld. Senior Counsel assisted by Mr. Gaurav Mankotia, Advocate for the respondent submits that since PSEB failed to lay any foundation on the alleged claim, rightly so, has been dismissed. In this regard, he has drawn attention of this Court to para Nos.4, 5, 6 and 7 of the award, whereby Arbitrator after dealing with the documents in extenso dismissed the same. On instructions from his client, he submits that his client would not be averse for awarding the interest w.e.f. 01.12.1980 instead w.e.f. 10.06.1978. He has further submitted that his client has suffered agony of pendency of the litigation for 40 years and it would not be apt to refer the matter back to the Arbitrator to determine the difference between FOR and Ex Factory Price and left it to the Court to determine the difference between aforementioned in order to arrive at correct figure. In support of his contention, he has relied upon judgment of the Hon'ble Supreme Court to contend that until and unless the award is lacking reasons and non-speaking, it should not be interfered until and unless very strong and cogent reasons are assigned vis-a-vis conduct of the Arbitrator. He further submits that award would reveal that there is no apparent mis-conduct and there is no alleged interpolation. The Arbitrator while pronouncing the award, considered awarding of interest, much less, clarifying the interest, as interest is necessary for awarding of the compensation in favour to the either party.

I have heard learned counsel for the parties and appraised the paper book and as well as the record of the Arbitrator.

There is no dispute vis-a-vis ratio decidendi culled out in the following judgments:-

"1. Bijendra Nath Srivastava (Dead) through LRs Vs. Mayank Srivastava, 1994(2) HLR 346,

2. Trustees of the Port of Madras Vs. Engineering Constructions Corporation Ltd. 1995(3) RRR 201."

It would be apt to reproduce para Nos.4, 5, 6 and 7 of the award:-

> *"4. In the evidence the Board examined Sarvshri Hari Om Garg, Purchase Officer; Shri Amar Nath Gupta, Divisional Accountant, Sbhjeet Gupta, Asstt. Executive Officer and Shri Surinder Singh in support of their claim besides placing on the record documents Ex.P1 – Ex.P56 and AW/A. In rebuttal to the claim of the company they examined Shri Hari Om Garg. The company in support of their claim has examined Sarvshri A.K. Dabriwala, an industrialist of the company and Shri J.N. Kapoor, Commercial Manager of the company, besides placing on*

record the documents D1 to D68. In rebuttal of the claim of the Board they have examined Shri K.K. Dabriwala, industrialist.

5. I have very carefully examined this evidence on the record and have heard at length their learned counsel.

6. The PSEB has admitted that there was no risk purchase in this case for which notice Ex.P50 was given. They claimed the damages under Section 73 of the Contract Act read with Clause 12 of the Contract Agreement Ex.P4. I have considered the whole evidence on the record in this respect. On the date of breach of contract ruling price of the poles of the specifications of Ex.P4 has not been established. I have considered Ex.P56 of the date 2.8.78 vide which the PSEB purchased poles at the rate of Rs.202/- per pole. The whole case of the Board is based on this document Ex.P56, but the poles of Ex.P56 are greater in length, more weighty, having more loading capacity and more durable bottom dimensions than the poles of Ex.P4. Naturally, therefore they were more costly, the rate being Rs.202/- per pole than the pole of Ex.P4 of which the rate was Rs.191/- per pole. Vide Ex.D55 dt. 6.3.78 the PSEB purchased poles of the specification of Ex.P4 at rate of Rs.190/- per pole. In Ex.D46 dt. 14.7.78 the rates mentioned are merely in the nature of offers and a lot of exaggeration is therefore understandable. It may be due to the reason that the Board was delaying payments and also delaying inspections. In Ex.D44 dt. 28.3.78 it is only mentioned that the cost of material has increased and no rate is given. These documents cannot be preferred in the face of Ex.P56 and Ex.D55. Ex.P56 is of later date and the whole case of the board is depending on this document which however obviously does not help them. It is therefore apparent that at the time of breach of contract the price per *pole of the specification of Ex.P4 does not exceed Rs.191/-. In these circumstances, the PSEB is not entitled to any loss or damage on account of non-supply of poles as claimed by them. The question of interest therefore also does not arise.*

7. As regards the defective poles alleged to be supplied to the consignees at Verka, Jalandhar, Kapurthala and Patiala. I have perused documents Exs.P25 dt. 4.4.77, P31 dt. 14.6.77, P41 dt. 15.12.77, P46 dt. 15.5.78, P46/A dt. 31.5.78, P47 dt. 31.8.78, P48 dt. 4.9.78 and P49 dt. 4.5.78 on behalf of the PSEB and Exs.D26 dt. 7.6.77, D27 dt. 8.6.77, D28 dt. 20.6.77 and D29 dt. 22.6.77 on behalf of the company. Inordinate delay in pointing out these defects itself is a factor which very much weighs against the Board. It appears from the letters of the company referred to above that the poles were received by the consignees in good condition, physically verified by them and thereafter the bills were signed and certificates issued. Ex.P55 shows that they were in OK condition and could be used in the fields. The same were passed in the inspections, then dispatched and received by them upto 30.11.76. It must therefore be held that there was no defect in these poles. The claim of the board in this connection also fails. The question of interest does not arise. "

On going through the findings rendered by the Arbitrator, I am of the view that Arbitrator after taking into consideration all the documents on record found that the claim of the PSEB did not have any foundation, much less, any basis and rightly rejected the same. No doubt, the Objecting Court while partly accepting the objections has not taken into consideration the difference between FOR and Ex Factory price. Company had claimed loss on account of difference in the price quoted to the PSEB and sold it to the Rajasthan State Electricity Board which comes to Rs.56/-. On going through the rough calculation, I am of the view that losses actually company would suffer after deducting charges as referred above is Rs.40/- per poles instead of Rs.56/- as claimed.

Similarly, vis-a-vis interest awarded at the rate of 12% as reduced by the Civil Judge, has been effective from 10.06.1978 whereas on going through the claim as referred in the award, Company has claimed interest w.e.f. 01.12.1980. Accordingly, the company in my view is entitled to interest as awarded by the Civil Judge w.e.f. 01.12.1980. The order of the Civil Judge has not been challenged by the company, in essence, they have accepted the reduction vis-a-vis their original claim as well as interest. It is in these circumstances, I embarked upon the path of calculation as litigation is almost of 40 years old.

Accordingly, award of the Arbitrator is modified and it is made clear that the company shall be entitled to Rs.40/- per pole instead of Rs.56/- and shall be entitled to interest awarded by the Civil Judge which shall be w.e.f. 01.12.1980 instead of 10.06.1978. Accordingly, award dated 12.11.1993 of the Arbitrator is modified.

Appeal is partly allowed.

02.02.2016 **(AMIT RAWAL)**
pawan **JUDGE**