

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

FAO No.4868 of 2005 (O&M)

Date of decision : 04.08.2016

Darshan Kumar Garg

...Appellant

Versus

Union of India and others

...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. Vikas Suri, Advocate for the appellant with
Darshan Kumar Garg, Appellate in person.

AMIT RAWAL, J. (Oral)

The appellant-Contractor is aggrieved of the dismissal of the objections filed under Section 34 of 1996 Act seeking setting aside of the arbitration award dated 14.05.2002.

Mr. Vikas Suri, learned counsel appearing on behalf of appellant-Contractor submits that vide application bearing No.17058-CII of 2013, copy of the award (Annexure A-4) rendered by the Arbitrator vis-a-vis claim No.4, has been placed on record whereby Arbitrator has given finding that Union of India had failed in not providing cement and bitumen which were two major products used for repairing of the roads vis-a-vis

contract.

He further submits that in February, 1995, tender was floated for repairing of road at Bathinda Military Station, which was awarded to the appellant on 14.03.1995 for a sum of ₹9,93,340/-. The contract was “item rate contract” and as per the terms and conditions of the same, the Department was to supply the Schedule (B) stores i.e. bitumen and cement for the said works. The entire work aforementioned was to be completed within six months. On 06.04.1995, Contractor requested the Department to issue the Schedule-B. No reply was received despite reminders and on 26.05.1995, when the Contractor went to the stores of the Department, it was found that bitumen was not available. Many letters, in this regard were written i.e. in the month of May, June, and July regarding the supply of the material but it did not yield any result. However, in August, 1995 Department wrote to the Contractor that bitumen was available in stock. Letter was replied and certain work was done. On 18.09.1995, another letter was written to the Department as Schedule-B products were the most important for execution of the work and as it lacked quantity of the bitumen and cement. In fact as per the contention of the contractor, bitumen stock physically received in their stores was only on 01.12.1995 and the aforementioned statement is made on perusal of the award (Annexure A-4), where Arbitrator had occasion to examine the stock register in respect of claim No.4.

He further submits that even stock register did not speak of the exact quantity which was required as per the terms and conditions of the Contract. On 27.09.1995, Contractor requested the Department to pay the

damages as per the condition No.9 by adding 70% on the quoted rates. Since, Department did not pay any heed and thus in October, 1995, Contractor requested for appointment of the Arbitrator. However, on 08.07.1996, contract was cancelled but again the contract was revived and with the consent of the Department, Contractor started work on 17.07.1996 and also prayed for extension of time, as original period had expired. By 22.07.1996, the Contractor had completed more than 50% of the work and asked for the payment of the work done and again on 02.08.1996, the contract was revived. Many reminders were sent, as Department had failed to supply the machinery and the Contractor was left in lurch as his entire machinery and the workers were remained idle. Apprehending the some liability imposed by the Department, Enquiry Officer was appointed by the Chief Engineer. Final notice was issued to the Contractor in April, 1997. Since the agreement envisaged the resolution of dispute through the Arbitrator, Arbitration proceedings commenced. During the arbitration proceedings, the appellant-claimant filed preliminary claim as owing to the fact that he was not having exact figures with regard to the deficiency in the stock and in that regard, moved an application dated 16.02.2002 Annexure A-2. As per the record of the Arbitrator, asking certain information vis-a-vis reasons on the extension granted and as well as ledger showing two months (quantity balance and date of procurement).

Mr. Vikas Suri, has also drawn the attention of this Court to various letters Annexures A-1, A-7, A-10, A-8 to contend that aforementioned applications were allowed and the Arbitrator called upon the Department to produce the record and the Department took many

adjournments evident from proceeding/the letters dated 01.12.2001 and on 02.03.2002 volte-faced by assigning reasons at Sr. No.18 it could not be given because of internal correspondences and nothing was supplied. The Arbitrator did not notice the aforementioned fact and proceeded to decide the claim.

He further submits that on going through the arbitration award, it is not in consonance with the provision of Section 31 of 1996 Act. It is a sufficient ground for the Objecting Court to set aside the award which fell within the realm of provision of Section 34 of the Act and thus urges this Court for setting aside of the award.

He further submits that element of biasness on the part of the Arbitrator is also there as in the other arbitration award dated 07.09.2010 (Annexure A-4), the Arbitrator had occasion to examine the stock register and passed the award in favour of the Contractor held Department liable for not supplying the material for the purpose of repairing the road.

On the last date of hearing, Mr. Aseem Aggarwal, counsel appearing on behalf of Union of India had submitted that despite repeated reminders, no body came from the office. In view of such circumstances, this Court had ordered for issuance of notice to the concerned Department and as per the office report dated 02.08.2016, notice sent to Union of India has been received back duly served. The aforementioned appeal is of year 2005, there is no representation on behalf of Union of India. Accordingly, I proceed to decide the appeal.

I have heard learned counsel for the appellant and appraised the paper book, much less, award and of the view that Arbitrator has assigned

no reasons in declining the claim, much less, accepting the counter claim. Award is not in consonance with the provision of Sub-Section 3 of Section 31 of the Act. For the sake of brevity, Clause at Sr. No.8 and 18 (Annexure A-1) dated 01.12.2001 reads thus:-

“8. Copy of reasons on which extension was granted.

18. Ledger showing bitumen qty. balance and qt. Date of procurement.”

The contractor had requested for supply the documents.

The interim order of the Arbitrator passed from time to time i.e. Annexure A-1, A-7 A-8, A-10 leaves no manner of doubt that department had seeking time to produce the documents. However, as per the contents of letter dated 02.03.2002, department could not given any reasons for supplying information against Sr. No.8, much less, gave vague and evasive reply vis-a-vis Sr. No.18. In my view, Arbitrator ought to have drawn adverse inference, though, the Objecting Court declined the claim.

It is a matter of record that via-a-vis claim No.4, the matter had reached to the Hon'ble Supreme Court and due to intervention of the same, the different Arbitrator was appointed and after examining the record, gave following findings:-

“6. These are undisputed facts between the parties that the contract was for special repairs to certain roads at Bathinda Military Station and for the repairs of these road, Bitumen and cement is the main material which was to be supplied by the respondent under Schedule B against payment by the claimant. The plea of the claimant is that after the acceptance of his tender, he issued letter dated 6.4.1995 (Ex.P1) to the respondent for supply of 200 bags

of cement and 75 Mt bitumen 80/100 and issued reminders dated 5.5.1995 (Ex.P2), 25.5.95 (Ex.P3), 12.6.1995 (Ex.P6), 19.6.95 (Ex.P7), 3.7.95 (Ex.P8), 12.7.95 (Ex.P9), 7.8.95 (Ex.P10) and 18.9.95 (Ex.P11) but the respondent did not issue this material as it (respondent) did not have this material in its store and for that reason the work could not be started and completed within the stipulated period of 6 months from 24.3.95 to 24.9.95. The plea of the respondent is that the claimant did not collect the schedule B stores because of his own mismanagement as narrated above. But this plea of the respondent that claimant did not collect the schedule B stores is falsified from the copy of the stock register RR-48 and 49, produced by the respondent from the perusal of which it is clear that the respondent did not have in its store 75 mt bitumen from the start of the contract i.e. 9.3.95 till 1.12.95 and as such there was no question of the failure of the claimant to collect bitumen from the respondent. As regard the other plea of the respondent i.e. non-construction of store yard, non-procurement of material, other than schedule B, non submission of samples and test at Engineer Lab is concerned, that has no relevancy to the start and completion of the work as it was the responsibility of the claimant to make arrangements for the storage of Schedule B Articles and in case of non construction of store yard it was the claimant who was to suffer for its theft or loss.

In view of the above discussion, I am of the considered opinion that bitumen was the main material for repair to the roads and the respondent failed to provide it to the claimant within the stipulated period of 6 months which amounts to failure to perform its part of the contract on the part of the respondent and the claimant is entitled to claim damages from the respondent.”

In my view, the Arbitrator should not have passed the award in undue haste.

Aforementioned findings are sufficient for setting aside the award but the Objecting Court in my view failed in its duty to ponder upon such aspects.

Accordingly, award and order under challenge are hereby set aside.

Parties are at liberty to seek the appointment of the Arbitrator in accordance with law.

Resultantly, appeal stands allowed.

04.08.2016

pawan

**(AMIT RAWAL)
JUDGE**

Whether speaking/reasoned:-

Yes

Whether reportable:-

Yes/No