

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

FAO No.471 of 2009 (O&M)

Date of Decision.30.11.2016

State of Punjab

.....Appellant

Vs

Som Datt Builders Limited and others

.....Respondents

Present: Mr. Chetan Mittal, Senior Advocate with
Mr. Varun Issar, Advocate
for the appellant.

Mr. Arvind Minocha, Advocate
for the respondents.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J. (ORAL)

The appellant State is aggrieved of the impugned order dated 25.07.2008 whereby the objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 against the Award dated 30.10.2002, has been dismissed.

Mr. Chetan Mittal, learned Senior Counsel assisted by Mr. Varun Issar, Advocate submits that the present case pertains to allowing of claim No.1 and 4 by the Arbitrator to the tune of ₹1,82,31,658/- and ₹66,01,479/- respectively. A contract for four laning of NH No.1 (IBRD) LN-3470-IN/CR-2365-In from KM 212.20 to KM 228.00 (Lot PB-1) was awarded to the respondents-Som Datt Builders Limited (hereinafter called claimants before the Arbitrator) on 23.11.1994 and contract agreement was signed between the parties on 4th January 1995.

Certain dispute arose between the parties and the matter was referred to the Arbitrator.

He submits that in order to appreciate the controversy with

regard to eligibility of the respondent for sustaining the claim No.1, Clause 2.11, dealing with the payment in foreign currencies is to be looked into. He has drawn attention of this Court to the clause 2.11.1 to 2.11.2, which are reproduced here-in-below:-

“2.11.1 The tenderer expecting to incur expenditure in currencies other than Indian Rupees for the inputs to the works supplied from outside the Employer's country and wishing foreign exchange to be paid accordingly, shall specify in Schedule I “Foreign Currency Requirements” of Section VIII in Volume 3 of the Tender Documents, the percentage of the Tender Amount (excluding Provisional Sums, if any) needed by him for payment of such currency requirements either (i) entirely in the currency of tenderer's home currency or at tenderer's option (ii) entirely in US dollars, always provided that a tenderer expecting to incur expenditures in a currency other than those stated in (i) and (ii) above for portions of the foreign currency requirements, and wishing to be paid accordingly, shall so indicate the percentage portion of such requirements in the Schedule I of the tender document.

2.11.2. The rates of exchange to be used for currency conversion shall be the selling rate for similar currency transactions published by the Reserve Bank of India on the date 28 (twenty eight) days prior to the latest date for the submission of tender. If the exchange rates are not so published for certain currencies, the tender shall state the rates used and the sources. For the purpose of payments, the exchange rates used for the tender shall apply for the duration of the contract, so that no currency exchange risk is borne by the tenderer.”

As per the clauses extracted above, the tenderer expecting to incur expenditure in currencies other than Indian Rupees for the inputs to the works supplied from outside the Employer's country and wishing foreign

exchange to be paid, is required to be specified in Schedule 1 of Section VIII in Volume 3 of the Tender Documents, the percentage of the Tender Amount (excluding Provisional Sums, if any) needed by him for payment of such currency requirements either (i) entirely in currency of tenderer's home currency or (ii) entirely in US dollars, provided that a tenderer expecting to incur expenditures in a currency other than those stated in (i) and (ii) above for portions of the foreign currency requirements and wishing to be paid accordingly, shall so indicate the percentage portion of such requirements and the rates of exchange to be used for currency conversion shall be the selling rate. The employer relied upon the Schedule I. The proposed machinery was to be imported from the foreign country in pursuant to the contract but did not place on record any invoice, bill of lading, custom clearance etc. It was only an intention to buy and since the employer had not been able to arrange the foreign currency as per the clause aforementioned, nothing prevented the contractor/tenderer to import the machinery by making the payment of currency and he was entitled to claim the difference of the rate in case of variation. Having failed to do so, the Arbitrators (majority view) has committed illegality and perversity in awarding the claim. In fact, the Award of the Arbitrator suffers from patent illegality as no bill and documentary evidence, much less, cogent evidence referred to above, has been placed on record and therefore, the Award was based upon supposition which was not within the domain of the Arbitrator.

He submits that there were three Arbitrators appointed. Two have given a majority view and one has given a dissenting/minority view. The appellants-respondents before the Arbitrator insisted for proof of the payment of foreign exchange but the claimants relied upon the gist of the

arguments i.e. the respondents had already admitted the claim. The claimants have also insisted for the World Bank guidelines which could not be made basis for substantiating the claim as it was not backed by any evidence. The claimants had established that 10% payment of the contract value for payment in foreign exchange was incorporated by the respondent after full satisfaction and with the clear understanding that the claimant shall be using old equipment brought from Jordan and the foreign exchange payment shall basically comprise the depreciation involved for the old depreciated equipment brought from abroad, whereas, the stand of the appellants was that the respondent had only set up an indigenous plant and the evidence of invoices available on record as Ex.R1 to prove the aforementioned fact. Even the claimants did not raise any demand of the foreign exchange component in the first 24 bills as most of the equipments were required at the spot leads to an irresistible conclusion that no foreign exchange had been utilized. The claimants harped upon the letter dated 15.07.1998 which basically deals with the major requirement involved in the old equipment imported from abroad, cost of spares, freight, misc. equipment and material. It does not reflect that the appellants had acknowledged the factum of material being imported. No doubt conversion rate was to be paid on the date of payment.

He further submits that the document Ex.A1 though contains list of imported machinery but no evidence had been led that whether any machinery was ever imported. Even Ex.R1 contains the invoices, which did not show payment of the foreign currency. It was only in Indian currency (Indian Rupees) only. In the absence of proof of expenditure, the Award is not sustainable.

As regards the reimbursement of the increased bank guarantee, charges alleged to have been paid to the extent of ₹66,01,479/-, he submits that the bank charges cannot be treated as rise in the cost of labour and material, as rise in the bank guarantee varies from bank to bank and therefore, the claimants were not entitled to any payment under the aforementioned claim. The Arbitrator heavily relied upon charges in respect of the Punjab National Bank whereas other Banks had given the rate lesser than that and therefore, alternative bank guarantee at lesser charges was available for performance bank guarantee. In this regard, he has drawn attention of this Court to clause 70 which comprised of two components i.e. 70.1 and 70.2. Sub clause 70.1 deals with sub components like local labour, general materials, lubricants and foreign inputs etc. whereas 70.2 implies that if after 28 days prior to the latest date for submission of tenders for the contract there occur in the country in which the works are being or are to be executed changes to any national or state statute, ordinance, decree or other law or any regulation or bye law or any local or other duly constituted authority which causes additional or reduced cost to the contractor other than under sub-clause 70.1 in execution of the contracts. The rates, prices and amount quoted by the tenderers were subject to adjustment during the performance of the contract in accordance with the provisions of clause 70.1 and 70.2 of the conditions of contract. The arrangement of finances was thus their own. Documentary evidence had been led with regard to other banks who had given lesser rates subject to further negotiation, thus, both the claims are liable to be set aside.

Per contra, Mr. Arvind Minocha, learned counsel appearing for the respondents submits that it was provided in the tender documents that

the requested percentage of foreign currency shall be justified by the successful tenderer to the satisfaction of the employer prior to the award of contract. The tender documents provided that the rate of exchange to be used for foreign currency shall be the selling rate for similar transaction published by RBI on the date 28 day prior to the last date of submission of tender. The base exchange rate fixed for the contract was ₹31.5 per US dollar.

The claimant quoted for 10% payment in foreign currency and on demand from the employer submitted letter dated 15.07.1994 wherein the justification equivalent to ₹13.25 crores was given whereas payment in foreign currency was demanded 10% of the contract value which was equivalent to ₹8.3 crores. Since the appellants did not honour this obligation and denied the payment in foreign currency, the World Bank guidelines were issued, on account of mid term review meeting in Delhi on 30th June/1st July, 1998 on the said issue which is evident from letter of Engineer (Ex.CH-12) whereby the appellants issued the instructions to Engineer for immediate compliance of these guidelines and the Engineer in turn directed the claimant to submit future interim payment certificates in accordance with these World Bank Guidelines. The bills submitted by the claimant and the Engineer recommended the payment of foreign exchange variation as the employer was unable to pay in foreign currency but the appellants did not pay even for this foreign exchange variation, though the appellants themselves had, as per these guidelines, instructed the Engineer for immediate action. Interim payments certificate bills (No.25 to 63) have been duly admitted by the appellants.

Even as per clause 2.11.5, the review after 20th October, 1998

as suggested in the World Bank guidelines and as per sub clause 72.2 of the Special Conditions of Contract, the change, if any, was to be done with mutual consent only. The appellants unnecessarily insisted for proof of payment of foreign exchange on the plea of audit requirement which is not part of the contractual obligation of the claimant under the contract. The Arbitrator has rightly taken into consideration the aforementioned documents and the interpreted the clauses in the right earnest by awarding compensation to the tune of ₹1,82,31,658/-.

As regards the claim No.4, he submits that as per clause 70.2 bank guarantee charges levied by nationalized bank prevalent as on 28th day before submission of the tender was 15 paise per month i.e. 1.8% per annum of the amount of bank guarantee. These charges remained valid upto 30.09.1994 and revised vide Ex.A4 to 2% for performance guarantee and 3% for mobilization advance and machinery advance guarantee. The rates and prices quoted by the claimant were subject to price adjustment during the performance of the contract in accordance with the provisions of clause 70.1 and 70.2 of the Conditions of Contract. The increase in the bank guarantee charges caused additional cost to the claimant for the work and thus, was liable to be paid, rightly so, had been paid by the Arbitrator. The aforementioned fact has been proved by filing the relevant documents from the bankers as Annexure IV in the statement of claims.

He further submits that courts are restricted to form a different opinion than the one arrived at by the Tribunal, thus, this Court is also precluded from re-appreciating the evidence. In support of his contention, he has relied upon ratio decidendi culled out in Navodaya Mass Entertainment Ltd. Vs. J. M. Combines (2015) 5 SCC 698 and as well as in

Arikala Narasa Reddy Vs. Venkata Ram Reddy Reddygari (2014) 5 SCC 312 to contend that role of the Court is supervisory in nature. Also relies upon judgment rendered by Hon'ble Supreme Court in **Associate Builders Vs. Delhi Development Authority (2015) 3 SCC 49** to contend that the Hon'ble Supreme Court while clarifying the public policy had reiterated the earlier settled position in law by holding that when a Court is applying “public policy” test to arbitral award, it does not act as a court of appeal and even the error of fact cannot be corrected, thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind cannot be held to be invalid, on this score. This Court also should not act as a court of appeal and re-appreciate the material/evidence and embarked on the path by substituting its own view, thus, urges this Court for dismissal of the appeal. He also relies upon judgments of Hon'ble Supreme Court and various High Courts in **Mcdermott International Inc. Vs. Burn Standard Co. Ltd. and others (2006) 11 SCC 498**; **Delhi Development Authority Vs. Bhardwaj Brothes** passed in FAO (OS) No.285 of 2014; **State of Punjab Vs. SDB Infrastructure Pvt. Ltd.** passed in FAO No.8466 of 2015; **Govt. of Kerala Vs. Som Datt Builders Ltd. AIR 2003 Kerala 61** to support his case.

I have heard learned counsel for the parties, appraised the paper book and of view that there is force and merit in the submission of Mr. Chetan Mittal. Mr. Arvind Minocha's submissions qua interference in the appeal with regard to finding rendered by the Arbitrator and upheld by the Objecting Court looks attractive but this Court cannot remain oblivious of the fact that the Hon'ble Supreme Court in **National Highways Authority of India Vs. ITD Cementation India Limited (2015) 14 SCC 21** had an

occasion to examine the provisions of Section 34 of the Arbitration and Conciliation Act vide which the expression “Patent Illegality” has been brought within the ambit of “Public Policy”. The finding rendered by the Arbitrator is, in fact, misconstrual of the evidence on record, much less, terms and conditions, thus, would fall within the ambit of patent illegality and therefore, the Court cannot not be precluded in setting aside the same.

It is in this conspectus of the matter, I now comment upon the finding rendered by the Arbitrator i.e. majority view regarding the awarding of claim No.1. The majority view heavily relied upon, that claimant established that 10% payment of the contract value for payment in foreign exchange was incorporated by the appellant after full satisfaction and with clear understanding. The list relied upon by Mr. Minocha does not indicate that foreign currency was ever used with the intention to buy material. No Invoices, Bill of Lading or Custom clearance with regard to alleged claim has been placed on record to establish that at any point of time, the contractor made payment in foreign currency and therefore, entitled to the difference. No doubt, the clauses as noticed above, envisage the arrangement of foreign currency by the appellants and if otherwise, the contractor not precluded to purchase the same by arranging his own currency, subject to the frozen rate and the difference, if any. Preparation of the bills are with regard to Indian rupees and not of foreign currency, thus, it is not established that the contractor had actually parted with the money in foreign currency. Had it been, the aforementioned documents should have been the part and parcel of the record of the Arbitrator. In the absence of any such documentary evidence, the majority view should not have granted the relief.

As regards the percentage of foreign currency indicated therein as percentage of total tendered amount, interpretation of the World Bank guidelines is, in my view, would not help the claimants in substantiating the aforementioned claim in the absence of material evidence brought on record. Bona fide use of machinery and equipment as per the letter dated 15.7.1994 is only a list of imported machinery that was “Intended” to be used by the claimant. No documentary evidence would show that the machines mentioned in document A-1, on the basis of which 10% of foreign exchange was demanded, have been brought to India, much less, its utilization. Documents R-1 also contain the invoices against which no foreign exchange had been paid by the claimants. All these facts have not been taken care by the majority view.

There is no dispute with regard to the judgments relied upon by learned counsel for the respondents but each and every case has to be dealt with by taking into consideration its facts and circumstances and relevant evidence brought on record. This Court cannot shut its eyes. No doubt in *Navodaya Mass Entertainment Ltd.'s case* (supra), the Court cannot re-appreciate the evidence but on going through the Award of the Arbitrator, the aforementioned reasoning of mine is not backed upon the re-appreciation of evidence. In fact, it is not a case of any evidence, therefore, it would not fall within the ratio decidendi culled out in *Navodaya Mass Entertainment Ltd.'s case* (supra) and therefore, the award of the Arbitrator accepting the claim No.1 is hereby set aside.

As regards claim No.4 i.e. Reimbursement of Increased Bank Guarantee/Charges, the claimants have relied upon increase in the cost on account of change in the National or State statutes, rates regarding charges

for mobilization and performance guarantee but the rates given by the appellants were much less than the one charged by their own bank. Nothing prevented the claimants to arrange bank guarantee from other bank which offered to give lesser rate and therefore, are not entitled to claim the difference in rate. Public money cannot be squandered away in the manner and mode as sought to be claimed by the contractor. The amount of ₹66,01,479/-, in my view, awarded by the majority view is not sustainable.

There is another aspect of the matter. Rates and prices in the amount quoted by the tenderer were subject to adjustment during the performance of the contract. The performance guarantee which is mandatory requirement of the contract, the contractor was required to furnish the bank guarantee to cover the risk. It does not behove to get a bank guarantee from a particular bank which charged higher rates.

For the reasons aforementioned, the award of the Arbitrator and the order under challenge are set aside and the appeal is allowed.

(AMIT RAWAL)
JUDGE

November 30, 2016
Pankaj*

Whether speaking/reasoned	Yes
Whether reportable	Yes