

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP No.19184 of 2014
Date of decision: 16.05.2016

AND

CWP No.20786 of 2014

Dhandi Builders Limited

... Petitioner

Versus

Advisor to Administrator, Union Territory of Chandigarh and others
... Respondents

CORAM: HON'BLE MR. JUSTICE S.J. VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE ARUN PALLI

Present: Mr. HS Dhandi, Advocate for the petitioner(s)
Mr. Sanjeev Sharma, Senior Standing Counsel,
UT Chandigarh with Mr. Ashish Rawal, Advocate
for respondents No.1 & 2.

ARUN PALLI J.

This order shall decide these two civil writ petitions, for the question that arises for determination in both is common. However, the facts are being culled out from Civil Writ Petition No.19184 of 2014.

Petitioner i.e. Dhandi Builders Limited was awarded a composite work of construction of 96 flats (Category II, Group III) in Sector 51-A, Chandigarh, for a sum of Rs.3,52,84,921/-, vide memo dated 08.05.2002, issued by Executive Engineer IV, Chandigarh Housing Board (hereinafter referred to as, "the Board"). A formal contract entered into between the parties, dated 14.05.2002, is appended as Annexure P7 with the petition.

Likewise, a similar contract for construction of 88 flats (Category II, Group IV) in Sector 51-A, Chandigarh was also assigned to the petitioner, for Rs.3,23,38,773/-, vide memo of an even date. Rest of the terms and conditions of the contract were identical as in the other agreement.

The petitioner is alleged to have failed to complete the work at various stages as per the terms of the contract. Resultantly, a show cause notice, dated 05.09.2002, was served upon it; as to why action under clauses 2, 3, 3(a) & 3(c) of the contract be not taken. Eventually, the Executive Engineer-III (Civil), in terms of clause 2 of the contract, levied compensation @ 10% of the estimated cost of the work amounting to Rs.35,28,492/-, upon the petitioner. And the contract itself was also rescinded vide order dated 06.01.2003. Being aggrieved, petitioner submitted a representation to the Chairman of the Board on 09.01.2003, in terms of clause 2 of the contract, and requested to waive the imposition of penalty by way of compensation. Vide order dated 13.02.2003, Sh. G.S. Rosha, the then Superintending Engineer of the Board, was designated by the Chairman as his authorized nominee to adjudicate upon the said representation. And at the same time, petitioner also preferred a Civil Writ Petition No.1047 of 2003, for the Board had also rescinded the contract itself. However, this court dismissed the said writ petition vide order dated 13.05.2003, for in terms of Clause 25A of the Contract, the dispute between the parties was arbitrable. Resultantly, pursuant to an application, dated 24.07.2003, submitted by the petitioner, Sh.

G.S. Rosha was also appointed as Arbitrator to adjudicate upon the dispute between the parties. Thus, Sh. G.S. Rosha was seized of the two disputes; (a) arising under clause 2, and (b) arbitration proceedings arising under clause 25A of the contract. The matter remained inconclusive for a long time till vide an order dated 21.02.2012 (Annexure P1), Sh. G.S. Rosha concluded that levy of compensation and subsequent rescission of the contract by the Board was unjustified. The conclusion arrived at reads thus:

“27. In view of the above findings, I come to the conclusion that the levy of compensation and subsequent rescission of the contract of the agency by the respondent Board vide its letter dated 06.01.2003 was unjustified, not in accordance with the true spirit of the signed Contract Agreements, legal position and facts brought on record and is thus set aside. The Board thereby committed a breach of the Contract with the result that the Board had no right to levy any compensation on the claimant agency and also either to retain the dues payable to the claimant by way of final bill of the work or to forfeit the security deposit of the Claimant in an attempt to recover any alleged compensation on account of liquidated damages or on account of expenses incurred by it in getting the work completed at the risk and cost of the agency.”

Likewise, vide an arbitral award of an even date, he also accepted the claims of the petitioner. Against the award rendered by the Arbitrator, the Board filed objections under Section 34 of the Arbitration & Conciliation Act, 1996. Whereas, against the order under Clause 2, the Board preferred an appeal under Section 72-A of the Haryana Housing Board Act, 1971 (as extended to Union Territory Chandigarh) [for short, ‘the Act’]. Petitioner preferred two

civil writ petitions, bearing CWP No.13026 of 2012 & CWP No.13594 of 2012, for there were two separate orders arising out of two separate contracts, and questioned the maintainability of the appeals. However, on a statement made by counsel for the Board that a decision was taken to withdraw those appeals, the petitions were accordingly dismissed by this court vide order dated 10.12.2012 (Annexure P2). For, the Board assailed the order, dated 21.02.2012, this time, vide a revision petition under Section 72-B of the Act, before the Advisor to the Administrator, UT Chandigarh (respondent No.1), petitioner again preferred a Civil Writ Petition No.15236 of 2013, and questioned the jurisdiction of respondent No.1 to hear and adjudicate upon the matter. This court vide order, dated 18.07.2013, dismissed the said petition with liberty to the petitioner to raise the issue as regards jurisdiction before the revisional authority itself. Accordingly, the petitioner moved a formal application, dated 30.10.2013 (Annexure P5), before respondent No.1 and questioned the maintainability of the revision preferred by the Board. But, vide order dated 28.07.2014, respondent No.1 (Advisor) concluded, for the Chief Engineer of the Board had decided the representation of the petitioner as an appellate authority, he was competent to hear the revision against the said order. The conclusion arrived at reads thus:

“The present revision petition has been filed under Section 72-B of the Haryana Housing Board Act, 1971 (as extended to UT, Chandigarh) and as per Section 72-B of the aforesaid Act, “the Administrator may either suo moto or on an application of the party, call for and examine the record of any proceedings or decision or

order passed by the Board, Chairman, Chief Executive Officer or Officer of the Board for the purpose of satisfying itself as to the legality or propriety of any decision or order passed and if in any case it shall appear to the Administrator that any such decision or order should be modified, annulled or revised, the Administrator may after giving the persons affected thereby an opportunity of being heard, pass such order thereon as it may deem fit". The Finance Department, Chandigarh Administration has issued notification dated 4.4.2005 vide which the powers exercised under Section 72-B of the Haryana Housing Board Act, 1971 (as extended to Chandigarh) by the Administrator have been delegated to the Adviser to the Administrator, Union Territory, Chandigarh. Since the Chief Engineering has decided the matter under Clause 2 of the Agreement in the capacity of Appellate Authority, this court is fully competent to hear the revision petition filed under Section 72-B of the Act. To come up for further hearing on merits on 17.9.2014.

The orders were reserved on 28.5.2013 and are being released today the 28th July, 2014.

**Sd/-
(K.K. Sharma)
Adviser to the Administrator,
Union Territory, Chandigarh."**

That is how, the said orders are under challenge in these two writ petitions, referred to above. For, even the objections preferred by the petitioner against the award rendered by the Arbitrator (Sh. G.S. Rosha, CE), were also dismissed by the Additional District Judge, Chandigarh, vide order and judgment dated 20.12.2014, the Board preferred two separate appeals i.e. FAO No.3091 of 2015 and FAO No.3108 of 2015, before this court. And, on being apprised of the fact that a Civil Writ Petition No.19184 of 2014, between the parties, as regards jurisdiction of

respondent No.1 (Advisor), is pending before the Division Bench, and there being some similarities between the issues arising in both the matters, the learned Single Judge vide order, dated 13.12.2015, ordered those appeals to be heard with these petitions.

Learned counsel for the petitioner submits that objection as regards the very jurisdiction of respondent No.1 to hear the revision petition was specifically raised, but an analysis of the order, that is being assailed, shows that respondent No.1 failed to adjudicate upon the said question, and justify as to how the revision against an order dated 21.02.2012, was even competent. Instead, he submits that respondent No.1 delved into the merits of the dispute, for he observed that the Chief Engineer under Clause 2 of the Contract could, at best, only reduce the amount of compensation, whereas he set aside the order dated 06.01.2003 itself. He submits that as the order, dated 21.02.2012, was passed in terms of Clause 2 of the Contract, therefore, the Act had no bearing vis-à-vis the rights and obligations of the parties. He submitted that the order dated 21.02.2012 is under the Contract and not under the Act and, therefore, the revision preferred by the Board under Section 72-B of the Act was not competent. Further, a bare analysis of Clause 2 of the Contract reveals that an order passed by the Chairman Chief Engineer of the Board or his authorized nominee, was final. Therefore, no further remedy either by way of appeal or revision was/is even conceivable, least under the Act.

On the contrary, learned senior counsel for the respondents submits that under Section 72-B of the Act, the Advisor either suo moto, or on the application of a party, could call for and examine the records of any proceedings, decision or order passed by the Board, Chairman, Chief Executive Officer or Officer of the Board to examine the legality and propriety of any such decision. The powers exercised by Administrator are delegated to the Advisor. The Board is a statutory body, established under the Act, and it was in terms of Section 17 of the Act, that the Contract was entered into between the parties. Therefore, he submits that the order, dated 21.02.2012, passed by Sh. G.S. Rosha upon the representation submitted by the petitioner being an authorized nominee of the Chairman of the Board was one under the Act and a revision petition under Section 72-B of the Act, against the same, was competent.

We have heard learned counsel for the parties and perused the records.

A short but a significant question that requires determination by us is; **Whether a revision petition under Section 72-B of the Act, would be competent or maintainable against an order, rendered by the nominee of the Chairman of the Board, in terms of Clause 2 of the Contract?**

Before we refer to and interpret the provisions of Section 72-B of the Act, to ascertain its true scope and ambit, we deem it expedient to point out that the Haryana Housing Board Act, 1971 (As extended to Chandigarh) was enacted solely with a view to

provide for measures to be taken to deal with and satisfy the need of housing accommodation. For, the State Housing Boards were considered to be the best agencies for speedy implementation of the housing programmes.

The Housing Board Chandigarh (Eviction from Board Premises) Rules, 1979 were promulgated under Section 73 and the Chandigarh Housing Board (Allotment, Management and Sale of Tenements) Regulations, 1979 were framed under Section 74 of the Act to carry out the purpose of the Act. For, it would be significant in context of the issue that arises for consideration, we may also refer to the provisions of Sections 17 and 72-A of the Act, which read thus:

“17. Power to make contracts. – The Board may enter into and perform or require the performance of all such contracts as it may consider necessary or expedient for carrying out any of the purposes of this Act.

XXX XXX XXX
XXX XXX XXX

72-A. Appeal- (1) Save as otherwise expressly provided in any other provision of this Act, an appeal shall lie from an original or appellate order of any officer of the Board or the Chairman under this Act or any rule or regulation made thereunder –

- (a) to the Chairman when the order is made by any officer of the Board;**
- (b) to the Board when the order is made by the Chairman.**

(2) Every such appeal shall be preferred within a period of thirty days of the date of communication of the order:

Provided that the Chairman or the Board as the case may be, may entertain the appeal after the expiry of the period of thirty days if it is considered that the appellant was prevented by sufficient cause from filing the appeal in time.”

And, likewise Section **72-B** provides a remedy by way of revision, the provisions which we are required to interpret and construe:

72-B. Revision. – The Administrator may either suo moto or on an application of a party, call for and examine the record of any proceedings or decision or order passed by the Board, Chairman, Chief Executive Officer or Officer of the Board for the purpose of satisfying itself as to the legality or propriety of any decision or order passed and if in any case it shall appear to the Administrator that any such decision or order should be modified, annulled or revised, the Administrator may, after giving the persons affected thereby an opportunity of being heard, pass such order thereon as it may deem fit.”

Provisions, that have been set out above are clear, precise and incapable of any misconstruction. A bare analysis of the intent, purport and operation of the Act irresistibly shows that an appeal under Section **72-A** of the Act would lie to the Chairman or to the Board only against those orders that are passed under the Act or any rule or regulation framed thereunder. Such as, those arising out of eviction proceedings, under Section 51 of the Act, against the unauthorized occupants of the premises of the Board,

allotment, management and sale of tenements. Likewise, Section 72-B takes within its sweep only those orders that are passed by the Board, Chairman, Chief Executive Officer or Officer of the Board, in exercise of powers under the Act. Undoubtedly, the contract, dated 14.05.2002, was entered into between the parties in terms of Section 17 of the Act, but the order, dated 21.02.2012, was not passed by the authorized nominee of the Chairman either under Act or the Rules or Regulations framed thereunder, but in terms of Clause 2 of the Contract. It would be apposite, at this juncture, to refer to Clause 2 of the Contract, which read thus:

“Clause 2. – The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor, and shall be reckoned from the date on which the order to commence work is given to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence (time being deemed to be of the essence of the contract on the part of the contractor) and the contractor shall pay as compensation an amount equal to one per cent or such smaller amount as the Executive Engineer (incharge) may decide, on the amount of the estimated cost of the whole work as shown by the tender for every day that the work remains uncommenced or unfinished after the proper dates. And further to ensure good progress during the execution of the work the contractor shall be bound in all cases in which the time all owed for any work exceeds one month to complete one-fourth of the whole of the work before one fourth of the whole time allowed under the contract has elapsed, one-half of the work, before one half of such time has elapsed and three-fourth of the work before three-fourth of such time elapsed. In the event of the contractor failing to comply with this condition he shall be liable to pay as compensation an amount equal to one per cent or

such smaller amount as the Executive Engineer Incharge may decide on the said estimated cost of the whole work for every day that the due to quantity of work remains incomplete provided always that the entire amount of compensation to be paid under the provision of this clause shall not exceed ten per cent in the estimated cost of work as shown in the tender. The Chairman Chief Engineer, Chandigarh Housing Board or his authorized nominee may, on a representation from the contractor reduce the amount of compensation and his decision in writing shall be final.”

Clause 3 stipulates the various actions that the Executive Engineer may take upon the petitioner being liable to pay compensation. Ex facie, disputes between the parties had arisen on account of the alleged non-performance of the contract by the petitioner, and not because of any breach or violation of the provisions of the Act or orders passed thereunder. Significantly, clause 2 of the Contract, and not any provision of the Act, enabled the Executive Engineer (Civil) to levy compensation, vide order dated 06.01.2003, on account of the delay that purports to have been caused in completion of the project. And, clause 2 itself provides a remedy, by way of representation, to the contractor/petitioner against the said order, to the Chairman, Chief Engineer of the Board or his authorized nominee. That is how, the authorized nominee of the Chairman examined the dispute and held the levy of compensation upon the petitioner to be unjustified. Further, the order dated 21.02.2012 (Annexure P1), was never passed by the authorized nominee as an appellate authority, for there was no appeal, but only a representation submitted by the

petitioner in terms of clause 2 of the Contract. For, any further appeal or revision against the said order was/is not envisaged under the Contract, so none could be competent or lie. Least under the Act. So much so, clause 2 of the Contract postulates that the order passed by an authorized nominee shall be final. Meaning thereby, the parties by an intent had excluded any further appeal or revision to any officer or authority to assign finality to the said order. That being so, it defies logic that the Board could assail the order dated 21.02.2012 (Annexure P1), by way of a revision under Section 72B of the Act. The Act had a limited relevance i.e. to enable the Board to enter into a contract in terms of Section 17 of the Act, and not thereafter. Post execution of the agreement, disputes, if any, inter se the parties shall have to be determined in terms of the conditions of the contract.

Matter in issue can be analyzed from yet another perspective, for which we need to refer to Clause 25-A of the Contract, which reads thus:

“Clause 25-A. – If any question, difference or objection whatsoever shall arise in any way connected with or arising out of this instrument or the meaning or operation of any part thereof or the rights, duties or liabilities of either party, then same insofar as the decision of any such matter is hereinbefore provided for and has been so decided every such matter including whether its decision has been otherwise provided for and/or whether it has been finally decided accordingly or whether the contract should be terminated or has been rightly terminated and as regards the rights and obligations of the parties as the result of such termination shall be referred for arbitration to the

Chairman/Chandigarh Housing Board, or his authorized nominee S.E./C.E. CHB, or acting as such at the time of reference within 180 days viz., six months from the date of making final payment to the contractor or when the contractor is not willing to receive the payment from the date a registered notice is sent to him that his final Bill.”

A bare reading of clause 25-A reveals that in the event of dispute between the parties, the matter can be referred for arbitration to the Chairman of the Board or his authorized nominee i.e. S.E./C.E. of the Board. If the argument that is being advanced on behalf of the respondents is accepted, it would mean that even an award rendered by the Superintending Engineer or Chief Engineer of the Board, as an Arbitrator, shall also be assailable by way of appeal or revision under the Act. Not just that, Clause 25-A further reveals that even those matters, for which the decision is already provided for in the contract or have been so decided, shall also be referred for arbitration. Therefore, the submission that an order passed by the authorized nominee is revisable under Section 72-B of the Act, if accepted, would render the arbitration clause nugatory or otiose.

In the conspectus of the position, as set out above, the order rendered by the authorized nominee of the Chairman, in terms of Clause 2 of the Contract, dated 21.02.2012, could neither be assailed by way of appeal nor was it revisable under Section 72-B of the Act. Therefore, the only and inevitable conclusion we could arrive at is; that the revision preferred by the Board to the

Advisor (respondent No.1) is not competent in law and, thus, the consequent proceedings are wholly without jurisdiction.

Accordingly, the writ petitions are allowed and as a consequence the order, dated 28.07.2014 (Annexure P6), is set aside. For, we have only determined the issue as regards the maintainability of the revision, preferred by the Board, under Section 72B of the Act, necessarily the appeals i.e. FAO Nos.3091 and 3108 of 2015, shall have to be decided separately, therefore, the same be placed before the learned Single Judge as per roster.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

(ARUN PALLI)
JUDGE

16.05.2016
Rajan

Reportable
