

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

FAO No. 4813 of 2011 (O&M)
Date of decision : January 15, 2016

The Executive Engineer, HUDA, Hisar

..... Appellant

Versus

The Sanjay Kiloi, Dopana L&C Society Ltd.and another

..... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Dinesh Nagar , Advocate
for the appellant.

Mr. Vivek Khatri, Advocate
for respondent No.1.

1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

Amit Rawal, J (oral).

HUDA is aggrieved of the order dated 17.1.2011 vide which objections filed by the Society under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside of the award dated 26.8.2009 has been allowed.

Learned counsel for the appellant submits that the agreement bearing No. 1545 of 2006-07 was entered into between the Executive Engineer HUDA and Society in respect of the work "Providing and fixing of barbed wire fencing on RCC pillars around sector 3 & 5 Hisar and all other works contingent thereto". Approximate Cost of ₹9.45 lacs which was restricted to amount of

₹7,54,740/- allotted vide No. 241 dated 16.1.2007 to the respondent.

The Society-respondent No.1 had submitted the tender. After opening the tender it was found to be the lowest and work was allotted vide letter dated 16.1.2007. As per the said letter the work was to be completed within three months w.e.f.16.1.2007. Clause 25-A of the agreement provide that in case of dispute between the parties the same was to be referred to the Arbitrator. A dispute arose between the parties and the Superintending Engineer was nominated as arbitrator to adjudicate the dispute between the parties. As per the said agreement with the issuance of acceptance letter, the contract between the parties deem to have been concluded, thus, prays that the objecting court has committed illegality and perversity in accepting the objections by holding that the agreement was not a contract as no contract agreement was signed, rather, objecting court has mis-interpreted the documentary evidence brought on record, thus, the impugned order is liable to be set aside.

Learned counsel appearing on behalf of the Society-respondent No.1 submits that the award aforementioned was an ex-parte award which was not valid as the agreement has not been signed by both the parties. The arbitrator after entering into reference did not issue any notice to the Society. No show cause notice was served by HUDA seeking appointment of the arbitrator, thus, prays for dismissal of the appeal.

I have heard learned counsel for the parties and appraised the paper book.

I am of the view that HUDA-appellant had initiated

action against the Society on the basis of the contract. Mere acceptance of the offer does not amount to valid contract. The acceptance of the instructions in the letter of acceptance that acceptance letter would be a contract does not have any force as the petitioner-Society was requested to sign the written agreement on any working day. Once the agreement has not been signed there was no contract, thus, the arbitrator had failed to notice the aforementioned fact. Even otherwise, the arbitrator did not record satisfaction viz-a-viz service of arbitration proceedings upon the respondents. The objecting Court found that the arbitrator had mis-conducted the arbitration proceedings and set aside the award. The operative part of the order of objecting court reads thus:-

9. *The facts of this case are speaking themselves. There is not dispute the respondents floated the tender with regard to execution of work “providing and fixing of barbed wire fencing of RCC pillars around sector 3 & 5, Hisar and all other works contingent thereto”. The respondent in reply to petition in para No. 3 on merits admitted the tender for the work submitted by the petitioner society was found to be lowest and in response to the same work was decided to be allotted to the petitioner society and the acceptance letter was issued in favour of petitioner society as per letter No. 610 dated 08.01.2007 issued by the respondent stipulating the period to perform the work within three months from the date of issuance of letter. The allotment/acceptance letter contained instructions that with the issue of acceptance letter petitioner society contract stood concluded. The petitioner society was requested to sign the contract*

agreement on any working day and respondent admitted petitioner never turned up to sign the contract agreement with mala fide intention. Once, the petitioner society did not sign the contract agreement either with mala fide intention or genuinely by one thing is clear it was no agreement, legally, enforcement between the parties but the arbitrator considered it an agreement and in the absence of legally and valid contract between the parties, entering into reference by the Arbitrator and conducting himself subsequent proceedings is illegal. On this score Arbitrator mis-conducted himself. From the perusal of arbitral proceedings it is again clear Arbitrator had not retained on the record, either, original agreement or its photocopy and due to this reason Court is not in position to look into the legally valid aspect of the said agreement between the parties and non-making of an effort by the Arbitrator to retain on record either original or duplicate agreement make clear, he danced at the tune of respondent No. 1. As per the own pleadings of the respondent No. 1, it is clear that the petitioner society was to complete the work within the time of three months with effect from 18.01.2007 and this period expired on 17.04.2007 and during this period petitioner had not contacted to the Sub Divisional Engineer of HUDA at Hisar for starting work. This fact again makes clear, the respondent No. 1, initiated action against the petitioner society on this basis of unilateral contract. It is settled law mere acceptance of offer does not amount valid contract as per provisions of the Contract Act, 1872. When there was no legal and valid contract between the parties the entering into reference by the Arbitrator is illegal, Arbitrator exceeded his jurisdiction which amounts to misconduct on his part and on his score award dated 24.08.2009 is liable to set aside. Further more, assuming

there was valid and legal agreement between the parties and then petitioner society committed breach of contract and as per Clause-25-A of contract agreement between the parties the Arbitrator was appointed to adjudicate the dispute. On entering into reference the Arbitrator was required to give notice to the petitioner society and from the perusal of the arbitral proceedings, it is clear Arbitrator issued memo No. 13708 dated 29.09.2008 against the petitioner society and directed Krishan Kumar, Clerk to deliver the said letter upon society but he reported to Sh. Ishwar Singh, Executive Engineer, HUDA Division No.-1, Hisar that no office of the petitioner was situated on the address give and thereafter, Arbitrator issued another letter dated 17.10.2008 effect service upon the petitioner through publication but to the astonishment of the Court, no newspaper has been brought on the record showing that petitioner society was ever served throughout the arbitral proceedings. It is clear, the Arbitrator has not passed specific order against the petitioner society ordering exparte proceedings against them. The Arbitrator was required to pass specific order with regard to proceedings exparte against the petitioner society and this is sheer illegally amounting to mis-conduct on the part of the Arbitrator who without hearing the petitioner society proceeded ahead. The present petition has been filed by the society being legal entity and throughout the Arbitrator proceedings it has nowhere been shown by whom it was being represented, for example, by its president, vice-president, Secretary etc. When the notice to the society was not sent through its representative then how could the service be effected upon the society. On this score, the Arbitrator also mis-conducted himself while ignoring the rule of procedure.

10. *Due to the reasons stated hereinbefore, it*

has clearly been established on record, the Arbitrator mis-conduct the arbitral proceedings prior to pronouncing of award dated 24.08.2009 and on this score , said award dated 24.08.2009 is liable to be set aside. Issue in favour of the petitioner.

Keeping in view the aforementioned facts, I do not intend to differ with the finding rendered by the objecting court, which is based on appreciation of oral and documentary evidence.

In view of what has been observed above, the appeal is devoid of merits, accordingly, the same is dismissed.

**(AMIT RAWAL)
JUDGE**

**January 15 , 2016
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