IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. FAO No.1067 of 2015 (O&M)
Date of decision : 02.12.2016

Punjab Health Systems Corporation, Mohali ...Appellant

Versus

M/s Nagarjuna Construction Co. Ltd. ...Respondent

2. FAO No.911 of 2014 (O&M)
Date of decision : 02.12.2016

Punjab Health Systems Corporation, Mohali ...Appellant

Versus

M/s Nagarjuna Construction Co. Ltd. ...Respondent

3. FAO No.912 of 2014 (O&M)
Date of decision : 02.12.2016

Punjab Health Systems Corporation, Mohali and another ...Appellants

Versus

M/s Nagarjuna Construction Co. Ltd. ...Respondent

4. FAO No.913 of 2014 (O&M)
Date of decision : 02.12.2016

Punjab Health Systems Corporation, Mohali ...Appellant

Versus

M/s Nagarjuna Construction Co. Ltd. ...Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

Present: Mr. D.V. Sharma, Sr. Advocate with
Ms. Jasleen Kaur, Advocate for the appellant.

Mr. P.S. Rana, Advocate for the respondent.

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AMIT RAWAL, J. (Oral)

This order of mine shall dispose of four appeals filed at the instance of employer arising out of decision of four awards in respect of contract allotted to the Contractor for construction of Mental Hospital, at Amritsar.

Mr. D.V. Sharma, learned Senior Counsel assisted by Ms. Jasleen Kaur, learned counsel appearing on behalf of the appellant submits that total price of the contract entered into on 16.04.2001 was ₹38,28,16,522/-. The completion was to be done upto 15.07.2002. However, same could not be done and an extension in this regard was given, ultimately, upto 31.03.2003, but the Contractor left the work incomplete, in essence, balance work of certain lacs of rupees was yet to be completed. Though, appellant-employer did not invoke the clause of risks and costs but assessed the liquidated damages by deducting the amount at the rate of ₹32,000/- per day and the outstanding bill was in minus. Since the parties were at variance with regard to respective claims, all the disputes were referred to the Arbitrator against the decision given by the DRE (Dispute Review Expert) as the contract also envisaged that prior to reference to arbitration, the adjudication of the dispute by DRE and having failed to arrive at consensus, the matter, aforementioned, was referred to the Arbitral Tribunal consisting of three arbitrators. The arbitrator erroneously allowed the claim No.6 running to the tune of ₹2,85,44,531/- along with 10% compounded interest as per the provisions of Clause 60.8 a and b of the contract. The interest factor is too phenomenal. Keeping in view the downfall trend in the market and as well as the financial hardship being faced by the various agencies, interest should not have been more than 9% simple interest. The arbitral tribunal also abdicated in not referring to the certain documents which actually were not received in the office and the claims qua submission of 19th running Bill has erroneously been accepted. The arbitral tribunal also ordered for release of security to the amount of ₹36,00,000/- along with interest and for payment of ₹22,00,000/- for incompletion of the boundary wall, on the premise that labour of the contractor remain idle. All these factors have not been taken care of, even rent at the rate of ₹86,000/- per month for using the office of Collector by contractor was permitted, but the contractor unilaterally without any permission conducted the repair to the tune of ₹1,20,000/-, therefore, rent has been reduced to ₹17,000/- per month.

He further submits that there has been misreading of the terms and conditions of the contract which itself is a ground for challenge as per provision of Section 34 of the Act. It is in this backdrop of the matter, the objections were filed as award was against the public policy, much less, on examination of the same, and as per appellant's opinion it suffers from the patent illegality. No doubt the scope of interference in the award of the arbitrator is limited but the present case is the one where award is not sustainable in view of lot of ambiguities and patent illegalities.

Per contra, Mr. P.S. Rana, learned counsel appearing on behalf of respondents submits that awarding of 10% of the interest on the balance ₹89,00,000/- is perfect, legal and justified, in essence, contractor's deduction of 10% on the total amount of work i.e. ₹38.28 crore was erroneous, for, major work had already been done. The contractor had submitted the 19th running Bill which as per the provision of the terms and conditions of the contract had to be certified by the Engineer, whereas it had been done at the SDO level and rightly so, said claim has been rejected. The claim is perfect, legal and justified. This Court cannot re-appreciate the evidence which has been looked into in extenso by the arbitrator, even if formed an different opinion in view of ratio decidendi culled out by Hon'ble Supreme Court in *Navodya Mass Entertainment Ltd. Versus J.M. Combines, 2015 (5) SCC 698*. Award does not suffer from patent illegality and would not fall within the ratio decidendi culled out by Hon'ble Supreme Court relied upon by Mr. D.V. Sharma, Sr. Advocate i.e. *National Highways Authority of India Versus Cementation India Ltd., 2015 (3) R.A.J. 1*. Compounding of the interest is permissible in view of ratio decidendi culled out by Hon'ble Supreme Court in *M/s Hyder Consulting (UK) Ltd. vs. Governor State of Urissa through Chief Engineer 2016(6) SCC 362*, therefore, it does not lie in the mouth of the appellant to challenge the compounding interest. Even Compounding interest was never alleged or protested before the arbitrator and, therefore, the appellant is deemed to have been waived as per the provision of Section 4 of 1996 Act and thus urges this Court to affirm the findings under challenge as objections were not falling within the realm of Section 34 of 1996 Act.

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

Though at the first blush, arguments of Mr. D.V. Sharma, learned Senior Counsel in allowing the compounding interest on all claim at the rate of 10% looks very attractive but on going through the terms and conditions of the contract particularly Clause No.60.8 (a) and (b) which are reproduced hereinbelow:-

> *"60.8(a) The amount due to the Contractor under any interim payment certificate issued by the Engineer pursuant to this clause, or to any other term of the contract, shall, subject to Clause 47, be paid by the Employer to the Contractor as follows:-*
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> *i. in the case of interim payment certificate, within 42 days after the Contractor's monthly statement has been submitted to the Engineer for certification, pursuant to Sub-Clause 60.1. Provided that if the Engineer's interim certificate has not yet been issued within said 42 days, the Employer shall pay the amount shown in the Contractor's monthly statement and that any discrepancy shall be added to, or deducted from, the next payment to the Contractor;*
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> *ii. in the case of the Final Payment Certificate pursuant to Sub-Clause 60.13 within 84 days after the Final statement and written discharge have been submitted to the Engineer for certification;*
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> *(b) In the event of the failure of the employer to make payment within the times stated, the employer shall pay to the Contractor interest compounded monthly at the rate(s) stated in the Appendix to Bid upon all sums unpaid from the date upon which the same should have been paid. The provisions of this Sub-Clause are without prejudice to the*

Contractor's entitlement under Clause 69 or otherwise."

compound interest, not only on the interim bill but also on the other items of the contract, is permissible.

I have gone through the award of the arbitrator in extenso and findings given by the arbitrator, granting the compensation at the rate of ₹2,85,44,531/- vis-a-vis claim No.6, deemed to be justified as dismantling charges have been deducted and during the pendency of the proceedings before the arbitrator called upon the employer to produce 19th Bill submitted by the contractor, but failed to produce the same, whereas SDO prepared the same in minus which is not the requirement of law. It has to be certified by the Engineer-in-Chief, thus, evidence of the contractor has gone unimpeached. Similarly, on other lines regarding release of the security, in my view, findings of the arbitrator is perfect, legal and justified as contractor is entitled to seek the refund of the security given for the entire work and majority of the work according to Mr. Rana, Advocate has been done.

Regarding the liquidated damages imposed by the Department, ₹32,000/- per day on the total cost has also been debated by the Arbitrator on the premise that only work amounting to ₹89,00,000/- was left and thus, while applying 10% had assessed the claim and held the deduction of the Department to be not in accordance with terms and conditions of the contract and evidence brought on record. The arbitral tribunal being expert, consisting of three arbitrators have gone into the matter extensively. This Court cannot sit in the arm chair of the appellate Court and re-examine the evidence in view of ratio decidendi culled out by *Navodya Mass Entertainment Ltd's case (Supra)*. However in the peculiar facts and circumstances of the case, I am of the view that awarding of the interest @ 10% compounded on all the claims is highly phenomenal, much less, onerous.

During the course of hearing, I called upon Mr. Rana, Advocate for granting the concession with regard to interest and he on instructions from his client, fairly agreed for reduction of the interest at the rate of 11% per annum instead of compound interest. This concession of Mr. Rana, Advocate is appreciated by the Court.

Keeping in view the aforementioned fact, award of the arbitrator and all claims are upheld.

However, there is modification in the award and all the claims shall contain the element of simple interest @ 11% p.a.. There shall be no compound interest.

With the aforementioned modifications, all appeals are partly allowed.

There shall be no change on the date of accrual of the interest also.

02.12.2016 **(AMIT RAWAL)**
pawan **JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No