

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

FAO-1361-2015

Date of decision : 28.05.2016

M/s Poonam Construction Company

... Appellant

Versus

Chandigarh Housing Board, Sector 9, Chandigarh and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr.Sunil Chadha, Senior Advocate
with Mr. Chetan Bansal, Advocate
for the appellant.

Mr. Ashish Rawal, Advocate
for respondent No.1.

AMIT RAWAL, J.(ORAL)

The appellant-contractor is aggrieved of dismissal of the petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called '1996 Act') seeking setting aside of the award dated 27.02.2012 whereby the claim of the respondent to the tune of ₹10,84,586/- along with interest has been awarded.

Mr. Sunil Chadha, Senior Advocate assisted by Mr. Chetan Bansal, Advocate in support of his grounds of appeal has raised the following submissions:-

The appellant-contractor on 02.03.1982 was awarded a

contract for construction of 88 MIG(D) Group V Flats in Sector 41-A, Chandigarh at a total cost of ₹22 lacs which was to be completed within 12 months. First extension was granted upto 30.04.1983, thereafter another extension upto 30.04.1984. Though the third extension was recommended but was not granted by the then Executive Engineer. Vide letter dated 27.05.1985, the Contractor received a notice of imposition of penalty and finally vide letter dated 01.06.1985, appellant-contractor was called upon to associate for joint measurement and thereafter vide notice dated 03.06.1985, the respondent-Board terminated the contract. It is matter of record that work was allegedly completed in February 1986 through the agency of another contractor and the payment to other contractor was also made as way back as in 1986. He submits that the contractor was entitled to receive the payment for the work already undertaken. The department had prepared the bill on 14.04.1987 but did not make the payment. The matter was kept under carpet and suddenly the jurisdiction of the Arbitrator by taking the date of reckoning as January 1987 i.e. when the payment of money to be disbursed to the Contractor was sanctioned was invoked. On 28.01.1997 the then Executive Engineer, Chandigarh Housing Board,

Chandigarh wrote a letter to the Contractor that bill of the contract had been passed though was in minus i.e. for ₹9,14,534/-. It was further informed that after deducting security of ₹49,948/-, a sum of ₹8,64,586/- was outstanding against the contractor and on the basis of determination of aforementioned amount, the matter was referred to respondent No.2 for adjudication through arbitrator. On June, 1987, the claim petition was filed before the Arbitrator but the Arbitrator did not assign any reason as to how the claim was within limitation. He submits that in the first round of arbitration proceedings, the contractor was proceeded against ex-parte and ex-parte award dated 09.05.2003 was passed and finally objections under Section 34 were allowed and award was set aside vide order dated 24.01.2006. It is the said impugned award dated 27.02.2012 after contest had been assailed against which the objections were filed whereby the counter claim of ₹32,32,348/- has been rejected and claim of Chandigarh Housing Board to the tune of ₹10,84,586/- along with interest at the rate of 9% has been awarded. In this regard, reliance was placed upon the judgment of this Court in *Amarpal Singh Vs. The Executive Engineer, Public Health (RWS) Division, Muktsar, 2011(1) PLR 311* to contend that in case the

party has raised the objection qua the claim being barred by law of limitation, the same can always be agitated as per provisions of Section 3 of the Limitation Act, 1963.

Mr.Ashish Rawal, arguing counsel appearing on behalf of the Board submits that the terms and conditions of the contract are sacrosanct between the parties and cannot be deviated. A plain and simple reading of Clause 25 (A) of the Contract leads to irresistible conclusion that the limitation of the claim would rise from the date of making of final preparation. Once the Board had made the payment and arrived at calculation vide letter dated 28.01.1997 whereby some aforementioned amount was found due would be one to be taken into consideration for the purpose of limitation. He further submits that in the earlier arbitration proceedings the contractor had willfully absented, therefore, there was no reason for the Chandigarh Housing Board to bring into force provision of Section 25(A) of the Contract Act. The objections were not falling within parameters of Section 34 of the Arbitration and Conciliation Act and rightly so have been dismissed.

I have heard counsel for the parties and appraised the paper books and am of the view that there is merit and force in the submissions of Mr. Chadha.

Relevant extract of Clause 7 and 25(A) of the contract is quoted thus:-

“Clause 7

No payments shall be made for work estimated to cost less than rupees one thousand, till after the whole of the

work shall have been completed and a certificate of completion given. But in the case of works estimated to cost more than rupees one thousand the Contractor shall on submitting bill thereof be entitled to receive a monthly payments proportionate to the part thereof than approved and passed by the Engineer-in-charge whose certificate of such approval and passing of the sum so payable be final and conclusive against the Contractor. But all such intermediate payments shall be regarded as payments by way of advance against the final payment only and as not as payments of work actually done and completed and shall not preclude the requiring of bad, unsound erected, or be considered as an admission claim nor shall it conclude. Determine or affect in any way the powers of the Engineer-in-charge under these conditions, or any of them as to the final settlement and adjustment of the accounts and otherwise, or in any other way vary or affect the Contract. The final bill shall be submitted by the Contractor within one month of the date fixed for completion of the work, otherwise the Engineer-in-charge's certificate of the measurement and of the total amount payable for the work accordingly shall be final and binding on all parties.

Clause 25(A):

If any difference of 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 right, duties or liabilities of either party, then save in so far as the decision of any such matter is herein before 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 or acting as such at the time of reference within 180 days, viz. six months from the date making final payment to the Contractor or when the Contractor is not willing to receive the final payment from the date a registered notice is sent to him that his final bill is ready for payment and his decision shall be final and binding and where the matter involves a claim for or the payment or recovery or deduction of money, only the amount if any awarded in such Arbitration shall be recoverable in respect of the matter so referred.”

“If the matter is not referred to Arbitration within the specified period, all the rights and claims under the Contract shall be deemed to have been forfeited and absolutely barred.”

A plain reading of both the Clauses reveals that the matter shall be referred to the Arbitration on account of termination of the Contract 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 the final bill is ready for payment and decision shall be final and binding and where the matter involves a claim for or the payment or recovery of deduction of money, only the amount if any awarded in such Arbitration shall be recoverable in respect of the matter so referred and there is

specified period, the claim to be forfeited and much less to be barred.

In my view unless and until the statute does not prescribe the exclusion of the provision of Limitation Act, the parties cannot of their own volition count the period of limitation as has been fixed in the instant case i.e. 6 months. The facts noticed above leaves no manner of doubt that on 14.04.1987, the department had prepared the final bill but no explanation has come forth much less no notice was sent to the Contractor as per the condition contained in Clause (ibid) calling him to receive the payment or not to make payment. Neither proof of file movement nor notices in this regard have been placed on record. It is conceded position on record that the contractor did not at point of time acknowledged liability to make the payment so as to bring case within limitation in the year 1997. In essence, there is no acknowledgment as per provision of Section 18 of the Limitation Act 1963. Even, no copy of registered notices purported to have been sent by the Chandigarh Housing Board to the Contractor has seen the light of the day. In my view, the claim of the Housing Board in the year 1997 despite having prepared the bill as way back on 14.04.1987 was hopelessly barred by law of limitation.

I have gone through the award and find that the arbitrator has failed to assign any reasons. Nothing has been placed on record in the arbitration proceedings. In my view the award of the arbitrator is also not in consonance with the provisions of Sub Section 3 of Section 31 of the Act. Thus, the objections were squarely falling within parameters of

Section 34 but the objecting Court fallen in error in not appreciating the period of limitation.

For the foregoing reasons, the appeal stands allowed and the award is set aside and the claim of the Housing Board Chandigarh is hereby dismissed/rejected.

(AMIT RAWAL)
JUDGE

May 28, 2016.
Davinder Kumar