

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

**FAO No.1537 of 2016 (O&M)
Date of decision: May 04, 2016**

State of Haryana and others

....Appellants

Versus

M/s KCC Buildcon Pvt. Ltd. and another

....Respondents

CORAM:HON'BLE MR.JUSTICE HARINDER SINGH SIDHU

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Present: Mr.Rahul Mohanji, DAG, Haryana assisted by
Mr.Siddharth Sanwana, DAG, Haryana for the appellants.

HARINDER SINGH SIDHU, J.

The challenge in the present appeal is to the order dated 24.8.2015 passed by the Additional District Judge, Jhajjar whereby objections filed by the appellant – State of Haryana against the award dated 10.5.2014 and the corrected award dated 23.7.2014 have been dismissed.

The respondent was awarded work of widening and strengthening along with reconstruction of concrete pavement in Km 28.00 to 58.600 and 62.500 to 67.00 (SH-22) (Section-Jhajjar to Kosli) of Bahadurgarh-Jhajjar-Subana-Kosli road vide S.E. Jhajjar Office Memo No.2003 dated 30.11.2007 on agreement basis with time limit of twenty (20) months. The date of start of the work as per agreement was 15.12.2007 and date of completion was 14.08.2009. The defect liability period of the work was two years from the date of completion.

The case of the respondent- claimant was that it completed

the works in terms of the agreement on 23.05.2009. The final bill was submitted on 25th May, 2009, of which final approval was given by the Executive Engineer on 25th February, 2010. The Defect Liability period came to an end on 22.05.2011. In fact, Defect Liability Clearance Certificate was issued on 18.07.2011 which was to operate w.e.f., 22.05.2011 and all his claims should be settled on that basis. It was also urged that once the Defect Liability Clause ceased to operate it could not be extended after 22.05.2009.

Reliance was placed on clause 35 of the Agreement which dealt with the manner and method in which the Defect Liability Period is to operate:

“35. Correction of Defects

35.1 The Engineer shall give notice to the Contractor of any Defects before the end of the Defects Liability Period, which begins at completion and is defined in the Contract Data. The Defects Liability Period shall be extended for as long as Defects remain to be corrected.

35.2 Every time notice of a Defect is given, the Contractor shall correct the notified Defect within the length of time specified by the Engineer's notice.”

The appellants on the other hand referred to various communications which they had addressed to the claimant – respondent No. 1 to remove the defects. It was their case that the claimant in fact removed these defects. The sequence of correspondence after the letter dated 18.7.2011 vide which the Superintending Engineer, Jhajjar had recommended for clearance of Defect Liability Period to the Engineer-in-Chief was also relied upon. It was stated that in response to this letter the Head office after viewing the VCD communicated certain defects to the S.E. Office vide letter dated 22.07.2011 for

resubmitting the case after attending the observation. The Defects/Observation were notified to the claimant-respondent vide memo dated 08.08.2011 and again vide letter dated for 10.08.2011 for removal of defects. Thereafter, the Department pursued the matter with claimant for removal of defects vide Memos dated 13.10.2011, 03.11.2011, 24.11.2011, 27.12.2011, 30.12.2011 and 15.06.2012. The claimant-respondent accepted the fact of attending the defects vide letter dated 04.10.2011, which shows that the agency had not attended the defects completely earlier. Thus, the Defect Liability Period of the work was extended vide letter dated 05.09.2011 and again vide letter dated 30.12.2011 upto 31.05.2012 or till the rectification of defect by the agency. After completion of rectification of defects, Superintending Engineer, Jhajjar Circle, Haryana PWD B&R Branch, Jhajjar office vide memo dated 15.06.2012 had submitted the case for clearance of Defect Liability Period to Head Office duly recommended. The Head Office vide memo dated 02.07.2012 has authorised his office to issue completion of Defects Liability Period. Accordingly, Defect Liability Clearance Certificate was issued by this office of S.E. Jhajjar Circle office vide memo dated 01.08.2012.

The Ld. Arbitrator held that the letter dated 18th July, 2011 of the Superintending Engineer which had been sent to the Chief Engineer clearly stated that the site had been inspected and the claimant is entitled to the defect liability clearance certificate w.e.f., 22.5.2011. This had been noticed in the letter dated 2nd July, 2012. In the letter dated 1st August, 2012 reference had been made to letter dated 15th June, 2012 which points out that the defects stand removed. Accordingly it was held that the respondent - claimant was right in its submission that the defect liability certificate was issued on the basis of the letter dated 18th July, 2011 and that it should relate back to 22.5.2011. The fact that 50% of the retention amount was released on 21.09.2011 was also taken to

be supportive of the contention of the claimant that the defect liability came to an end on 22.05.2011. Further no notice in terms of Clause 35 was ever issued. The mere fact that some work was done by the claimant as evidenced in the letter dated 4th October, 2011 was held to be, not of itself, proof of the fact that such defects had occurred during the defect liability period.

The objections filed by the appellants under Section 34 of the Arbitration and Conciliation Act, 1996 were dismissed on the same grounds.

The sole argument of the Ld. Counsel for the appellant is that the Ld. Arbitrator as well as the Court has wrongly concluded based on the letter of the Superintending Engineer, Jhajjar dated 18.07.2011 that the Defect Liability Period had been cleared w.e.f., 22.05.2011. The sequence of letters post 18th July, 2011 have been relied upon in support of this plea.

This plea has already been considered by the Ld. Arbitrator as well as by the Ld. Additional District Judge while dismissing the objections.

The Ld. Additional District Judge while dismissing the objections observed as under:-

“9. As per letter dated 18th July, 2011 issued vide memo No.3419, the petitioner/appellant stated that there was a defect in the construction which was not removed by respondent no.1. As per the agreement, the construction work has to be concluded by 23.05.2009 and there was a defect in the construction and Defect Liability Certificate was issued on 18th July, 2011, which was to operate w.e.f. 22.5.2011 as per letter dated 18.07.2011 issued vide memo no.1439. Taking note of this communication and the later communication dated 15.06.2012 the Engineer-in Chief authorized to issue the Defect Liability Certificates. The fact that the 50% of the

retention amount was released on 21.09.2011 also supports the contention of the State of Haryana & ors. Vs. M/s KCC Buildcon Pvt. Ltd. & anr. 15 claimant/respondent no.1 that the defect liability came to an end on 22.05.2011 as otherwise the respondents would have waited for release the amount when communication was addressed in July, 2012. Thus, the Defect Liability Certificate would relate back to the date which is mentioned in the communication dated 18.07.2011.

10. *The case as projected by the respondents that there were several defects and these were pointed out on various occasions may also be seen. One letter is dated 27.07.2011. Another is dated 08.08.2011 which makes mention of letter dated 27.07.2011. Yet another letter is dated 20.09.2011 by which the claimant was called upon to extend the validity of Bank Guarantee. It may be seen that all these communications are after the issuance of the letter dated 18.07.2011 and it appears that the claimant is right in its submission that these defects if any came into existence after the recommendations were made by the Superintending Engineer on 18.07.2011. The plea that on 04.10.2011, the claimant/respondent no.1 had written a letter to the appellant in which it has been pointed out that defects have been removed. A perusal of the above letter indicate that this letter was written in response to a Memo dated 20.09.2011 seeking extension of Bank Guarantee in this communication it was mentioned that vide Memo No.1439 dated 18.07.2011 the department had recommended that the defect State of Haryana & ors. Vs. M/s KCC Buildcon Pvt. Ltd.*

& anr. 16 liability period should be treated as coming to an end on 22.05.2011. This letter further contains a recital that certain works have been executed as a goodwill inspite of the fact that defect liability period had come to an end. The defects which were pointed out by the petitioner by way of various communication of several dates were removed by the respondents before 22.05.2011. The fact that the 50% of the remaining balanced payment was released on 21.09.2011. The contention of the respondent no.1 that the defect liability have been removed on or before 22.05.2011. After perusal of letter dated 18.07.2011 vide memo No.3419, which clearly depicts that the site has been inspected and the respondent no.1 is entitled to defect liability certificate w.e.f. 22.05.2011. This communication was noticed by way of letter dated 2nd July, 2012 while in the letter dated 1st August, 2012, reference has been made to the letter dated 15th June, 2012. Letter dated 15.06.2012 points out that the defects if any have been removed. So that the defect liability certificate is being issued on the basis of letter dated 18.07.2011. Thus, it can be safely concluded that the Defect Liability Certificate has been issued w.e.f. 22.05.2009.

11. *The contention of the claimant/respondent no.1 is that the defect liability certificate came to an end on expiry of two years. No notice in terms of clause 35 was issued to the claimant before the expiry of period of two years. Letter issued on 27 State of Haryana & ors. Vs. M/s KCC Buildcon Pvt. Ltd. & anr. 17 August, 2009, 4th November, 2009; 9th November,*

2009; 22nd December, 2010; 10th January, 2011; 24th January, 2011, 24th February, 2011; 2nd February, 2011; 11th March, 2011 were written after the expiry of two years were 27.7.2011; 8.8.2011; 10.8.2011; 8.9.2011 and 20.9.2011. The letters written after 22.05.2009 cannot help the respondents (herein appellants). Once the period of two years came to an end than the later communication cannot operate to extend this period.”

It is by now well settled that the scope of interference by the Court with the Arbitral award is very limited. An arbitration award under the Arbitration and Conciliation Act, 1996 can be set aside only on grounds mentioned under Sections 34(2) and (3), and not otherwise. None of the grounds contained in sub-section (2)(a) of Section 34 deals with the merits of the decision rendered by an arbitral award.

Thus, a Court is not justified in reappraising the material on record and substituting its views in place of the arbitrator's views. It is only where there is an error apparent on the face of the record or the arbitrator has not followed the statutory legal position, would it be justified in interfering with the award of the arbitrator **Navodaya Mass Entertainment Ltd. v. J.M. Combines, (2015) 5 SCC 698, Associate Builders v. DDA, (2015) 3 SCC 49.**

I find no such error on the face of the record nor any perversity in the findings of the Arbitrator.

Accordingly, the appeal is dismissed.

May 04, 2016

**(HARINDER SINGH SIDHU)
JUDGE**

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