IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

F.A.O.No.775 of 2013 (O&M) &
Cross-objection No.187-CII of 2014
Date of Decision: October 06, 2016

State Bank of Patiala, Head Office, The Mall, Patiala

...Appellant

Versus

M/s Satish Kumar Contractors, Barnala & another

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

Present: Mr.Chetan Mittal, Senior Advocate with
Mr.Kunal Mulwani, Advocate,
for the appellant.

Mr.A.K.Bansal, Advocate,
for respondent No.1.

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AMIT RAWAL, J.

CM Nos.5017-CII & 5019-CII of 2013

For the reasons mentioned in the applications, which are supported by affidavits, delay of 86 days in re-filing and 7 days in filing the appeal is condoned.

Applications stand disposed of.

F.A.O.No.775 of 2013

Appellant-State Bank of Patiala is aggrieved of the impugned order dated 27.4.2012, whereby the objections for setting-aside the award dated 7.2.2004, have been partly allowed.

Mr.Chetan Mittal, learned Senior Counsel assisted by Mr.Kunal Mulwani, Advocate, representing the appellant bank submits that there was an agreement for construction of Administrative Block Building comprising of basement and three stories on Plot No.99-107, Sector 8-C, Chandigarh. Respondent No.1 was appointed as a Contractor for construction of the aforementioned block. However, a dispute arose and since the agreement contained the resolution of dispute through arbitration, Arbitrator accordingly was appointed. The claimant-contractor lodged as many as five claims, i.e., (i) outstanding due on account of work done; (ii) cash security; (iii) price variation adjustment; (iv) loss on account of infructuous overhead expenditures and; (v) interest. However, the Arbitrator allowed Claims No.1, 2, 3 and 4, but Claim No.3, which dealt with price variation adjustment, has been rejected by the Objecting Court having fallen within the "excepted matter" as per the provisions of Clause 35 of the agreement, but the contractor could not stake rest of the claims in view of Clause 16 of the general instructions and Clause 28 (a) of the terms and conditions of the agreement, much less, the Arbitrator should not have applied the HUDSON Formula as the damages and loss has to be proved on actual basis and not on presumptions.

He further submits that the interest awarded by the Arbitrator is 9% on the total amount for pre reference period plus future interest and, therefore, there is an element of compounding, which is not permissible in law. The 16th bill submitted by the contractor could not have been considered as 17th bill prepared by the owner was to be treated as final bill. There was an enquiry conducted by the Central Vigilance Commissioner and certain discrepancies were found in the bills and audited 17th bill was prepared, which was accepted as final bill prepared after technical scrutiny. Clause 33 of the agreement envisaged that all certificates and payments shall be regarded as payments by way of advance against the final payment only. Measurements were to be taken by architect or a person approved by him by giving notice to the contractor. In present case, he was not present and if the contractor does not send his agent, the measurements shall be final and binding. The liquidated damages is a sum calculated for delay in completion of work. In fact, they were either to be adjusted in Claim No.1 and Claim No.2 but not by way of a separate claim, whereas Clause 27 of the contract is binding upon the parties and the decision of the employer shall be final and finding and could not be interpreted in a different manner.

He further submits that the objections were falling within the parameters and provisions of Section 34 of the Arbitration and Conciliation Act, 1996. The award of the Arbitrator is also perverse and against well established provisions of law. The Arbitrator had exceeded his jurisdiction by giving undue benefit to the contractor by accepting the excessive measurements given in 16th and 17th bills. As per the clause, once there is extension of the contract, the contractor would not be liable to claim other than extension time for delay in completion of the work. All these factors did not weigh in the mind of the Arbitrator, much less the Objecting Court and, thus, urges this Court for setting-aside the impugned order under challenge.

Per contract, Mr.A.K.Bansal, learned counsel for respondent No.1 submits that the award of the Arbitrator is perfect, legal and justified. Rather, the cross-objections have also been filed. The Objecting Court has erroneously set-aside Claim No.3 to the tune of ₹ 7,36,616/-, which was not falling within the "excepted matters". No reasoning has been assigned by the Objecting Court in setting-aside the aforementioned claim. He further submits that this Court, much less the Objecting Court, cannot re-appreciate the evidence and treat the objections as appeal while sitting on the arm chair of the Arbitrator, who being expert, having examined the evidence on record. In support of his contention, relies upon the ratio decidendi culled out by the Hon'ble Supreme Court in **Navodya Mass Entertainment Ltd. Versus J.M. Combines, 2015 (5) SCC 698**. In fact, the appellant-bank has not been able to point out any illegality/patent illegality in the award vis-a-vis the claims accepted by the Arbitrator and, thus, urges this Court for affirming the findings and allowing the cross-objections.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is no force and merit in the submission of Mr.Mittal, for, Clause 16 of the agreement is not a clause of contract agreement, but a part of general instructions to the contractor and conditions of tender. Clause 28(a) of the agreement provides that the contractor shall have no claim other than extension time for the delay in completion of the work or there is no decision, opinion, direction or certificate, but yet the Arbitrator can always interpret the provisions in view of the ratio decidendi culled out by the Hon'ble Supreme Court in **G.M. Northern Railways Versus Sarvesh Chopra, AIR 2002 SC 1272.** The application of HUDSON Formula, even if the exact loss was not on record, has been recognised and accepted by the Courts.

Claim No.1 was with regard to the outstanding dues on account of the work done, which has not been disputed. Claim No.2 was for refund of the cash security. Interest, in my view, has also been rightly awarded @ 9%, though clause 31(7) provides awarding of interest @ 18%.

In my view, the price variation adjustment was falling in Clause 35 of excepted matters and, therefore, the Arbitrator did not have jurisdiction to entertain and try the same and rightly so, rejected/discarded by the Objecting Court. The Arbitrator, being an expert, has already examined the claim threadbare by taking into consideration the terms and conditions of the agreement and not the general instructions. The contract is of 1991 and the award was pronounced on 7.2.2004 and rightly so, 9% interest on total amount for pre reference period has been awarded in view of the law laid down by the Hon'ble Supreme Court in **Hyder Consulting (U.K.) Limited Versus State of Orissa, 2016 (6) SCC 362.**

Regarding partly acceptance of objection vis-a-vis Claim No.3, the appeal as well as the cross-objections are rejected and the findings vis-a-vis Claim Nos.1, 2, 4 and 5 are upheld.

October 06, 2016 **(AMIT RAWAL)**
ramesh **JUDGE**

Whether speaking/reasoned **Yes/No**

Whether Reportable: **Yes/No**