

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

FAO No.3942 of 2016 (O&M)

Date of Decision.19.09.2016

2. FAO No.3943 of 2016 (O&M)

Union of India and another

.....Appellants

Vs

M/s Joginder Lal Sethi Builders and Engineers and another

.....Respondents

Present: Mr. Chetan Mittal, Senior Advocate with
Mr. Prateek Gupta, Advocate
for the appellants.

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

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J.

This order of mine shall dispose of two FAOs bearing No.3942 and 3943 of 2016 filed at the instance of the Union of India. The former first appeal is filed against the dismissal of the objections filed at their instance under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called as the “1996 Act”) and for setting aside of the Award pronounced on 11.07.2011 and the latter one is against the allowing of the objection of the contractor for setting aside the Award dated 24.05.2007.

Before advertng to the rival contentions of learned counsel for the parties, it would be apt to give a brief pre-face of the matter. The contract bearing No.CECHZ-12 was allotted to the respondent-contractor for construction of officers mess, single officers quarters, servant quarters, workshop, garage and road etc. at Patiala. The contract was a Lump Sum Contract for a total sum of ₹4,85,69,117.97. The last date for receipt of the

and for Phase-II was 24 months. The date of commencement of work as per work order No.1 was 20.10.1994 and the date of completion of work as per work order No.1 for Phase-I & Phase-II was 19.07.1995 and 19.10.1996 respectively.

It is conceded position on record that in March, 1995, the MES authorities changed the site in consultation with DG, Civil Aviation to avoid air funnel area and the contractor stated to have written many letters regarding the failure on the part of the MES authorities. Show cause notices were issued to the contractor for slow work on 31.05.1996, 5.11.1996 and finally on 21.01.997, the contract was cancelled by the MES authorities. However, due to intervention of the Court, on 02.08.1997, the work was restored and the date for completion of work was extended upto 05.11.1998. As per the pleadings 14-18 RARs (Running Account Receipts) upto this period were paid to the contractor. According to the appellant, the work was cancelled on 22.02.2000 w.e.f. 28.2.2000 and since the contract envisaged the work to be done at the risk and cost, the aforementioned work contract was accepted on 22.12.2000 and the amount of the remaining work as per the claim of the appellant was ₹4,73,89,169.07 and the commencement of the risk and cost contract as per work order No.1 for Phase-I and Phase-II was fixed as 11.01.2001. On 30.06.2002, a case was registered against the respondent-contractor along with others by CBI on account of allegations of over payment.

As per the grounds of appeal, the resolution of dispute was sought through arbitration. Union of India initiated the arbitration proceedings and the Arbitrator namely Mr. Satish Chandra, according to them, was appointed on 20.04.2004, but he resigned on 30.07.2004 and

thereafter, on 15.04.2005, Sh. Rama Nath, Chief Engineer was appointed as the sole Arbitrator, who entered into reference on 16.05.2005. The respondent-contractor was proceeded ex parte before the aforementioned Arbitrator. Resultantly, the ex parte award on 24.05.2007 vide which the claims No.1, 3, 5 and 7 were accepted came to be passed.

Mr. Chetan Mittal, learned Senior Counsel assisted by Mr. Prateek Gupta, Advocate appearing for the appellants submitted that no doubt, the respondent-contractor was acquitted by Special Judge, CBI Court in the case registered against him by CBI, but the contractor despite having availed the remedy of filing objections against the Award dated 24.05.2007, moved a petition under Section 11(6) of the 1996 Act before the Civil Judge (Senior Division) and the Union of India remained unrepresented and finally as per order dated 22.07.2010 passed by this Court, Sh. Krishanjit Singh, Engineer-in-Chief was appointed as Arbitrator. A review application was filed by Union of India, but the same was dismissed by this Court on 25.05.2011.

Before the Arbitrator, the respondent-contractor lodged as many as 16 claims but the Arbitrator accepted only claim No.1 i.e. payments due to illegal termination of contract, claim No.2 pertained to amount claimed on account of escalation of material and labour, claim No.3-claim, on account of work done on abandoned buildings, claim No.4-claim, on account of loss of profit and overheads, claim No.8-loss on account of confiscated machinery, shuttering etc., claim No.11-loss suffered on account of compensation wrongfully levied due to non-completion of Phase 1, claim No.12, illegal encashment of bank guarantee, claim No.15-interest past, pendente lite and future and claim No.16-cost of reference.

The objections against the aforementioned Award were filed in the year 2011 and transfer application bearing No.152/2011 was filed by the respondent-contractor for transferring the objections of the appellant seeking setting aside of the Award dated 11.07.2011 from the court of District Judge to the Court of Additional District Judge, Chandigarh where the objections at the instance of respondent-contractor against the previous Award dated 24.05.2007 were pending. Accordingly, the objections were transferred vide order dated 06.01.2012. On 14.11.2013, the respondent-contractor did not appear in his case whereby had challenged the Award dated 24.05.2007 and the same was dismissed for non-prosecution. On 10.11.2014, the objections of the Union of India were dismissed by the Court of Additional District Judge, Chandigarh and FAO bearing No.2789 of 2015 was preferred challenging the aforementioned order. This Court vide order dated 29.01.2016, which is annexed with the appeal as Annexure P-3, allowed the application seeking for restoration of the objection filed by the respondent-contractor and the order dated 10.11.2014 was set aside and the matter was remitted back to the Objecting Court to decide the objections together. It is in this background of the matter, the impugned orders have been passed whereby the objections of the contractor has been allowed and the objections of the Union of India have been rejected. The Objecting Court has not only grossly erred in addressing the issue which is against the established principles of law, but also granted no opportunity to the Union of India to defend the claim on merits as the scope under Section 34 of the 1996 Act is very limited. Objections of the contractor viz-a-viz the Award dated 24.05.2007 was only with regard to set aside the award on ground of having proceeded ex parte but this aspect has totally escaped the notice and

there was no occasion for the Objecting Court to set aside the Award dated 24.05.2007 passed in favour of the Union of India. The contractor, in fact, deliberately kept himself away from the arbitral proceedings before the 1st Arbitrator and application moved by the respondent under Section 9 of the 1996 Act for stay of the proceedings was also dismissed on 17.03.2007. He further submitted that the ex parte award in the arbitration proceedings was passed after granting due opportunity to the contract and after due service and therefore, the Award could not have been set aside.

In support of his contentions, he relied upon judgment of the Hon'ble Supreme Court in *State of Uttar Pradesh and otehrs Vs. Combined Chemicals Company Private Limited (2011) 2 SCC 151* on the premise, that where the contractor intentionally did not bother to participate in the arbitral proceedings, is not a ground for setting aside the Award, in essence, the contractor cannot complain that he was denied the reasonable opportunity of hearing. In fact, the appellant was not given any opportunity to defend claims of the contractor on merits before the Objecting Court. The whole approach of the Objecting Court is in contravention of the settled provisions of law. In fact, claims of the contractor were hit by doctrine akin to "Res Judicata". In this regard, relied upon judgment of Hon'ble Supreme Court in *Indian Oil Corporation Limited Vs. SPS Engineering Ltd. (2011) 3 SCC 507* to contend that the dispute between the parties arising out of contract had already attained finality in the arbitral Award dated 24.05.2007. The interest @18% is phenomenal and ought not to have been granted whereas the appellants have been granted only lesser interest. At least, there should have been parity viz-a-viz the interest. In fact, the objections of the contractor were not falling within the expression "against

public policy” as explained by Hon'ble Supreme Court in *Associate Builders Vs. Delhi Development Authority (2015) 3 SCC 49* or it could not be said that the Award suffered from patent illegality. The damages under Section 73 of the Contract Act have rightly been rejected, for, the Union of India had to get the work done at the risk and cost at higher rate and therefore, contractor was/is not liable to claim the payment. In fact, there was no amount due, thus, urges this Court for setting aside of the order under challenge, much less, the Award dated 11.07.2011 by upholding the Award dated 24.05.2007.

Per contra, Mr. A.K. Maleri, learned counsel appearing for the respondent-contractor submitted that many letters were written to the contractor by the MES authorities after the change of site in order to avoid the air funnel area. As per Ex.C64, 14 to 18 RARs, as noticed above, were upto 21.08.1997 paid to the contractor. The payment for abandoned work of 1994-95 was agreed to be paid by the authorities as per Ex.C64 dated 28.10.1999. On 30.12.1999, 19th RAR was signed which was ignored by the department. The MES authorities prepared its own RAR in which it was shown that the contractor had taken payment of ₹56.30 lakhs, which was stated to be prepared by Mr. Adlkaha, AGE. A departmental enquiry was held and the amount of over payment was increased to ₹58.42 lacs and ultimately, the work/contract was finally terminated, as noticed above, on 28.02.2000. Three caveats were filed by the department before the Courts at Patiala indicating the progress of the work which varied from 39% to 52.5%. All these have been produced on record as Ex.C32 and C73.

On 09.01.2002, the contractor filed an application for appointment of arbitrator and the appointing authority i.e. Engineer-in-

Chief, appointed Arbitrator and referred only those claims which were preferred by the Union of India whereas claims of the contractor were never referred to the appointed Arbitrator. In fact, the Arbitrator refused to hear the claims of the contractor until the same were referred either by the appointing authority or by the Court, thus, the contractor was left in lurch to file his claims viz-a-viz the claims of the Union of India. Brig. R.R. Singh was appointed as 1st Arbitrator on 29.08.2001 and the statement of claims was filed on 30.11.2001 and as noticed above, in the meantime a case was registered against the contractor though he was acquitted by Special Judge, CBI, Patiala. During the interregnum, on 05.08.2002, 2nd Arbitrator i.e. Brig. R.B. Singh was appointed upon resignation of Brig. R.R. Singh. He entered into reference on 16.08.2002. The contractor wrote to him about adjudication of his claims vide letter dated 23.09.2002 but the same was outrightly rejected vide letter dated 03.10.2002. The aforementioned Arbitrator resigned on 22.11.2003 and thereafter, Mr. Satish Chander was appointed as Arbitrator on 20.02.2004, but he also resigned after few months on 30.07.2004. On 15.04.2005, Sh. Rama Nath was appointed as 4th Arbitrator but the Union of India as per letter dated 06.06.2005 stuck to their previous statement of claims. However, in the proceedings before the CBI Court, the truth surfaced with regard to lapse on the part of the MES Authorities and the department pressurized the Arbitrator to make and publish Award which fact is evident from letters dated 20.10.2006, 27.10.2006 and 28.10.2006. On 27.10.2006, the Union of India filed revised claims before the Arbitrator without taking any sanction from the appointing authority. The Union of India delayed the cross-examination of prosecution witnesses in the criminal court after examination of PW-1 and

PW-2 in July, 2005 and the rest of the witnesses were examined after publication of the Award dated 24.05.2007 but the fact remains that the application under Section 11(6) of the 1996 Act, as noticed above, was filed at the instance of the contractor as the earlier Arbitrator refused to entertain the claims of the contractor. In fact, the application for appointment of the Arbitrator in this court was filed on 17.04.2007 just 37 days prior to the pronouncement of the Award by Arbitrator, Rama Nath. The application was seriously contested by the Union of India but this Court, as noticed above, vide order dated 22.07.2010, appointed independent Arbitrator to look into the claims preferred by the contractor. The independent Arbitrator published the award in favour of the contractor after hearing the parties i.e. Award dated 11.07.2011. The issue of res judicata and non-submission of claims by the contractor was raised in the review petition, which was dismissed vide order dated 22.05.2011.

Once the contractor was not allowed to file the claims, he had no other option but to seek adjudication by the independent Arbitrator, rightly so, the Objecting Court had set aside the ex parte Award dated 24.05.2007, thus, urges this Court for upholding the order under challenge as the scope of interference is very limited, particularly in view of the law laid down by the Hon'ble Supreme Court in **Navodaya Mass Entertainment Limited Vs. J.M. Combines (2015) 5 SCC 698** where it has been held that the Objecting Court, much less, this Court cannot reappraise the evidence. He also relied upon the judgments of Hon'ble Supreme Court in **Associate Builders Vs. Delhi Development Authority (2015) 3 SCC 49** and **Bharat Heavy Electricals Limited Vs. Globe HI-FABS Limited (2015) 5 SCC 718** to contend that the interest from the date of Award @18% is totally in

consonance with the provisions of Section 31 (7) (b)of the 1996 Act.

I have heard learned counsel for the parties, appraised the paper book and record of the Arbitrator.

The facts as noticed above lead no manner of doubt that in the 1st arbitration proceedings, the contractor was prevented to file claim viz-a-viz the payment dues which have been entertained by the subsequent Arbitrator in pursuance to the order passed by this Court in proceedings initiated under Section 11(6) of the 1996 Act and review application against the same had also been dismissed. In my view, there is no force and merit in the submissions of Mr. Mittal, learned counsel appearing for the appellant that the decision of the 2nd Arbitrator deciding claims of the contract, which he was prevented to press before the 1st Arbitrator, would hit by doctrine akin to res judicata, thus, the ratio decidendi culled out in **Indian Oil Corporation Limtid's** case (supra) would not apply.

For appreciating the aforementioned controversy, it would be necessary to reproduce the claims of Union of India as well as of the contractor.

Claims of Union of India	Claims of contractor
1. Claim No.1-Recovery on a/c of work completed at risk and cost through another agency.	1. Claim No.1-Payments due to illegal termination of contract.
2. Claim No.2-Delay in completion of work	2. Claim No.2-Amount claimed on a/c of escalation of material and labour.
3. Claim No.3-Recovery on account of overdrawn store.	3. Claim No.3-Claim on a/c of work done on abandoned buildings.
4. Claim No.4-Recovery on account of technical examination of work.	4. Claim No.4-Claim on a/c of loss of profit and overheads.
5. Claim No.5-Recovery on account of non return of classified documents.	5. Claim No.5-Claim on a/c of illegal cancellation of contract and loss of business.
6. Claim No.6-Recovery on a/c of superintendence and establishment charges.	6. Claim No.6-Claim on a/c of illegal cancellation and later its revival in 1997.
7. Claim No.7-Tackling charges of scattered material lying at site.	7. Claim No.7-Loss suffered on a/c of theft/destruction of material etc.

Claims of Union of India	Claims of contractor
8. Claim No.8-Loss on a/c of vehicles standing in open.	8. Claim No.8-Loss on a/c of confiscated machinery shuttering etc.
9. Claim No.9-Rate of interest @18% per annum on claim Nos.1 to 8.	9. Claim No.9-Loss of reputation and mental tension.
	10. Claim No.10-Loss due to shifting of site.
	11. Claim No.11-Loss suffered on a/c of compensation wrongfully levied due to non completion of Phase I.
	12. Claim No.12-Illegal encashment of bank guarantee.
	13. Claim No.13-Losses suffered on a/c of wrongly deduction of sale tax.
	14. Claim No.14-Loss on account idling of T&P and machinery.
	15. Award No.15-Interest-past, pendente lite and future
	16. Claim No.16-Cost of reference.

On juxtaposition of both the claims, it appears that the claims are not overlapping. In fact, the claims entertained by the Arbitrator i.e. Claim No.1, 3, 5 and 7 of the Union of India, as per the Award dated 24.05.2007, are on account of work completed at the risk and cost through another agency, recovery on account of overdrawn store, recovery on account of non-return of classified documents and tackling charges of scattered material lying at site. Rest of the claims as noticed above have been rejected.

On the contrary, the contractor's claim No.1, 2, 3, 4, 8, 11, 12, 15 and 16 have been allowed which includes the costs of litigation. All the claims are not overlapping. In fact, the Union of India has claimed under different heads whereas the contractor's claims were on account of payment due. The claims of the contractor qua illegal cancellation of the contract and loss of business and as well as claim on account of illegal cancellation and later its revival in 1997 i.e. claim Nos.5 and 6 have been treated as “Nil”. Even the loss suffered on account of theft/destruction of material etc. and

loss of reputation and mental tension have been granted “Nil” and the same have been maintained by the Objecting Court. Both the Arbitrators have examined the evidence viz-a-viz the claims of the Union of India and the Contractor vide Awards dated 24.05.2007 and 11.07.2011 respectively. In my view, the necessity for appointment of 2nd Arbitrator arose as the Contractor was prevented from lodging its counter claim viz-a-viz the claims of Union of India in the 1st arbitration proceedings. In fact, the contractor was left in lurch for adjudication of claims as indicated above. I am in agreement with submission of Mr. Mittal, learned Senior Counsel viz-a-viz the fact that the objections seeking setting aside of the Award dated 24.05.2007 were only in respect of having prevented from contesting the objections having been proceeded ex parte but the fact remains that the contractor has not been able to give any cogent, much less, sufficient cause of having been prevented from contesting the claims of the Union of India, de hors of the fact that his claims were not entertained by the Arbitrator as per the submission of Mr. Maleri, learned counsel appearing for the respondent-contractor. The aforementioned view has been reiterated in the judgment of Hon'ble Supreme Court in *State of Uttar Pradesh's case* (supra). This aspect has totally escaped the notice of the Objecting Court while setting aside the Award dated 24.05.2007. As per the Award dated 24.05.2007, the appellant-Union of India has been held entitled to interest @10% w.e.f. 28.02.2000 i.e. from the date of cancellation of contract of defaulting contractor on the awarded amounts except awarded amount against claim No.7 and in respect of claim No.7, interest rate will be effective from 11.07.2000 since the amount incurred by them only on 10.07.2000 when the stacking of scattered material was completed for work

order No.16 dated 06.05.2000 and costs of litigation as Rs.15,000/-. In my view, before the Arbitrator, the Union of India has been able to bring on record sufficient material of having allotted the work to the subsequent contractor for the remaining work at ₹4,73,89,169.07 viz-a-viz the total amount of the contract for ₹4,85,69,117.97 and therefore, the difference between the sum has rightly been awarded by the Arbitrator. The entire material has been placed on record to argue that the Objecting Court has not assigned any cogent reasons for setting aside the Award. In my view, the objections of the contractor viz-a-viz setting aside the Award dated 24.05.2007 were not falling within the realm of Section 34 of the 1996 Act, lacking material. The Objecting Court has not assigned reasons as to how and under what circumstances the contractor was prevented from contesting the claim of Union of India in the first arbitration proceedings. Accordingly, the impugned order of the Objecting Court setting aside the Award dated 24.05.2007 is set aside and the Award *ibid* passed by the Arbitrator is restored.

As regards the contention of Mr. Mittal, learned Senior Counsel for the appellants for setting aside the Award dated 11.07.2011 allowing the claims of the contractor in the 2nd arbitration proceedings, I am of the view that the claims, as noticed above, are not overlapping and therefore, the expression “res judicata” cannot be pressed into for adjudication of the *lis* as the contractor's claims, as noticed above, have been allowed with regard to payments due. However, I am of the view that the interest awarded to the contractor is on the higher side though it is in consonance with provisions of Section 31(7) of the 1996 Act but it should be at par with the interest awarded to the Union of India. I am totally in agreement with the ratio

decidendi culled out in the judgment of Hon'ble Supreme Court in *Navodaya Mass Entertainment Limited's* case (supra) that the examination of entire evidence again either by the Objecting Court or by this Court would not fall within the realm of Section 34 of 1996 Act but the fact remains that Union of India has failed to prove on record the patent illegality to compel this Court in forming a different opinion than the one arrived at by the Arbitrator, thus, in my view the objections were not falling within the realm of Section 34 of the 1996 Act and the Arbitrator has given detailed reasons while entertaining the claims. Resultantly, the Award of the Arbitrator dated 11.07.2011 viz-a-viz entertaining the claims, which are not overlapping, is hereby maintained, however, modified to the extent of awarding interest @10% to bring it at par with what has been awarded to the Union of India.

Accordingly, the appeal bearing FAO No.3942 for setting aside the Award dated 11.07.2011 is partly allowed as regards the interest part only and the appeal bearing No.3943 of 2016 for setting aside the impugned order dated 27.04.2016 is allowed. Resultantly, the impugned order dated 27.04.2016 is set aside and the Award dated 24.05.2007 is ordered to be restored.

(AMIT RAWAL)
JUDGE

September 19, 2016
Pankaj*

Whether reasoned/speaking Yes

Whether reportable Yes