

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

**FAO No.4279 of 2016 (O&M)
Date of decision:01.08.2016**

Sardar Beant Singh Memorial and Chandigarh
Centre

... Appellant

Vs.

M/s Bhayana Builders Private Limited and another ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Harkesh Manuja Advocate
for the appellant.

AMIT RAWAL J.

C.M.No.14740-CII-2016

For the reasons stated in the application, duly supported by an affidavit, delay of 48 days in re-filing the appeal, is condoned.

C.M.stands disposed of.

FAO No.4279 of 2016 (O&M)

This appeal is directed against the dismissal of order dated 22.09.2014, whereby, objections filed under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as “1996 Act”), for setting aside of the Award dated 14.10.2010, have been dismissed.

The appeal is accompanied by an application seeking condonation of delay of 467 days in filing the appeal on the reasons assigned that the delay occurred was neither intentional nor deliberate. The society had written a letter to the Law Department U.T.Chandigarh to seek the opinion with regard to the said case which was returned on 30.03.2015 and the case was discussed with the Law Department by the Superintendent

on 22.05.2015. Since, he was on leave from 11.06.2015 to 23.06.2015. Then Director took charge and remained on leave from 05.06.2015 to 30.6.2015. Thereafter, another Director took over charge as Project Director of the Society. In the meantime, the Superintendent was also on leave from 09.07.2015 upto 23.07.2015, then again the Director proceeded on leave from 25.02.2016 to 12.04.2016. In this way, the explanation has been given and delay of 467 days has occurred in filing the appeal.

It is a matter of record that impugned order was passed on 22.09.2014 and the appeal has been filed on 29.04.2016.

I am of the view that the aforesaid application is lacking material, particularly with regard to seeking condonation of delay. Such a casual approach has been adopted by the appellant-Corporation in pursuing the so called rights, once they have lost before the Objecting Court vis-a-vis award.

As regards merits, Mr. Harkesh Manuja, learned counsel appearing on behalf of the appellant, confined his argument to claim nos.2, 3, 4 and 5, against 10 claims filed by the Contractor. He submits that an agreement dated 15.02.1999 was entered into for construction of “Sardar Beant Singh Memorial and Chandigarh Centre for performing and Visual Arts” Sector 42, Chandigarh and the time period for construction of the same was 24 months, i.e., w.e.f. 28.02.1999 to 28.02.2001 for a sum of ₹7,74,34,072.00. The contractor terminated the contract on 23.05.2003 on account of the fact that no proper payment was made. He further submits that claim no.3 was for a sum of ₹1,00,60,505 /- on account of enhanced rates of work beyond the contract period. He submits that as per the terms

and conditions of the contract, particularly Clause SC-58, appellant was not liable to pay compensation for escalation on any account. The Arbitrator by relying upon the ratio decidendi culled out by the Hon'ble Supreme Court in **Port of Calutta vs. Engineers-De-Space-Age (1996) 1 SCC 516** and **Bharat Drilling and Foundation Treatment (P) Limited vs. State of Jharkhand and others 2009 (16) SCC 705**, granted the relief.

In support of his aforementioned contentions, he further submits that as per judgment cited supra, it pertains to a clause where the Commissioner was empowered not to entertain the claim for interest. However, in the present case, the contract prohibited compensation, therefore, the Arbitrator could not go beyond the terms and conditions of the contract. He further submits that almost identical clause came to be interpreted by the Hon'ble Supreme Court in **Asian Techs. Ltd. vs. Union of India 2010 (8) RCR (Civil) 106** and the Hon'ble Supreme Court has not assigned any reasons, just in paragraph 18 relied upon ratio decidendi culled out by the Hon'ble Supreme Court in Board of Trustees, Port of Calcutta's case (supra) and submits that such type of clause only prohibits the department from entertaining the claim, but it does not prohibit the Arbitrator from entertaining it, thus, there is no finding in this regard. He further submits that once there is no reasoning given by the Hon'ble Supreme Court with regard to the jurisdiction of the Arbitrator in interpreting the clause and giving compensation, the contractor was not liable, much less, Arbitrator could not have awarded the same.

The reasoning given by the Arbitrator reads thus:-

“No compensation for escalation on any account shall be

payable.

The clause is not susceptible of any sensible interpretation since it is couched in vague and general language. Even if, hypothetically speaking, the clause is considered to be a bar for payment of compensation, it is still not applicable in view of the judgment of the Hon'ble Supreme Court in Sarvesh Chopra's case. The situation contemplated under (iii) of the aforesaid reproduced extract is squarely applicable to the present case, inasmuch as the claimants have, in clear and unambiguous terms, intimated to the respondents vide Ex.C-11 (6.3.2001) that they would be entitled to extra rates for work done beyond the stipulated period of contract. It is undisputed that the respondents accepted performance by the claimants despite having been put on notice with regard to increased rates. Thus, the prohibitory clause, if clause SC-58 is presumed to be so, is not applicable to the facts of the present case.

In a recent judgment of the Hon'ble Supreme Court reported as Asian Techs Ltd. vs. Union of India, (2009)10 SCC 354, the Apex Court has reiterated the aforesaid principle of law in the following terms.

*“21. Apart from the above, it has been held by this Court in Port of Calcutta v. Engineers-De-Space-Age, (1996)1 SCC 516, that a clause like Clause 11 only prohibits the Departments from Entertaining the claim, but it did not prohibit the arbitrator from entertaining it. This view has been followed by another Bench of this Court in Bharat Drilling & Treatment (P) Ltd. v. State of Jharkhand, (2009)16 SCC 705.”
(Emphasis mine)*

I, therefore, hold that clause SC-58 does not bar the arbitrator

from awarding compensation, if the facts and circumstances of the case so warrant.

I have already held above that the respondents were in breach of contract and hence, the claimants are liable to be compensated for the work carried out in the prolonged period. The claimants have quoted clause 7.3.2 on page 36 of the contract in support of their contention that they had given estimate of probable effect of delay at the appropriate time, but no action thereon was taken by the respondents. It would be appropriate to set out clause 7.3.2 of the contract to understand the true import thereof:

“Any claim for extension of time shall be made in writing to the Construction Manager not later than twenty days after the commencement of the delay; otherwise it shall be waived. In the case of the continuing delay only one claim is necessary. The contractor shall provide an estimate of the probable effect of such delay on the progress of the work”.

The claim was sent to the respondents on 6.3.2001 (Ex. C-11), i.e. just six days after the expiry of the stipulated period. It was incumbent upon the respondents to have initiated immediate action on the said letter so that the matter could have been resolved to the satisfaction of both parties. However, from the record, I find that the respondents maintained a studied silence on the said communication. In fact, the Architect had been repeatedly reminding the respondents about various claims which could be raised by the claimants due to continuing delay. I find that at a much later stage, the respondents constituted a sub-committee to consider the claims, but the sub-committee did not give any positive recommendations. As late as 25.10.2002 (Ex.C-51), the sub-committee was asked to submit its report within one month. A meeting was held between the parties on 4.4.2003 (Ex.C-25), wherein the claimants had offered to withdraw their claims

subject to certain conditions being fulfilled within one month. The respondents should have been prudent enough to grab this opportunity to settle the claims. However, even this chance was not availed of by them. In the Executive Committee meeting held on 16.5.2003 (Ex. C-52), the respondents side-tracked the main issue, i.e. resolution of claims, but stating that since the claimants had requested for closing of contract, no action could be taken. I find that throughout the period of contract, including the period of prolongation, the respondents had been least mindful of their obligations, thereby inflicting losses on the claimants. On facts and evidence on record, I hold that the claimants are liable to be compensated for the increased cost of construction in the prolonged period of contract.

Coming to the quantum aspect, the claimants were required to provide an estimate of probable effect of delay to the respondents in terms of clause 7.3.2 of the contract. This was duly done. I have gone through Ex. C.11. I find that the claimants have given meticulous details of the increase in prices of various materials, i.e. cement, steel, coarse and fine aggregate, bricks, granite, aluminium etc. Details of the claim were given in the claim statement, which were not disputed by the respondents. The claimants have claimed that the work done in the prolonged period of contract was Rs.2,33,96,523,97 but according to the respondents, the work done was Rs.1,99,55,441/-. I adopt the figure given by the respondents. The claimants have claimed increase in prices by 43%, which I find to be excessive. Escalation is a global phenomenon and obviously, in the present contract also, the prices of various materials had registered an upward trend. The contract period was 24 months. Taking a reasonable hike of 0.5% per month, I feel that the price increase cannot exceed 12.5%. I accordingly, allow 12.5% increase in prices for the

work done in the prolonged period of contract (Rs.1,99,55,441/-). Based on the above principle, I award an amount of Rs.24,94,430/- in favour of the claimants in full and final settlement of Claim No.3.”

The aforementioned plea of Mr. Manuja, is hereby rejected, for, as regards, claim no.4, he pointed out that it was on account of not being able to execute the contract in entirety, the Arbitrator could not have awarded the aforementioned amount as the contractor failed to lead any evidence in this regard. In this regard, he has drawn the attention of the Court to the finding rendered by the Arbitrator. I am of the view that the Arbitrator has referred to the aforementioned contentions and gave a finding to the fact that since the appellant was held responsible for various breaches of contract, therefore, the claimant/contractor was left with no other option but to terminate the contract and by assessing the amount of contract done and work left done, adding the profit @ 10% awarded the amount to the tune of ₹6,63,830/-. The Arbitrator, in my view, has examined thread bare entire material/evidence. On claim no.5, he submits that contractor has failed to place on record any amount with regard to payment of margin money on account of renewal of bank guarantee and awarding of amount ₹1,39,492/- is neither here and there.

It would be apt to reproduce the findings given by the Arbitrator which read thus:-

“I have considered the submissions of the parties and material on record. I have already held that the respondents were responsible for breach of contract. I also do not agree with the

contention of the respondents that the claimants were under no obligation to renew the Bank Guarantees beyond the initial expiry date. I have gone through Ex.C-12. The claimants have claimed renewal charges to the tune of Rs.3,20,888/- and interest on blockade of funds to the tune of Rs.16,02,939/-. Insofar as Bank Guarantee Nos. 115/30/99 and 115/31/99 are concerned these relate to mobilization advance. The claimants were under a contractual obligation to keep these Bank Guarantees alive since the entire amount of mobilization advance had not been repaid to the respondents. However, insofar as the Performance Guarantee (No.115/32/99) is concerned, I feel that the claimants are entitled to renewal charges thereon since the performance was delayed on account of defaults on the part of the respondents. I am not inclined to award any interest on blockade of funds since the claimants have not placed on record any evidence with respect to margin money and interest being claimed thereon. In view of my findings above, I award an amount of Rs.1,39,492/- in favour of the claimants in full and final settlement of Claim No.5.”

The aforementioned finding, in my view, is on examination of the Ex.C-12, which is a letter dated 06.03.2001 addressed by the Contractor to the Chandigarh Administration, wherein, it has been mentioned that revenue fees are to the tune of ₹1,39,492/-. The letter was on behalf of the appellant-Corporation for renewal of the bank guarantee which was expiring.

For the foregoing reasons, there is no merit in the appeal. In my view, the impugned order is perfectly legal and justified. The appeal is dismissed on limitation as well as on merits.

(AMIT RAWAL)
JUDGE

August 01, 2016

savita

Wheather speaking/reasoned

Yes/No

Whether Reportable

Yes/No