IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

F.A.O.No.4722 of 2016 (O&M)
Date of Decision: August 10, 2016

M/s General Electronics of Haryana, New Delhi

...Appellant

Versus

Uttar Haryana Bijli Vitran Nigam Limited, Panchkula & another

...Respondents

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

Present: Mr.Kanwaljit Singh, Senior Advocate with
Mr.Amandeep Singh Meho, Advocate,
for the appellant.

Mr.P.S.Poonia, Advocate,
for the respondents.

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AMIT RAWAL, J.(Oral)

CivilMisc.No.18210-CII of 2013

The prayer in the application is for converting the present revision petition to the FAO as the award was passed under the new Act, though the reference was made under the old Act.

Application is allowed. Revision petition is ordered to be treated as FAO.

Main case

Mr.Kanwaljit Singh, learned Senior Counsel assisted by

Mr.Amandeep Singh Meho for the appellant submits that a Purchase Order dated 9.3.1973 was placed before the appellant-contractor for supply of 2450 KM ACSR Conductor consisting of 6 strands of bard drawn aluminium over one strands of high tensile galvanised steel wire size 2.59 mm at the rate of ₹913/- per unit per KM. The net price was ₹22,49,100/-. He submits that in pursuance to the aforementioned Purchase Order, the agreement was also entered into. The contractor was to supply 350 KM of ACSR Conductor Weasel by 31.3.1973 and thereafter 350-400 KM every month from April, 1973 onwards. The supply could not be made as the aluminum was not available for want of shortage of the same. The parties were bound by the agreement, particularly Clause 6 of Article-III, Clauses 1 and 2 of Article VII of the agreement. He has drawn the attention of this Court to the aforementioned Clauses, which read thus:-

> "CLAUSE-6 NEGLIGENCE:
>
> *If the company shall neglect to execute the work with due diligence and expedition or shall refuse or neglect to comply with any reasonable orders given, in writing, by the Engineer in connection with this contract, or shall contravene the provisions of the contract, the purchaser may give seven days notice, in writing to the company to*

make good the failure, neglect or contravention complained of and should the company fail to comply with the notice within a reasonable time from the date of service thereof. In the case of a failure, neglect or contravention capable of being made good, within that time, or otherwise within such time as may be reasonably necessary for making it good, then and in such case the purchaser shall be at liberty to take the work wholly or in part out of the company's hands and recontract at a reasonable price with any other person or person. In such an event it shall be lawful for the purchaser to retain any balance which may otherwise be due by him to the company on any account, and apply the same towards the execution of the whole or balance of the work so recontracted, as aforesaid, if no such balance is due by him to the company or if due, is not sufficient to cover the amount thus recoverable from the company it shall be lawful for the purchaser to recover the whole or balance of the amount from the company by action at law or otherwise, vide clause 2 of Article VII of this contract."

CLAUSE-1 TERMS OF PAYMENT:

Subject to any deductions which the purchaser may *authorised to make under the contract, the company shall be entitled to payment for the material as under:-*

xxxx xxxx xxxx

CLAUSE-2 DEDUCTIONS FROM CONTRACT PRICE:

All costs, damages, or expenses, the purchaser may have paid for, which under the contract the company is liable, may be deducted by the purchaser from any moneys due or becoming due by him to the company under the contract or may be recovered by action at law or otherwise from the company."

He submits that UHBVNL did not issue any notice of seven days for cancellation and purchasing the material at the cost and risk of the appellant, yet lodged the claim before the Arbitrator as the agreement contained the resolution of dispute through arbitration. The respondents did not place on record any documentary evidence regarding the Purchase Order or purchasing of the material at the risk and costs of the appellant, much less no advance notice regarding the same was sent and merely by placing on record the order would not be sufficient to substantiate their claim before the Arbitrator, but despite that the Arbitrator treated the claim as damages under Section 73 of the Indian Contract Act, which was not within the letter and spirit of the agreement, therefore, the Arbitrator exceeded the terms and conditions of the agreement and the same was objected to when the application for make the award as rule of Court was made, but the trial Court erroneously rejected the same. Even the appeal filed before the Additional District Judge was dismissed and hence the present appeal.

He further submits that in this process, almost thirteen years have elapsed and interest @ 10% on the amount of ₹14,51,257/- has been awarded. In fact, no negligence was attributed to the appellant, but it was on account of the unforeseen conditions and, therefore, the Arbitrator ought not to have fastened the liability on the appellant and, thus, urges this Court for setting-aside of the impugned orders.

Mr.P.S.Poonia, learned counsel for the respondents submits that there is no defiance to the terms and conditions of the agreement, but, in fact, the same were adhered to in letter and spirit. Numerous letters were sent to the appellant-contractor, but having failed to do so, Purchase Order No.772 dated 18.7.1974 was placed to another Company, i.e., M/s Prem Cables, Piplian Kalan, Rajasthan and even proof of payment made by letter dated 10.2.2003 has been placed on record, but there is a stark difference in respect of the price and keeping this aspect of the matter into consideration, the Arbitrator awarded the compensation, thus, there is no force in the submission of Mr.Kanwaljti

Singh. Rather, it was a commercial transaction and, therefore, the Arbitrator ought to have granted only more than what has been granted. The objections were not falling with the realm of Section 34 of the Arbitration and Conciliation Act, 1996 and, thus, urges this Court for affirming the award and the judgments passed making the award the rule of the Court by dismissing the present appeal.

I have heard the learned counsel for the parties and appraised the paper book.

The Arbitrator, in my view, did not grant the compensation strictly in terms of the provisions of Section 73 of the Contract Act, i.e., for liquidated damages as the respondent virtually had placed on record the Purchase Order prior to the Purchase Order dated 18.7.1974. Preceding to that, numerous letters/notices have been written to the appellant for supply of material as the material was badly required for mass tubewell energisation. The last letter was dated 21.2.1974 and the Purchase Order was of 18.7.1974. Even then, payment of the same has been proved on record vide letter dated 10.2.2003. The Arbitrator, on the basis of the aforementioned evidence, arrived at a conclusion that there was a difference of ₹14,51,257/-, as noticed above and accepted the claim of the respondents by awarding interest @ 10%. I cannot remain oblivious of the fact that the contract was awarded in 1973, whereas the

Purchase Order issued to the third party was placed in the month of July, 1974 and the award was passed on 14.3.2003 entailing the interest @ 10%. There can be deferment of the interest instead of 10% to 6% in the peculiar facts and circumstances of the case, which shall not be read as condition precedent.

For the foregoing reasons, I modify the award to the extent that instead of interest @ 10%, it shall be 6% throughout from the date of demand till realisation, while upholding the award.

Appeal stands disposed of.

Records be sent back forthwith.

August 10, 2016 **(AMIT RAWAL)**
ramesh **JUDGE**

Whether speaking/reasoned **Yes/No**

Whether Reportable: **Yes/No**