IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR No.3111 of 2013
Date of Decision: 10.11.2017

M/s Kristam Engineers (P) Ltd. ...Petitioner

Versus

The Punjab State Co-operative ... Respondent

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Ms. Seema Pasricha, Advocate
for the petitioner.

Mr. Atul Kaushik, Advocate
for the respondent.

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RAJ MOHAN SINGH, J.

[1]. Petitioner has assailed the order dated 19.11.2012 passed by Additional District Judge, Chandigarh, dismissing the appeal against the judgment and decree dated 01.09.2007 passed by Civil Judge (Senior Division), Chandigarh in the objections filed under Section 30 of the Indian Arbitration Act, 1940.

[2]. Respondent floated a tender for supply and installation of malted milk foods manufacturing plant at Jalandhar. Petitioner gave its offer with requisite earnest amount to the tune of Rs.20,000/-. Letter of intent was issued to the petitioner

on 30/31.01.1987 for supply and installation of malted milk foods manufacturing plant. After due negotiations and deliberations, the respondent issued a letter dated 05.08.1987 to the petitioner as an order for supply, installation and commissioning of equipment of malted milk foods manufacturing plant. As per Clause 7 of the work order dated 05.08.1987, payment terms were categorized in the following segments:-

(a) Supply

(b) Erection

(c) Taxes and duties.

(d) Retention for product development.

[3]. For supply following provisions were made:-

"(i) 30% of the order value shall be paid on acceptance of the order subject to the supplier furnishing a Bank guarantee valid for 12 calender months from the date of guarantee for an equivalent amount from a schedule or Nationalized Bank.

(ii) 60% on safe receipt of the equipment ordered at site but not later than 45 days from the date of receipt, the equipment at site, provided a performance guarantee for 10% of the order value is furnished along with the invoice raised for 60% payment.

(iii) The balance 10% of the value shall be paid within 12 calendar months from the date of commissioning/installation of the equipment concerned or 24 months from the date of receipts of the same at

> *site whichever is earlier. However, the balance 10% of the payment will also be released, if so desired by the supplier, provided the supplier furnishes a Bank guarantee from a Nationalized Bank for the 10% value of consignment in Indian Rupees valid for a period of 24 months from the date of dispatch."*

In the aforesaid context, learned counsel for the petitioner submitted that (a) (i) has been complied with. (a) (ii) has also been complied with. (a) (iii) is the offending clause, wherein an amount of Rs.3,07,325/- was retained along with earnest money of Rs.20,000/- by the respondent. The said clause is relatable to the period prior to the appointment of Arbitrator.

[4]. For erection, following provisions were made:-

> *"(i) 10% of the order value on acceptance of the order subject to the supplier furnishes bank guarantee from a Nationalized Bank in India for a equivalent amount valid for a period of 12 Calender months.*
>
> *(ii) 80% against monthly progressive bills duly certified by the General Manager of the Plant.*
>
> *(iii) Balance 10% within 12 calender months from the date of satisfactory commissioning of the plant."*

(b) (i) has already been complied with. (b) (ii) has also been complied with. (b) (iii) is the offending clause, wherein the entire amount has not been paid, rather it has been retained and forfeited i.e. Rs.3,56,487/-.

[5]. For taxes and duties, the clause has been complied with.

[6]. In respect of retention for production development, learned counsel for the petitioner submitted that 50% of the entire claim under retention for product development has been retained and the remaining 50% has been released. The release of 50% of the amount under the aforesaid category is suggestive of the fact that the compliance was done and the action of the respondent was not justified in forfeiting the amount of Rs.7,56,781/-. The letter dated 12.08.1989 on record showed that the product has been developed, stabilized and commissioned.

[7]. According to the aforesaid letter dated 12.08.1989, minutes of the final production trials of malted milk foods manufacturing plant at Jalandhar were considered in the presence of all concerned and it was noticed that the production trial was started from 07.08.1989 jointly by the officials to enable Doaba Co-operative Milk Producers Union Ltd., Jalandhar to continue the regular production of malted milk foods. Initially, some problems were faced, which were rectified. It was also noticed that now the production has been standardized, stabilized and acceptable for marketing. If any further improvement is required, the same shall be incorporated after

ascertaining the acceptability of the product from the market. It was also proposed that regular production will be continued to train the staff permanently for smooth production of the malted milk products. It was also noticed by the authorities that about 200 kgs of the finished product was manufactured and packed. The representative of the petitioner was of the opinion that the capacity trial will be conducted later on when the staff will be trained and production operation are stabilized. However, the capacity can be achieved as per calculations submitted before the concerned authority. Petitioner was to be informed about the capacity trial to enable the petitioner to make its own arrangements. The committee was of the opinion that the final decision regarding deployment of staff for regular production be taken immediately by the management of Doaba Co-operative Milk Producers Union Ltd., Jalandhar.

[8]. Perusal of the aforesaid letter revealed that the plant was developed, stabilized and commissioned according to the satisfaction of the authority and even finished product was also manufactured and packed to the satisfaction of the authority. For future improvements, the provisions were made and even for capacity trial, the provisions were to be made in future. There was no dispute with regard to plant having been developed, stabilized and commissioned by the petitioner for

which no such bifurcation in terms of retention for product development could have been made by the respondent.

[9]. A dispute arose between the parties and the matter was referred to the Arbitrator. Statement of claim was filed by the petitioner in respect of Rs.43,14,295.28 from the respondent. Petitioner has highlighted its stand that after installation of the plant, capacity trials for testing the capacity were offered by the petitioner, but the same were declined by the respondent in a very clandestine manner. The Milkfed has operated the plant for one year. In view of agreement performance, guarantee period was 12 months which stood expired in 1990. Despite this, Milkfed has encashed two bank guarantees without assigning any reasons and has also withheld a sum of Rs.72,869/- towards development of product and earnest money of Rs.20,000/- without any justifiable reasons.

[10]. Learned counsel for the petitioner submitted that the factum of letters dated 28.07.1989 and 12.08.1989 have substantiated the fact that the plant was developed, sensitized, stabilized and commissioned fully and the same was taken over by the Milkfed and was operated for a period of one year. The plaint had worked to the satisfaction of Milkfed. According to the learned counsel, the aforesaid letters were misread, mis-construed and mis-supplied by the Arbitrator in his award dated

24.04.2000.

[11]. Learned counsel for the petitioner relied upon ***Rajasthan State Mines and Minerals Ltd. Vs. Eastern Engineering Enterprises and another, (1999) 9 Supreme Court Cases 283, Grid Corporation of Orissa Ltd. and another Vs. Balasore Technical School, AIR 1999 Supreme Court 2262, Bharat Coking Coal Ltd. Vs. Annapurna Construction, (2003) 8 Supreme Court cases 154, Seth Mohanlal Hiralal Vs. State of M.P, (2003)12 Supreme Court cases 144, Steel Authority of India Ltd. Vs. J.C. Budharaja, Government and Mining Contractor, (1999) 8 Supreme Court cases 122, Food Corporation of India Vs. Chandu Construction and another, (2007) 4 Supreme Court cases 697*** and contended that when fundamental terms of the agreement between the parties are ignored by the Arbitrator, then it has to be taken that the Arbitrator has exceeded his jurisdiction. Arbitrator is duty bound to consider the bilateral terms and conditions between the parties and decision, if any, goes against the terms of the reference, it amounts to commission of a jurisdictional error and the award of the Arbitrator can be interfered with by the Court. Learned counsel further emphasized that jurisdiction of the Arbitrator is confined to four corners of the contract and the Arbitrator cannot ignore

terms and conditions of the contract, otherwise he would be acting without jurisdiction. If the material documents are ignored, the same would amount to mis-conduct under Section 30(a) of the Arbitration Act and the same would be having no connotation of moral lapse.

[12]. The common view arising out of aforesaid precedents has to be applied in the context of terms and conditions of the contract. If the Arbitrator ignores specific terms and conditions of the contract and goes beyond four corners of the contract, such award would be impermissible. Learned counsel by referring to component (d) of Clause 7 contended that the entire claim has been decided by the Arbitrator on the basis of aforesaid clause of retention for product development by inferring that the plant has not reached upto the capacity of 4 MTs per day and therefore, the entire claim of the petitioner has to be rejected. Learned counsel further submitted that even as per component (d) of Clause 7, half of the claim arising out of aforesaid component was retained and remaining half has been released. If the product was not developed according to the terms and conditions of the agreement, then how half of the amount was released in favour of the petitioner and the remaining half was retained. As per letter dated 12.08.1989, it was the decision of the respondent to show that the production

has been developed, stabilized and commissioned, therefore, the Arbitrator has gone beyond the scope of reference by disallowing the claim of the petitioner in toto.

[13]. The findings recorded by the Arbitrator are self contradictory inasmuch as that the entire claim of the petitioner has to be tested on the threshold of components of supply, erection, taxes and duties and retention for product development. All the components of supply were duly satisfied except (a) (iii) that too to the extent of retention of Rs.3,07,325/- along with earnest money of Rs.20,000/-. For erection, all the components were duly satisfied except (iii) for which the amount was retained and forfeited to the tune of Rs.3,56,487/-. In respect of Clause (d), the Arbitrator has rejected the claim of the petitioner in toto without adhering to the clauses of aforesaid components which were duly satisfied and in respect of retention for production development also 50% of the amount was released on appreciating the product being developed, stabilized and commissioned as per satisfaction of the competent authority. The award of the Arbitrator is self-contradictory and could not be made a rule of the Court in view of objections raised.

[14]. Learned counsel for the respondent however endorsed the findings recorded by the Arbitrator on the ground that as per

agreement, the plant has not reached upto the capacity of 4 MTs, therefore, award given by the Arbitrator is justified for rejecting the claim of the petitioner.

[15]. Petitioner filed objections under Section 30 of the Indian Arbitration Act against the award dated 24.04.2000 passed by the Arbitrator. Respondent federation filed the petition against the petitioner and Registrar Co-operative Society under Section 14 read with Section 17 of the Arbitration Act to file the award dated 24.04.2000 in the Court for making the award as rule of the Court. Accordingly, the award was received in the Court through the Arbitrator. On the objections filed by the petitioner, the Court proceeded to decide the same after framing the issues. The objections filed by the petitioner were dismissed and the separate petition filed by the respondent in Arbitration No.30 of 22.05.2000 for making the award as rule of the Court was allowed. Civil Judge (Senior Division), Chandigarh dismissed the objection petition vide order dated 01.09.2007.

[16]. An appeal was preferred before the Additional District Judge, Chandigarh and the same was dismissed on 19.11.2012 primarily on the ground that the Court cannot sit as a Court of appeal on the merits of the award announced by the Arbitrator. The Court also observed that the Court can only see whether

Arbitrator has mis-conducted himself or he has mis-conducted the arbitration proceedings. Reasonable opportunities were given to the petitioner by the Arbitrator and the petitioner availed the same by examining the witnesses. Opportunity was given to cross examine the witness of the respondent. Petitioner was duly represented by the authorized representative before the Arbitrator and the proceedings were conducted in the presence of all the authorities. Lower Court Appellate Court proceeded to dismiss the appeal by observing that the Arbitrator has not mis-conducted himself as well as the proceedings.

[17]. Having considered the facts and circumstances of the case, I find that the award given by the Arbitrator is harsh enough to reject the claim of the petitioner even qua those components which were duly complied with according to the satisfaction of the respondent. Even the component (d) i.e. retention for product development was also complied with to the extent of 50%. Only because the plant has not reached upto the capacity of 4 MTs per day, the entire claim of the petitioner could not be rejected on that sole premise. In my considered opinion, the Courts below have not decided the objections with reference to material on record. In the light of objections raised and material available on record, the Court below would be obligated to decide the controversy, whether the Arbitrator has

gone beyond the scope of reference, thereby misconducting himself?

[18]. For the reasons recorded above, the impugned orders are set aside. The case is remanded to the Court of Civil Judge (Senior Division), Chandigarh for fresh decision on the objection under Section 30 of the Indian Arbitration Act 1940 afresh in accordance with law.

[19]. Nothing expressed hereinabove shall be taken to be a final expression on merits of the case. The Court below shall not be influenced by any statement of facts and would re-assess the controversy purely on merits in accordance with law with reference to the scope of remand.

[20]. Disposed of.

(RAJ MOHAN SINGH)
JUDGE

10.11.2017
prince

Whether Reasoned/Speaking **Yes/No**

Whether Reportable **Yes/No**