

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

**FAO No. 5227 of 2012 (O&M)
Date of Decision: 24.10.2017**

Union of India

..... Appellant

Versus

M/s Narinder Singh & Sons

..... Respondent

CORAM: HON'BLE MR. JUSTICE JASWANT SINGH

Present: Mr. Puneet Jindal, Senior Advocate assisted by
Mr. Karamjit Verma and Mr. Amandeep Singh Meho, Advocates
for the appellant.

Mr. Anand Chhibbar, Senior Advocate assisted by
Mr. Vishal Gupta and Ms. Riya Bansal, Advocates
for the respondents.

JASWANT SINGH, J.

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'Act'), is filed assailing Order dated 22.03.2012 passed by Additional District Judge, Gurdaspur whereby objection petition filed by the appellant-UOI, under Section 34 of the Act has been dismissed.

2. The facts emerging out from impugned order as well as record of the case are that after a long litigation, Justice A.L. Bahri (Retd.) was appointed sole Arbitrator by this Court who vide his award dated 27.11.2010 allowed the claim of the respondent-contractor. The appellant filed objection petition under Section 34 of the Act and Ld. ADJ vide Order dated 22.03.2012 upheld award passed by Arbitrator. Ld. ADJ held that Arbitrator has given a number of opportunities to the appellant-UOI to lead evidence and even subject to costs one more opportunity was granted,

however, the appellant failed to pay even costs. Therefore, it cannot be said that Arbitrator has violated the principles of natural justice. The Arbitrator has rightly granted interest in terms of Section 31 of the Act.

3. Mr. Puneet Jindal, Senior Advocate for the appellant raised two issues namely (i) Violation of principles of natural justice and (ii) Payment of Interest. Mr. Jindal vehemently argued that Arbitrator had passed award in gross violation of principles of natural justice. The Arbitrator vide Order dated 28.09.2010 adjourned the matter subject to payment of cost of ₹ 10,550/- with a direction to appellant to produce its evidence on affidavit and produce the person/persons giving affidavit for cross-examination on the next date of hearing. The appellant moved an application for recalling Order dated 28.09.2010. However, Arbitrator vide order dated 21.10.2010, dismissed the said application of the appellant and further held that since cost have not been paid, affidavit of Sh. Abhay Kumar, Senior DEN-II, Northern Railway, Ferozpur can not be taken on record.

4. As per counsel for the appellant, the Arbitrator while rejecting application for recalling order dated 28.09.2010 was supposed to grant an opportunity to deposit cost and lead evidence. The Arbitrator acting in unfair and arbitrary manner rejected application as well as refused to take on record affidavit of Sh. Abhay Kumar, Sr. DEN-II, Northern Railway, Ferozpur. Therefore, there is gross violation of principles of natural justice. He also contended that Section 25(b) of the Act was amended w.e.f. 23.10.2015 whereby in case respondent fails to communicate his statement of defence, Arbitrator is empowered to forfeit the right of the respondent to

Section 25 w.e.f. 23.10.2015 is that prior to amendment, the Arbitrator had no right to forfeit defence of the respondent.

On the question of interest, counsel submitted that there was specific clause i.e. Clause 16 (2) of the General Conditions of the Contract mandating that no interest would be payable on consideration payable to Contractor. Thus, the learned Additional District Judge as well as the Arbitrator had no jurisdiction to go beyond the terms and conditions of the agreement and have wrongly accepted the claim of interest because it is settled principle of law that the parties for pre reference and *pendente lite* interest have to adhere to the terms and conditions of agreement executed between them. In support of his contention, Ld. Counsel relied upon judgment of Hon'ble Supreme Court in the case of ***Payyavula Vengamma versus Payyavula Kesenna and others 1953 AIR (SC) 21, Sree Kamatchi Amman Contructionss Vs The DRM (Works), Palghat 2010 AIR (SC) 3337, UOI Vs Bright Power Projects 2015(4) SCC (Civil) 702***. He also relied upon judgment of Orissa High Court in the case of ***Dharmu Saboto and another versus Krushna Saboto and other, 1956 AIR (Orissa) 24*** and Bombay High Court in the case of ***Nazim H. Kazi versus Kokan Mercantile Cooperative Bank (Ltd.)***.

5. Per contra, Mr. Anand Chhibbar, Senior Advocate has argued that there is no violation of principles of natural justice. The appellant was granted proper and fair opportunity and he even failed to deposit costs as ordered by Arbitrator. The Arbitrator had no option except to strike down the defence of the appellant. Sufficient opportunities were granted so there is no violation of principles of natural justice. The scope of interference

under Section 34 is very limited so there is no reason to set aside the award

and order of objecting court. The counsel cited judgment of Supreme Court in the case of ***Associate Builders Vs DDA 2015(3) SCC 49, Punjab State Civil Corporation Ltd. and another versus M/s A.P. Rice Mills Ltd. and another, SLP CC 21248 of 2016; Navodaya Mass Entertainment Ltd. versus JM Combines (2015) 5SCC 698***. He also cited judgment of this Court in ***Punjab State Civil Supplies Corporation Ltd. and another versus M/s Trade India Ltd. and another, FAO 3848 of 2010***. In view of all these judgments, the scope of interference is very limited.

On the question of interest, the counsel submitted that the Arbitrator had jurisdiction to grant interest because Clause 16 nowhere says that the Arbitrator has no power to grant interest pre-reference or *pendente lite*. In support of his argument, Mr. Chhibbar cited judgment in the case of ***JSW Steels Ltd. versus AI Ghuriar Iron Steel LLC, 2014 (5) AIR Bom. R 540*** and ***Hume Pipe Co. Ltd. versus State of Rajasthan 2010 (1) R.C.R. (Civil) 620***.

6. After hearing both the parties and perusing the record with the able assistance of counsels, court finds that below mentioned 3 questions arise for the adjudication:

- i) Whether Arbitrator has passed award in violation of principle of natural justice?
- ii) Whether Arbitrator has rightly granted interest preference as well as *pendente lite*?

If question No.1 is answered in affirmative, the below mentioned question would arise which though has not been raised by both the parties, nevertheless needs to be answered.

- iii) Whether objecting Court or this Court can remand the

matter back to Arbitrator?

7. This Court finds that Arbitrator vide Order dated 28.09.2010 while adjourning the case for 21.10.2010, granted opportunity to produce evidence on affidavit and produce persons giving affidavit for cross-examination subject to payment of costs of ₹ 10,550/-. The appellant did not deposit costs and filed application seeking recalling of Order dated 28.09.2010. The Arbitrator vide Order dated 21.10.2010 dismissed said application and without granting opportunity to the appellant to deposit costs held that the appellant has failed to pay cost, therefore, affidavit of the appellant cannot be taken on record. It is axiomatic in judicial discipline that justice hurried is justice buried. The Arbitrator was supposed to grant at least one opportunity to deposit cost after dismissing application seeking recalling of order imposing costs. It was unfair on the part of Arbitrator to strike down defence of the appellant without granting at least one opportunity to deposit costs. The appellant is Union of India and it is well known that in Government sector costs cannot be deposited without following proper procedure. In such circumstances, it was incumbent upon the Arbitrator to grant some time to deposit costs which the Arbitrator did not; therefore, the Arbitrator has passed order in violation of principles of natural justice. Therefore, award dated 27.11.2010 passed by Ld. Arbitrator as well as Impugned Order dated 22.03.2012, passed by objecting court is liable to be set aside. The counsel of the respondent has cited various judgments to contend that scope of interference under Section 34 and 37 is very limited so this Court should not interfere in the award as well as order passed by Objecting Court. I find that violation of principle of natural justice is one of the grounds for interference under Section 34 of the Act.

From time to time courts have set aside award even on the ground of denial of opportunity of cross examination and this is a case where defence of the respondent was struck down even though Arbitrator could grant another opportunity to deposit costs.

8. The second issue involved is question of interest. The appellant has relied upon Clause 16(2) of the General Conditions which indisputably is part of contract. The said Clause reads as under:

Clause 16(2):

INTEREST ON AMOUNTS- No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon.

The argument of appellant carries weight and has to be accepted. The same clause in the case of appellant Railway itself has been considered by Hon'ble Supreme Court in the case of ***Sree Kaatchi*** *ibid*. In the said case after reproducing clause 16(2) of the General Conditions (as in present case) in para 5, the Hon'ble Supreme Court held that no interest could be paid on the amount awarded which was payable to the contractor under the contract. As in the present case, same clause 16(2) is part of contract so it was beyond the jurisdiction of the Arbitrator to grant interest pre-reference as well as *pendente lite*. However, in view of the provision under Section 31(7) of the Act, the arbitrator is not restrained from granting interest post award. Therefore, findings qua interest pre reference and *pendente lite* are liable to be set aside.

9. As question No. 1 stands answered in affirmative, 3rd question

assumes significance and it is imperative for this court to decide 3rd question even though has not been addressed by both the Counsels. If the matter is remanded, the Arbitrator would have to start proceedings from the stage at which defence of the appellant was struck down. Hon'ble Supreme Court while dealing with cases arising under Arbitration and Conciliation Act, 1996, in the case of ***Taruna Vaid and Another versus Rakesh Kumar, 2005 (12) SCC 235, United India Insurance Co. Ltd. versus J.A. Infrastructure Pvt. Ltd. 2006 (4) R.C.R. (Civil) 331 and Union of India versus Col. L.S. N. Murthy and Another 2012 (3) R.C.R. (Civil) 629,*** remanded the matter back to the Arbitrator. Bombay High Court in the case of ***Gulraj Engineering Construction versus Hotel Corporation of India Ltd., 2012 (40) R.C.R. (Civil) 344; Rajesh Tiwari versus Motilal Oswal Securities Ltd & Another 2013 (11) R.C.R. (Civil) 455*** and Delhi High Court in the case ***C.P. Madan Vs National Small Scale Industrial Corporation 2997 (1) R.A.J. 585*** remanded the matter back to Arbitral Tribunal.

However, court has come across recent judgment of Hon'ble Supreme Court in the case of ***Kinnari Mullick and Others versus Ghanshyam Das Damani, 2017 (3) R.C.R. (Civil) 251.*** The Hon'ble Supreme Court while hearing appeal against the decision of Division Bench of Calcutta High Court has held that Division Bench wrongly suo moto remanded, the matter back to Arbitrator. The Single Judge had set aside award and held that parties are free to pursue their remedies in accordance with law. The Division Bench of Calcutta High Court while upholding decision of Ld. Single Judge remanded the matter back to the Arbitrator,

with a direction to assign reason to support his award. Hon'ble Supreme

Court while setting aside decision of Division Bench held that the Parliament has not vested court with the power to remand the matter back to Arbitral Tribunal under the scheme of 1996 Act, therefore, Court can not exercise power to remand the matter back to Arbitral Tribunal after setting aside the award.

It is apt to notice that under Section 16 of the Arbitration Act, 1940, the objecting court had power to remand the matter back to the arbitrator, however, under the Act of 1996, scope of interference by objecting court has been squeezed. There is limited power to remand under Section 34(4) of the Act.

10. This Court is bound by judgment of Bench of three judges of Hon'ble Supreme Court in the case of Kinnari Mullick *supra* wherein it has been categorically held that under Section 34 of the Act, court can not remand the matter back to arbitrator. Hon'ble Court has upheld decision of Single Judge of Calcutta High Court who had set aside the award and directed to the parties to avail remedy as per law.

11. In the above background, this Court finds that parties would be left in lurch if award is set aside and dispute between the parties is not finally settled and put to rest. Our Courts time and again have held that it is duty of the Courts to finally adjudicate the rival claims of the litigants and nobody should be left remediless. This court believes that Section 43 of the Act is solution of the situation arising from setting aside of the award, therefore, it would be profitable to have a look at Section 43 of the Act. The said Section 43 of the Act is reproduced as under:

43. Limitation.—(1) *The limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in*

Court.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted.

(Emphasis supplied)

As per Section 43(4) *supra* where Court orders that an Arbitral Award be set aside, the period between the commencement of Arbitration and the date of order of the Court shall be excluded in computing the time prescribed by Limitation Act for the commencement of the proceedings with respect to the dispute so submitted. This Sub-section indicates that matter may be decided afresh, if it is set aside by the Court. Considering purport and scope of Section 43(4) of the Act, Court holds that period spent between the commencement of Arbitration and date of Order passed by this Court shall be excluded in computing the time prescribed by Limitation Act for the commencement of proceedings with respect to the dispute so submitted.

Delhi High Court while setting aside award in the case of *Cybernetics Network Pvt. Ltd. versus Bisquere Technologies Pvt. Ltd., 2012 (39) R.C.R. (Civil) 604* has held that it will be open to the appellant to approach the ld. Arbitrator to decide those claims which have been rejected by impugned award, in accordance with law and pass a fresh award.

Considering the opinion of Ld. Single Judge of Delhi High Court and Calcutta High Court in judgments *supra* and respectfully following the judgment of Hon’ble Supreme Court in the case of *Kinnari supra*, this court holds that matter can not be remanded back to Arbitrator, however, parties are at liberty to approach arbitrator for the afresh adjudication of their dispute or avail any other civil remedy as otherwise permitted by law subject to exclusion of period spent in present litigation as envisaged under Section 43(4) of the Act.

With the aforesaid observations, order of Arbitrator and Objecting Court is set aside. Parties are at liberty to approach the Ld. Arbitrator to decide their claims in accordance with law.

October 24th, 2017

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**(JASWANT SINGH)
JUDGE**

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No