

In the High Court of Punjab and Haryana at Chandigarh

Civil Revision No. 6527 of 2012(O&M)

Date of Decision:6.4.2018

Executive Engineer Punjab Mandi Board Grain Market

---Petitioner

vs.

Surinder Kumar Contractor

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. V. K.Kaushal, Advocate
for the petitioner
Mr. Keshav Gupta, Advocate
for the respondent

Rekha Mittal, J.

The present petition directs challenge against orders dated 21.4.2012 passed by the Additional District Judge, Bathinda and dated 29.1.2009 by the Additional Civil Judge (Senior Division), Bathinda whereby application under Sections 14 and 17 of the Indian Arbitration Act, 1940 (in short “the Act”) for making award dated 23.1.2003 as rule of the Court, filed by respondent Surinder Kumar was allowed by the trial court and appeal preferred by the petitioner against order dated 29.1.2009 was ordered to be dismissed.

In short, respondent was allotted the work for supply and fixing tubular trusses for construction of three single shed at grain market Raman Mandi, G.No. II vide letter dated 13.3.1984 and agreement number FDK 4 of 1984-85 containing terms and conditions of work was executed by the respondent in favour of the petitioner. The time limit for completion of work was two months

to be reckoned from 7.3.1984. As per plea of the petitioner, the contractor could not complete the work within the specified time. On his request, time was extended upto 31.7.1984. The contractor failed to complete the work even within the extended period and the petitioner had to get the work completed at the risk and cost of the respondent.

The respondent raised dispute in terms of arbitration clause in the agreement and the matter was referred to sole arbitrator namely R.L.Angi, the then Superintending Engineer PWD, B and R Bathinda Circle who delivered award dated 31.5.1991 for a sum of Rs. 3,540/- but subject to final settlement of account after adjusting the amount recoverable from the contractor for the work having been left incomplete. The respondent filed application under Sections 14 and 17 of the Act for making the award dated 31.5.1991 as Rule of the Court. The application was dismissed by the Additional Civil Judge (Senior Division), Bathinda vide order dated 26.2.1998 and the matter was remitted to the Arbitrator for decision afresh.

Respondent filed an application on 16.3.2001 for appointment of Hakam Singh, Superintending Engineer as sole arbitrator as Gurbax Singh, Superintending Engineer earlier appointed as Arbitrator vide order dated 24.8.1999 has since retired from service. The application was allowed by the Court and Hakam Singh was appointed as sole arbitrator who gave award dated 23.1.2003 whereby he has awarded a sum of Rs. 1,15,123/- with interest @ 9% per annum till actual payment to the respondent. The counter claim filed by the appellant for sum of Rs. 2,13,591/- was dismissed.

As has been noticed hereinbefore, application filed by the respondent for making the award dated 23.1.2003 as Rule of the court was allowed by the trial court and the order passed by the trial court has been affirmed in appeal.

The sole submission made by counsel for the petitioner is that the petitioner submitted counter claim, referred to at pages 89-90 of the paper book

but the Arbitrator rejected the counter claim without advertng to contention of the petitioner much less assigning any reason for rejection of the counter claim, therefore, neither the award passed by the Arbitrator can be allowed to sustain nor the orders making the award as Rule of the Court passed by the trial court and affirmed in Appeal can be confirmed. In support of his contention, he has relied upon judgment of Hon'ble the Supreme Court **K.V.George vs. The Secretary to Government, Water and Power Department, Trivandrum and another AIR 1990 Supreme Court 53**. Further reference has been made to judgment of this Court **M/s Standard Wires and Cables, Khanna vs. Uttar Haryana Bijli Vitran Nigam and another** FAO No. 4822 of 2013 decided on 22.3.2016.

Counsel for the respondent while refuting contention of counsel for the petitioner would urge that though the award was passed by the Arbitrator under the Act but the Arbitrator has dealt with claims and counter claims in detail and rejected counter claim for the reasons assigned in paras 6 to 8 of the award. It is further argued that as per the settled position in law, Court cannot sit in appeal on findings recorded by the Arbitrator nor can appreciate and re-appreciate evidence for recording a findings different from what has been held by the Arbitrator.

Another submission made by counsel is that the present petition filed under Article 227 of the Constitution of India is not maintainable as the petitioner, at best, can avail remedy under Section 115 of the Code of Civil Procedure (in short "the Code"). It is further argued that remedy under Article 227 of the Constitution can be availed only if there is a statutory bar against filing of petition under Section 115 of the Code. In support of his contention, he has relied upon judgments of Hon'ble the Supreme Court **Sadhana Lodh vs. National Insurance Company Limited and another (2003) 3 Supreme Court Cases 524** and **Vishesh Kumar vs. Shanti Prasad (1980) 2 Supreme Court Cases 378**.

Counsel representing the petitioner, in reply, has submitted that even

if the remedy of revision under Section 115 of the Code is available, petition under Article 227 of the Constitution can be filed if the lower court has recorded finding without taking into consideration evidence on record. For this purpose, he has relied upon judgment of Hon'ble the Supreme Court **Achutananda Baidya vs. Prafulla Kumar Gayen and others AIR 1997 Supreme Court 2077**. In addition, it is argued that as the Arbitrator did not advert to counter claim filed by the petitioner and so also the evidence led in this regard, petition under Article 227 is maintainable. Reference has been made to judgment of Hon'ble the Supreme Court **National Thermal Power Corporation Limited vs. Siemens Atkeingesellschaft 2007(2) RCR (Civil) 449**. In the alternative, it is argued that if this Court arrives at a conclusion that petition under Article 227 of the Constitution is not maintainable as it was required to be filed by invoking Section 115 of the Code, petition may be treated as having been filed under the relevant provisions of the Code.

In response, counsel for the respondent would urge that petition filed under Article 227 of the Constitution cannot be treated as the one filed under Section 115 of the Code. For this purpose, reference again has been made to judgment of Hon'ble the Supreme Court in **Vishesh Kumar's case (supra)**.

I have heard counsel for the parties, perused the paper book particularly the award passed by the Arbitrator and the judgments passed by the Courts in proceedings under Sections 14 and 17 of the Act.

Perusal of the award would make it evident that the respondent-contractor raised four claims alongwith his entitlement to costs, detailed in the award. Simultaneously, the petitioner filed reply to the claim submitted by the contractor and also raised counter claim(s), referred to at pages 89-90 of the paper book. The contention raised by counsel for the petitioner that the Arbitrator did not advert to the counter claim preferred by the petitioner and merely recorded its conclusion with regard to award qua counter claim to be nil, is not meritorious

and liable to be rejected. As has been rightly argued by counsel for the respondent, the Arbitrator in paras 6 to 8 of the award has also dealt with counter claim raised by the petitioner and eventually recorded its findings in the concluding lines of para 8 by holding that the board has not measured up work of the contractor; final measurements/bill of the contractor has not been prepared; contractor has not been called in this regard for final measurement/preparation of final bill and; additional clause No. 5 of the agreement has been flouted by the Mandi Board as due notice has not been given to the contractor before re-allotting the work to other agency. In the given scenario, it is difficult to accept contention of the petitioner that the Arbitrator did not advert to counter claim filed by the petitioner while partly allowing the claims made by the contractor. In the given scenario, the petitioner cannot derive any advantage to its contention from the judgments in **K.V.George's case (Supra)** and **Standard Wires and Cables' case (supra)**.

Though the petition filed by the Executive Engineer, Punjab Mandi Board Grain Market, Bathinda is not tenable on its merits, therefore, this Court need not to dilate on the question of maintainability of the petition raised by counsel for the respondent. Nevertheless, Hon'ble the Supreme Court in **Sadhana Lodh's case (Supra)** has made obiter observation in para 6 of the judgment to the following effect:-

“Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the high Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution.”

In **Veshesh Kumar's case (supra)**, remedy of revision under Section 115 of the Code was barred by way of amendment by State of Uttar Pradesh vide (Uttar Pradesh Amendment) Act, 1978 and Hon'ble the Supreme Court has held that no revision to High Court would lie against a revisional order passed by the District Court under Section 25, Provincial Small Cause Courts Act, 1887 (as applicable in Uttar Pradesh). The observations in para 17 of the judgment were made in the light of peculiar facts and circumstances of that case.

For the foregoing reasons, the petition fails and is accordingly dismissed leaving the parties to bear their own costs.

(Rekha Mittal)
Judge

6.4.2018

paramjit

Whether speaking/reasoned: Yes

Whether reportable : Yes/No