

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

FAO No. 955 of 1990 (O&M)
Date of Decision: 14.03.2019

M/s Megh Raj Bansal, Govt. Contractor & Suppliers 3026-D, Street
No.4 Ajit Road, Bhatinda through its partner Hem Raj Gupta

..... Appellant

VERSUS

Punjab State Electricity Board and another

..... Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Amit Goyal, Advocate,
for the appellant.

Mr. Vaibhav Narang, Advocate
for respondent No.1.

JAISHREE THAKUR, J.

1. The appellant herein is aggrieved of the order dated 31.07.1990 whereby the objections filed on behalf of the respondent- Punjab State Electricity Board have been accepted and the petition for making the award dated 24.11.1987 as rule of the Court has been dismissed.

2. In brief a few facts that need to be noticed for proper adjudication of this case would be that an agreement for construction of 184 quarters including water supply, sanitary installations, compound wall etc. at Nuhon Colony RTP, Ropar came to be entered

into between the appellant firm and erstwhile Punjab State Electricity Board (for short 'PSEB'). On account of the difference which arose between the parties, the dispute was referred to the sole Arbitrator for adjudication. The Arbitrator entered into the reference and after giving opportunities to both the parties, submitted the award dated 24.11.1987 in favour of the claimant firm to the extent of a lump sum payment of ₹ 6,63,225/- along with interest @ 18% per annum. The appellant firm moved an application for making the award the rule of the Court. The respondent filed objection petition under Sections 24, 30 & 33 of the Indian Arbitration Act, 1940. The primary grounds raised therein were that the award is non-speaking, the Arbitrator had not dealt with the award itemwise, the award was passed after a period of four months, while further alleging that the Arbitrator had overlooked the material documents placed on the record while allowing the claim of the firm. It was further alleged that the Arbitrator had mis-conducted himself while allowing the claim. The objections were allowed. Aggrieved against the said order dismissing the application filed to make the award a rule of the Court, the instant appeal has been filed.

3. The matter was allowed by the High Court by holding that the Court below could not have allowed the objections as none of the objections were falling within the realm of Section 30 of the 1940 Act. It was further held that the Arbitrator has taken into consideration all the facts and awarded lump sum compensation while

further holding that there was no illegality and perversity in the award of the Arbitrator as the consolidated claim had been allowed, which was not barred. This judgment was challenged before Hon'ble the Supreme Court by filing Civil Appeal Nos. 9012-9013 of 2018 @ SLP(C) No. 31483-31484 of 2016 wherein Leave to Appeal was granted and the order passed in FAO No. 955 of 1990 was set aside and the matter was remitted back to this Court for hearing the matter afresh.

4. Mr. Amit Goyal, learned counsel appearing on behalf of the appellant contends that the Arbitrator after giving full opportunity to both the parties to lead evidence and argue the case, allowed the claim to the extent of ₹ 6,63,225/- only. It is argued that in fact a total of 12 claims had been filed including claim No. 12 for cost of reference and sufficient evidence had been led before the Arbitrator in support of the said claims. It is argued that on consideration of the entire evidence a consolidated claim was allowed which is permissible. It is further argued that in ***Raipur Development Authority etc. vs. M/s Chokhamal Contractors etc. 1989(2) SCC 721*** a Larger Bench of Hon'ble the Supreme Court has held that absence of reasons in an award by the Arbitrator, would not make it a ground to set it aside. Reliance has also been placed upon ***Hindustan Steelworks Construction Limited Vs C Rajashekhar Rao 1987(2) ArbLR 200*** to argue that it is not open to the court to probe the mental process of the arbitrator and speculate where no reasons are given in

the award, as to what compelled the Arbitrator to arrive at his conclusion. Reliance has also been placed upon a judgment rendered in *State Of Orissa Vs M/S Lall Brothers 1989(1) ArbLR 37* to argue that arbitration award cannot be set aside as being unreasoned and on the ground that lump sum amount was awarded without specifying under the various claims.

5. Per contra, Mr. Vaibhav Narang learned counsel appearing on behalf of respondent No.1-Punjab State Electricity Board raises two fold contentions that the award of the Arbitrator is beyond the period of limitation since the reference was entered into on 06.07.1987 and the award was passed on 24.11.1987 i.e. beyond the period of four months while further arguing that the award itself was a non-speaking award since it allowed a consolidated claim of the appellant which was contrary to his own order in which it had been decided that he would pass an order on all issues raised.

6. I have heard learned counsel for the parties and with their able assistance have also gone through the pleadings and the case law as cited.

7. As per Section 30 of the Arbitration Act, 1940 grounds for setting aside an award are enumerated therein. A reading of the said Section would reflect that an award shall not be set aside except on one or more of the following grounds, namely:-

- (a) that an arbitrator or an umpire has misconducted himself or the proceedings;

- (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35;
- (c) that an award has been improperly procured or is otherwise invalid.

8. No doubt, there are catena of judgments which have been relied upon by the counsel for the appellant which have held that when the award is silent, it is not open to the Court to probe the mental process by which Arbitrator has reached his conclusion. There are also a number of cases which have held that in case of non-speaking award, the jurisdiction of the Court is limited and the award can only be set aside if the Arbitrator acts beyond his jurisdiction. However, in a judgment referred to as ***Bharat Coking Coal Ltd. vs L.K. Ahuja, 2001(4) SCC 86***, the scope of interference with a non-speaking and lump sum award passed under Section 30 of the Arbitration Act has been considered. In the aforesaid case, ***Bharat Coking Coal Ltd.*** case (supra) two works were assigned by the appellant for construction of quarters at Karmik Nagar, Dhanbad pursuant to a tender notice issued, after certain negotiations between the parties, two work orders were issued by the appellant-Bharat Coking Coal Ltd. to the Contractor and the schedule dates of completion of the respective works were fixed. A dispute arose between the parties and the matter was referred to the sole Arbitrator, who made two awards which were filed in the Court of Civil Judge.

Objections were filed therein and the same were not considered as they were filed beyond the period of limitation as prescribed under Article 119 of the Schedule of the Limitation Act, 1963. The High Court dismissed the appeals which led to the filing of the Special Leave Petition. The Hon'ble Supreme Court while taking note of the pleadings of the Arbitrator and the award passed thereto where lump sum amount of ₹ 16,74,197.29 with interest at certain rates and costs of the arbitration had been awarded, came to hold in para Nos. 10 & 13 as under :-

“10. We cannot but describe the arbitrator's awards as hybrid which are neither speaking awards nor non-speaking partly speaking and partly non-speaking awards. The law is well settled that if the award made by the arbitrator is a non-speaking one the difficulty of showing that there is an error apparent on the face of the award becomes insurmountable and ordinarily such award cannot be challenged at all unless it is shown that the arbitrator has wholly travelled outside the contract which gives him the jurisdiction. The law is equally well settled that in cases of speaking awards the Court can interfere if there is an error apparent on the face of the award itself, it could also be shown that the arbitrator has misconducted himself in arriving at certain conclusions which are either plainly contrary to law or to the terms of the contract or ignored the provisions of contract or the evidence on record and such other similar matters. When a lumpsum award is made, it is all the more difficult to find out as to what went into the mental process of the arbitrator in fixing the same

particularly when a part of the award is a speaking award and determines the portion of the claim in a particular manner and in respect of other claims merely refers to the pleadings but not decided the matter but gives the award. The position of the appellant before the Court is unenviable and bristles with too many complexities to get over the awards.

13. It is not clear from the pleadings whether the claim made by the respondent is in respect of escalation in the costs of material such as plant, tools, appliances, implements, ladders, cordage, tackle, scaffolding, and tempers, works, etc. inasmuch as the appellant has the obligation to supply the most essential building materials such as cement, steel and such other building material. It is also not clear either from the pleadings or from the award as to whether the escalation claim is in respect of the materials provided by the respondent or in respect of escalation arising from delay in non-supply of materials which was due to be supplied by the appellant. So far as the plant and other equipments are concerned, they had already been provided for the purpose of the execution of the work and how the delay in non-supply of building materials such as cement, steel, etc. caused escalation so far as the building materials provided by the appellant is concerned is not clear. The arbitrator has not applied his mind to this aspect of the matter at all. Having lost sight of the importance of Clause 17 and application of the same to the circumstance of the case will clearly disclose that there is an error apparent on the face of the award. The claim under this head is Rs. 40 lacs with reference to the first agreement and Rs. 25 lacs with reference to the second agreement which is the

major chunk being nearly half the claim made by the respondent. In what manner this aspect has gone into in fixing the lumpsum by the arbitrator is not discernible. Therefore, we have no option but to set aside the entire award in respect of both the agreements made by the arbitrator and remit the matter. We propose that a new arbitrator be appointed in place of the old arbitrator because the arbitrator has dealt with the matter himself as an officer who had correspondence with the contractor at the time when he was an officer of the appellant. Therefore, it is fair neither to the appellant nor to the respondent to continue him as an arbitrator in the proceedings.”

9. In the instant case, this Court does find merit in the arguments raised by learned counsel for respondent No.1, that the Arbitrator had given an award in total violation and contradiction to his own order dated 24.09.1987. The claims raised are as under:

1. Reimbursement of Losses/Damages on account of prolongation of contract period.
2. Non-payment for applying Bitumen 6 inches along the vertical surfaces joining the roof.
3. Loss payment made against Serial Item No. 71(ii) of the Final Bill i.e. C.I. Flushing Cisterns (Item No. 30.3(1) of C.S.R.).
4. Extra payment due for preparation and painting of wooden plywood surfaces.
5. Extra payment admissible for use of 2 Nos Dehra Dun Chips (white) instead of 1½ Nos (3mm) Makrana Chips.
6. Less/under payment made by the

department towards non-scheduled items.

7. Less payment made towards tile terracing work.
8. Less payment made by the department towards certain items of wood-work (joinery) item.
9. -----(pages missing from record)
10. -----(pages missing from record)
11. Less payment made towards 4½” thick brick work in cement mortar 1:6 in foundation and plinth.

The award as passed reads as under:-

“5. That now by virtue of powers vested in me in terms of Contract Agreement and Arbitration Act, 1940, I make the award as under :-

I. The claims of the Claimant are allowed to the extent of Rs. 6,63,255.00 (Rupees Six lacs Sixty three thousands two hundred fifty-five only). The Respondent – Punjab State Elec. Board through Executive Engineer, Civil Const. Divn. No. VI. R.T.P., Ropar shall pay the said amount.

II. If the amount at item I is not paid by the Executive Engineer, Civil Construction Divn. No. VI. RTP, Ropar within 30 days from the date of announcement of the award, the Executive Engineer is liable to pay interest on the amount at item I above at the rate of 18% per annum till the date the payment is made or the decree whichever is earlier.

III. Both the parties are left to bear their own costs of arbitration.”.

10. The award is perfunctory to say the least and does not state which of the claims are being allowed or being discarded. By an order dated 24.09.1987 the Arbitrator had clearly ordered:-

“After discussion and arguments, it is decided that all the issues in the claim petition shall be discussed and considered. The arguments were heard on various claims from both the parties and parties argued according to their statements.”

A reading of the aforesaid order would reflect that there was a consensus between all that all issues as raised in the claim petition would be discussed and considered. The arbitrator had heard arguments on all claims from both the parties and thereafter had adjourned the proceedings for the award. Once it had been decided between the parties that all issues in the claim petition would be discussed and considered, it became incumbent upon the Arbitrator to have given reasons while allowing or dis-allowing the 11 claims as raised. In the judgment referred to as ***Raipur Development Authority etc.*** case (supra) it has been held that in case the parties to a dispute agree that the arbitrator should give reasons for his award, they can insist that such a clause is inserted within the agreement. In such an eventuality the arbitrator would be obligated to give reasons. This view has been reiterated in a recent judgment rendered by the Hon’ble Supreme Court in ***M/S Anand Brothers P. Ltd. Tr. M.D vs Union Of***

India (2009) 14 SCC 212. While dealing with a similar situation when a non-speaking award was passed, it was held that if the agreement mandated a reasoned award to be passed, the arbitrator was obligated to give his finding. It was further held that the term ‘Finding’ presupposes application of mind which is best disclosed by recording of reasons, while further holding that recording of reasons is the soul of every adjudicatory process which affects rights of parties.

11. Therefore, drawing strength from the judgments referred to above, it is thus clear, that the Court can refer to the pleadings of the parties and to the claims made by them before the Arbitrator, to determine whether the award suffers from an error apparent on the record. It is the opinion of the Court that the Arbitrator acted against the decision taken that all claims would be discussed and considered. Consideration on any issue would require a due application of mind and the term “discussed” would necessarily mean that the claims are deliberated upon, weighed upon etc. Since it is a written award being passed, the ‘discussion’ cannot be oral. Discussion would mean that the reasons are to be reflected as to why the claims are being allowed or disallowed, which is wholly absent in the case in hand, making it a sufficient ground to dismiss the appeal and uphold the order of the Court.

12. It is also a case set up by the respondent that the award is beyond the period of limitation. In the case in hand, there is no

dispute that reference was entered into on 06.07.1987 and the award was passed on 24.11.1987. In the proceedings held on 28.07.1987 Er. S.K. Pathak, AEE put in an appearance and filed his authorisation letter given to him to appear on behalf of the respondent-Board. The said authorisation letter was taken on the record and at the same time the respondent Board sought time to file their reply and some documents as well. On 28.07.1987, both the parties agreed that the arbitration proceedings would commence from 28.07.1987 and signatures were appended to the said order. A perusal of the letter authorizing Sh. Pathak to appear was limited and did not give him any authority to make a statement to enlarge time. The argument raised that Er. S.K. Pathak, AEE was not authorized to agree that arbitration would commence from 28.07.1987, is sustainable since he was not authorised to make any statement even though his signatures are appended. Having said that, this court cannot ignore Section 28 of the Arbitration and Conciliation Act 1940 which allows for the Court to grant extension in time whether the award has been passed or not. The power of the Arbitrator to extend the period comes only through the consent of parties and the Court itself has a power to consider extending the time when it is brought before it for making it rule of Court. In a judgment rendered in ***Hindustan Steelworks Construction Ltd.*** case (supra), the Hon'ble Supreme Court has held parties can extend time by consent and even the court can extend time after the award has been passed. This power has to be exercised

judicially. Similar view has been taken in *State Of Punjab Vs Hardyal, 1985(1) PLR 683* where it has been held that the power to enlarge time can be exercised even by the Appellate court where parties have been participating in proceedings before the Arbitrator. Before the Arbitrator, the respondent did not demur to the proceedings commencing from 28.7.1987. Even if Mr. Pathak did not have any authority to sign the proceedings as stated, no objection was taken thereafter by the respondents. In such an eventuality, this court deems it a fit case to allow for extension in time and hold that the award has been passed within the period of limitation. Therefore the finding of the Court is hereby set aside.

13. Based upon the discussion above, this court finds no infirmity in the findings of the Court below dismissing the petition to make the award a Rule of the Court as the award passed did not discuss and consider all claims separately in terms of the order dated 24.09.1987.

14. Appeal stands dismissed.

14.03.2019

Satyawan

**(JAISHREE THAKUR)
JUDGE**

Whether speaking/reasoned
Whether reportable

Yes.
No.