IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

FAO-2844-2004 (O&M)
Date of Decision: May 10, 2019

M/s Bhutoria Transformers and Rectifiers

......Appellant

VERSUS

Dakshin Haryana Bijli Vitran Nigam Ltd. and Others

.....Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Ashwani Talwar, Advocate
with Mr. Sahej Mahajan, Advocate
for the appellant.

None for the respondents.

JAISHREE THAKUR, J.(Oral)

1. The instant FAO has been filed seeking to set aside the impugned order dated 13.03.2004 passed by the Additional District Judge, Panchkula whereby the objections filed by the respondent-HSEB were accepted and the award passed by the Arbitral Tribunal was set aside.

2. The brief facts of the case are that the appellant-company was given a Purchase Order vide Purchase Order No. HH-4516 dated 31.07.1997 for supplying of 1000 KVA Transformers by M/s Haryana State Electricity Board now Uttar Haryana Bijli Vitran Nigam Limited (hereinafter referred to as the UHBVNL for the sake of brevity) valued at ₹4,36,69,400/-. As per the contract the entire lot of transformers was to be supplied up to 04.02.1998. The appellant-company could able to supply only 190 transformers up to February 1998. Therefore, vide letter dated 06.04.1998 the UHBVNL curtailed the

orders of transformers from 1000 to 500. Thereafter, vide letter dated 18.05.1998 the UHBVNL imposed liquidated damages on the appellant-company to the tune of Rs.10,91,735/-. Being aggrieved the appellant-company filed a civil suit at Panchkula. The suit was disposed of on the ground that the appellant-company could invoke arbitration clause and consequently the matter was referred to arbitration.

3. The appellant-company filed 9 different claims before the arbitral tribunal, which are as under:-

1)	Refund of amount by encashment of Bank guarantee and amount paid through demand draft	₹10,91,735/-
2)	Interest @ 24% on the above from 15.06.1998 to 30.11.1999	₹3,82,107/-
3)	Loss of profit on curtailed quantity of 500 No. T/Fs @ 12% of sale price	₹26,20,020/-
i)	Interest on the above amount	₹6,28,804/-
4)	Expenses of forced litigation in civil court District Judge Court and before the Arbitrator	₹1,20,000/-
5)	Expenditure incurred by the Co. for boarding, lodging and travelling of its officers.	₹60,000/-
6)	Excess deductions of discount made by board from the bills	₹1,56,652/-
7)	Interest on delayed payment @ 24% p.a.	₹4,57,860/-
8)	Loss of goodwill and reputation	₹10,00,000/-
9)	Interest on the value of raw-material having purchased by the Co. which remained blocked.	₹5,00,000/-
	Total:	**₹70,17,178/-**

It was mentioned in the claim petition that as per the terms of the Purchase order, the delivery as mentioned in Clause-III of the Purchase Order was required to commence within one month from the date of receipt of technically and commercially clear order/approval of drawings and the total supply was required to be completed by February, 1998 in equal bi-monthly rate Besides the above claim, the claimant-appellant/company also prayed for award of interest on the claimed amount pendentelite and till the date of actual payment as well as costs of the claim of the arbitration proceedings.

4. The respondent-UHBVNL filed its detailed reply to the claim petition. After considering the entire aspect of the matter, the Arbitral Tribunal accepted claim No.1 in toto and claims No.2, 3, 4 and 5 were partially accepted. Besides above, the appellant-company was allowed interest during pendency of arbitration proceedings @18% p.a. from 31.11.1999 to the date of actual payment. Vide award dated 13.11.2001 the claim petition filed by the appellant-company was allowed to the above extent along with interest @ 18% from the date of award till the date of actual payment.

5. The aforesaid award dated 13.11.2001 was challenged by the respondent-UHBVNL by filing objection petition under Section 34 of the Arbitration and Conciliation Act, 1996(the Act of 1996 for short).After considering the pleadings of the parties, the Additional District Judge, Panchkula framed the following issues:-

i) Whether the award dated 13.11.2001 passed by respondents No.2 to 4 is liable to be set aside on the grounds alleged? OPP.

ii) Relief.

On appreciating the evidence led by the parties, the Additional District Judge, Panchkula held that the respondent-UHBVNL was within its rights to curtail the supply order from 1000 KVA transformers to 500 KVA transformers and also rightly imposed liquidated damages to the tune of 5% of the value of the undelivered material amounting to ₹10,91,735/-. He further held that the Arbitral Tribunal had wrongly awarded ₹19,65,015/- to the appellant-company for loss of profit on account of curtailment of the order. He has further held that the respondent-UHBVNL was very much within its rights to curtail the Purchase Order then no question of grant of any claim for loss of profits on account of curtailment of the order would arise. With the above findings, the Additional District Judge, Panchkula vide order dated 13.03.2004 held that the award in question cannot be sustained and is liable to be set aside in view of the law laid down by the Apex Court in the case of '**Oil and Natural Gas Corporation Vs. SAW Pipes, 2003 (2) RCR (Civil) 554 '.** He allowed the objections petition with costs and set aside the award dated 13.11.2001.

6. The order dated 13.03.2004 passed by the Additional District Judge, Panchkula came to be challenged through the present appeal.

7. Mr. Ashwani Talwar along with Mr. Sahej Mahajan, learned counsels appearing on behalf of the appellant contend that the District Judge erred in setting aside the award of the arbitrator. It is argued that the scope of inference in an award is limited by virtue of the provisions of Section 34 (2) of the Act of 1996 i.e if it is, (a) contrary to the interests of India; or (b) contrary to justice or morality; or (c) patently illegal. An award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court as then it would be opposed to public policy. Reliance was also placed upon judgments rendered in '***Union of India vs. M/s Ktech Engineers Builder Co Pvt Ltd. in FAO-608-2015' and 'Ramnath International Construction Pvt. Ltd. vs. Union of India 2007 (1) RCR (Civil)709' and 'M/s Asian Techs Ltd. vs. Union of India 2010 (8) RCR (Civil) 106'*** etc. etc. in support of this argument.

It is contended that the arbitrator took into consideration the loss of profit on curtailed quantity of 500 No. T/Fs @ 12% of sale price ₹26,20,020/-and awarded interest and has also rightly awarded refund of the bank guarantee and the interest thereon.

8. I have heard the counsel for the appellant and have also gone through the record made available.

9. It is not disputed that a contract was entered into for the supply of 1000 KV transformers to the department by an agreement dated 31.07.1997 and time was the essence of the contract. As per the contract the entire lot of transformers was to be supplied up to 04.02.1998. Since the appellant-company was able to supply only 190 transformers up to February 1998, UHBVNL curtailed the orders of transformers from 1000 to 500 vide its letter dated letter dated 06.04.1998. A demand was raised by the appellant for appointment of an arbitrator and upon reference entered 9 claims were filed. The appellant assigned the cause of delay in completing the supply within the time frame to the respondent by stating that the approval of the drawings and specifications were not supplied in time and on that basis claimed loss of profit on curtailed quantity of 500 No. of transformers @12% of sale price amounting to ₹26,20,020/-. The arbitrators allowed the claims by attributing the delay in completing the supply of transformers within time to the respondents by holding that the drawings had not been approved within a reasonable time. The arbitrators also held that the respondent could not have terminated the contract midway.

10. To appreciate and arrive at a correct conclusion whether the respondents are justified in curtailing the quantity of transformers and whether

delay could be attributed to them alone, a few dates would have to be referred to and the sequence of events that transpired. As stated above, there is no dispute that a contract came into existence between the parties for supply of 1000 kva transformers and as per the terms and conditions, specified in Clause-9 was the essence of contract. The contract was entered into the 31st of July 1997 by way of a Purchase Order (PO). As per Clause 3 "the supply will commence within one month from the date of receipt of technically and commercially clear order/ approval of drawing and a minimum of 20% of the ordered quantity will to be offered within commencement period and balance supplies will be completed by February,1998 in equal bi-monthly rate thereafter. The delivery schedule of the Purchase Order will be extended due to delay in payment, inspection, dispatch authorization/dispatch instructions on the merit of the case". As per the said clause further the material was to be delivered to the consignee within one month of issue of dispatch authorization. As per Clause 5 of PO order dated 31.7.1997 pertaining to "drawing' which reads as :'specified that drawing as approved vide memo No.CH-3/4220/XEN/P-11/Cell-4 dated 28.05.1996 accepted against P.O. No.-HH-4220 will also hold good for the supplies to be made against this P.O. Anyhow, you will submit that detailed dimensional drawing in quadruplicate with Prime Core for final approval and record of this office."

11. The drawings were submitted on 18.07.1997. In terms of the contract the appellant offered 100 transformers for inspection by their letter dated 13.08.1997 (R7 available on the record of the arbitrator), which was replied by the respondent herein by its letter dated 29.8.1997, stating that there was a deviation in the transformers as per the drawings submitted and to

provide fresh transformers as per the GTP drawings and to provide necessary facilities for conducting various tests as mentioned in the purchase order. By letter dated to 01.10.1997 (R9), the appellant herein offered 50/100 more KVA transformers for inspection which were accepted and the appellant herein were directed to dispatch the said transformers to the various centres (R 10). Vide letter dated 21.11.1997, the appellant offered 50 more transformers for inspection (R 11). The respondents authorized the dispatch of 90 transformers vide a letter dated 17.12.1997. By letter dated 16.01.1998, the respondents herein addressed a letter to the appellant, stating that the inspectors had reported 'HV. Resistance of transformer bearing serial number BTR 2065 was observed to be 18.79 Ohms at 14.5°C. While calculating at 75°C, the same has exceeded the limit of 34 Ohms as provided in the GTP /PO and as such the lot was rejected by them. You are requested to offer the material afresh as per the GTP of the PO.' By letter dated 20.01.1998 another set of 50 transformers was offered for inspection by stating some more are under manufacturer (R-15). This letter was responded to by the respondent Board stating that the new sets of transformers could not be accepted as transformer bearing serial number BTR 2065 , one of the samples tested did not conform as per the specifications GTP /PO. (R-16). Again, the appellant offered 60 transformers for inspection by the letter dated 4.2.1998 (R-17) which letter was replied to on 13.2.1998, stating that an authorized representative would be visiting for inspection, while also stating that transformer bearing serial number BTR 2065, which had failed in HV Resistance during inspection dated 10.01.1998 must be got inspected as well . Subsequent to the inspection that was done on 24.3.1998 of transformers offered by the appellant by their letter dated 24.3.1998; it was found that they were not in conformity with the specifications. The firm then decided to withdraw this lot before re-offering the material for final inspection. Minutes of the joint meeting held on 24.3.1998 would reflect that the urgency was reiterated and the appellant firm was required to offer the transformers at the earliest after the rectification of the problem. It is thereafter that letter dated 6.4.1998 was issued curtailing the order of supply of 1000 No of 100 KVA transformers to 500 with recovery of liquidated damages at the rate of 5%.

12. The arbitrator erred in holding that the delay in completing the contract within the specified time was on account of the delay in approval of the drawings. A perusal of the communication as detailed above would also reflect that the drawings had been submitted to the respondent board on 18.7.1997 i.e much prior in time to the Purchase Order contract being awarded to the appellant. The PO dated 31.7.1997 had in principle already approved of the drawings as is evident from the Purchase Order itself. Even otherwise, when the 1st lot of transformers was offered for inspection, the appellant was informed by letter dated 29.08.1997 (R8) regarding the discrepancies in the transformers and that they were not in conformity with the GTP P/PO, meaning thereby that the appellant was well aware of the specifications and could not take any benefit and attribute the delay in performing the contract to the respondents of the ground that the drawings had not been approved of. On 4th of November 1997, the transformers offered for inspection were approved and authorized for dispatch, which fact is indicative of the appellant having full knowledge about the specifications of the transformers that were to be supplied. As per the Purchase Order dated 31.7.1997, 1000 transformers of 100 KVA were to be supplied by 4.2.1998 and as per the respondent only 190 met the specifications.

13. Further, the arbitrator has failed to take into consideration, Clause 18 and 23 of Schedule D of the Conditions of the Contract entered into, which are reproduced as under:

> *"**Clause 18** referred to reflects that in case the supplier shall neglect to execute the work with due diligence and expedition, or shall refuse or neglect to comply with any reasonably orders given in writing by the purchaser or his authorized agent in connection with this contract or shall contravene these provisions of the contract, the purchaser may give 15 days notice, in writing to the supplier to make good the failure, neglect or contravention complained of and should the supplier fail to comply with the notice within the above said time from the date of service thereof in case of 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 goods, then in such case, the purchaser shall be at liberty to take the work wholly or in part out of the supplier's and recontract at a reasonable price with any other person(s). In such event, it shall be lawful for the purchaser to retain any balance which may otherwise be due by him to the supplier on any account and apply the same towards the execution of the whole of balance of the work so recontracted , as aforesaid, if no such balance is due by him to the supplier or if due, is not sufficient to cover the amount thus recoverable from the supplier, it shall be lawful for the purchaser to recover the whole of the balance of the amount from the supplier by action at law or otherwise. The remedy under this Clause will be in*

> *addition to and without prejudice to the right available to the purchase under other clause of these terms and conditions".*
>
> *"Whereas **Clause 23** provides that a purchaser can terminate the contract without notice to the supplier at any stage and the supplier shall have no claim whatsoever on the purchaser on this account and the supplier shall also be liable to pay a sum equivalent to 5% of the value of the undelivered material as liquidated damages".*

Clause 23 of Schedule D of the Contract specifically allow the respondent to terminate the 'contract without notice to the supplier at any stage and the supplier shall have no claim whatsoever on the purchaser on this account and the supplier shall also be liable to pay a sum equivalent to 5% of the value of the undelivered material as liquidated damages'. If the respondent was competent to terminate the contract, it would also necessarily mean that the numbers could be curtailed as well. The appellant had obviously not met the schedule specified for the in supply of the Transformers so ordered and as noticed above even the transformers supplied did not confirm to the specifications as required, as would be evident from the minutes of the joint meeting held on 24.3.1998. If there was non- performance, the contract could be cancelled and the respondent board was even competent to curtail the number of transformers to be supplied . The evidence and the terms of the contract did not warrant the arbitrator to have allowed the claims. It is such a well settled principal that an arbitrator cannot go beyond the terms of the contract between the parties. In the guise of doing justice, he cannot pass an award contrary to the terms of the contract. If he does so he will have misconducted himself.

14. Another argument as raised by the counsel for the appellant which needs to be addressed is whether the District Judge had exceeded his jurisdiction in allowing the objection petition filed under Section 34 of the Arbitration And Conciliation Act 1996, in the wake of the judgments referred above. It is argued that Section 34(2) provides for the parameters and circumstances under which an award of the arbitrator can be interfered with. There is no dispute with the case law, as cited by the appellant herein but they would be distinguishable on the facts and hence not applicable.

15. The Supreme Court in '***Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd. (supra)*** while interpreting the term Public Policy as enlisted in Section 34(2)(b) of the Arbitration and Conciliation Act 1996, being one of the grounds when a court can interfere in the award of the arbitrator held that, if the Arbitrator is directed to decide the dispute in accordance with the terms of the contract under Section 28(3), but the Arbitrator ignores the same; or If the award is non-speaking one and is in violation of Section 31(3); The Court can interfere with such an award under Section 34 of the Act. It was held that the term 'Public Policy' has not been defined under the Act and it has to be construed in the context, it has been used. A wider meaning has to be given to the term despite the fact that limited grounds have been provided under Section 34 to challenge the Arbitral award. The term 'Public Policy' has again been interpreted by the Supreme Court in ***ONGC VS Western Geco International Limited 2014 (9) SCC 263*****,** wherein the Supreme Court added three other distinct and fundamental juristic principles which must be understood to be part and parcel of the fundamental policy of Indian law. The

Court held as under:

> *"**35.** What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC Ltd. v. Saw Pipes Ltd.,(2003)5 SCC705 does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.*

> ***38.*** *Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.*
>
> ***39.*** *No less important is the principle now recognized as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [**Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)**] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available."*

16. Therefore, as held in the judgment rendered in ***Western Geco International Limited (Supra)***, the Arbitrator being a creature of the contract cannot act in a whimsical manner and ignore the binding terms between the parties. When the Arbitrator goes behind the terms and conditions as specified in the contract, the Court deciding the objections can interfere and set aside the award. The District Judge while deciding the objections has held that the Arbitrator has ignored Clause 18 and 23 while allowing the claims. This Court

after having gone through the pleadings of the parties and the arguments raised finds that there is no ground for interference in the well reasoned order of Additional District Judge, Panchkula dated 13.03.2004.

17. Accordingly, the appeal stands dismissed.

May 10, 2019 **(JAISHREE THAKUR)**
seema **JUDGE**

Whether speaking/reasoned Yes.
Whether reportable No.