**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH**

FAO No.5086 of 2012 (O&M)
Date of Decision:February 27, 2019

Punjab State Power Corp. ltd. and others

...Appellants

Versus

NBCC Ltd. NBCC House and another

...Respondents

**CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR**

Present:- Mrs. Ritam Aggarwal, Advocate
for the appellants.

Mr. Parvez Chugh, Advocate
for respondent No.1.

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**JAISHREE THAKUR, J.**

1. Being aggrieved against the order dated 06.06.2012 passed by the District Judge, Bathinda, dismissing the objections petition filed by the appellants under Section 34 of Arbitration and Conciliation Act, 1996 (for short 'the Act') for setting aside the award dated 05.02.2011 passed by the Arbitrator, the instant appeal has been filed.

2. Briefly, the facts of the case as stated are, that the appellant vide allotment order dated 1314 dated 13.02.1995 had allotted work for construction of 220 meter high RCC Chimney at GHTP, Lehra Mohabbat, Bathinda to respondent No.1. An agreement was executed between the parties in this regard, containing an arbitration clause, which stipulated the date for completion of the work as 15.01.1997, but respondent No.1 failed

to complete the work within the stipulated period. Certain disputes arose between the parties, which led to filing a petition for appointment of arbitrator by respondent No.1 before this High Court. By an order dated 22.03.2010, Major B.D. Gupta was appointed as sole arbitrator, who subsequently passed award dated 05.02.2011, granting a sum of ₹ 50.70 lacs with simple interest @ 10% per annum, qua claim No.1, in favour of respondent No.1. Aggrieved against the award dated 05.02.2011, the appellant herein filed the objections petition unde Section 34 of the Act for setting the impugned award, however, the same came to be dismissed by the District Judge, Bathinda by the impugned order dated 06.06.2012, which order is under challenged in this appeal.

3. Mrs. Ritam Aggarwal, learned counsel appearing on behalf of the appellants herein argues that both the District Judge as well as the arbitrator completely failed to appreciate 2.2 section E of the agreement, which provides for imposition of penalty by the appellants, in case, respondent No.1 failed to complete the work within the stipulated period. It is contended that the District Judge, while dismissing the objections of the appellants, misread the provisions of Section 34 of the Act, which provides that an arbitration award can be set aside, if the arbitrator has exceeded his jurisdiction or has gone beyond the terms of the agreement. It is submitted that respondent No.1 had raised six claims in total before the Arbitrator, but the Arbitrator allowed only one claim to respondent No.1, while holding that rest of the claims as filed by respondent No.1 were not in conformity with the agreement. It is argued that the sum of ₹ 50.70 lacs was liable to be deducted from respondent No.1 on account of delay in completion of

work, as specified in clause 2.2. section E of the agreement. It is argued that there was no delay on the part of the appellants in making the payments to respondent No.1 and since the arbitrator has exceeded his jurisdiction, while passing the impugned award, both the award as well as the order of the District Judge are liable to be set aside. In support of her arguments, learned counsel relied upon judgments rendered by the Apex Court in ***M/s Sharma & Associates Contractors (P) Ltd. vs. Progressive Constructions Ltd. 2017(1) Apex Court Judgments (SC) 621*** and ***Steel Authority of India Ltd. vs. J.C. Budharaja Government and Mining Contractor, (1999) 8 SCC 122.***

4. On the other hand, Mr. Parvez Chugh, learned counsel appearing on behalf of respondent No.1 submits that the impugned award has been passed by the Arbitrator, in terms of the agreement, as such, the objections filed by the appellants have been rightly dismissed by the District Judge.

5. I have heard learned counsel for the parties, apart from perusing the record.

6. In the grounds of appeal as well as during the course of arguments before this court, the sole argument raised by learned counsel for the appellants is that the Arbitrator has exceeded his jurisdiction and has gone beyond the terms of the agreement, while passing the impugned award and thereby, failed to appreciate 2.2 section E of the agreement, which provides for imposition of penalty by the appellants, in case, respondent No.1 failed to complete the work within the stipulated period.

7. There exists a catena of cases through which the law is well

settled that the reappraisal of evidence by the court is not permissible with an award made by the arbitrator, unless there exists a total perversity in the award; or the same is based upon a wrong proposition of law; or the same is against public policy. Reliance in this regard has been placed upon judgments rendered in **M/s Sharma & Associates Contractors (P) Ltd. vs. Progressive Constructions Ltd. (supra), B.V. Radha Krishna vs. Sponge Iron India Ltd. 1997(2) RCR (Civil) 316, State of Rajasthan vs. Puri Construction Co. Ltd. (1994) 6 SCC 485, Sudarsan Trading Co. vs. Govt. of Kerala, (1989)2 SCC 38, Ispat Engineering & Foundry Works vs. Steel Authority of India Ltd., 2001(4) RCR (Civil) 285, Indu Engineering & Textiles Ltd. vs. Delhi Development Authority, 2001(3) RCR (Civil) 770.** However, if it is found that the claim was entertained by the Arbitrator on the provisions, which were not applicable, then in such an eventuality the court can look into the award and this exercise does not amount to appraising the evidence or dealing with the matter as an appellate Court. Reliance in this regard can be placed upon judgments rendered in ***Food Corporation of India vs. Chandu Construction & Anr. 2007(2) RCR (Civil) 744, Rajasthan State Mines and Minerals Ltd. vs. Eastern Engineering Enterprises & Anr, (1999) 9 SCC 283.***

8. In order to find substance in the argument so addressed by learned counsel for the appellant that the Arbitrator has exceeded his jurisdiction, this court would like to go through the agreement as well as the award. As per 2.2 section E of the agreement "*If the contractor fails to complete the work within stipulated period as per contract, the contractor shall be liable to pay as penalty charges, a sum of Rs.0.5% (½ of 1%) of the*

*total contract value of work per fortnight of delay or part thereof not exceeding maximum limit of 5% of the total contract value of work. The levying of penalty shall not relieve the contractor from his obligations to complete the works and/or from any liability whatsoever under the contract.*"

9. After the appointment of Arbitrator in this case by this High Court, a total of six claims were raised by respondent No.1 and the same were duly replied to by the appellant and replication was also filed. The Arbitrator after hearing the arguments, passed the impugned award. The Arbitration disallowed the claims No.2 to 6 raised by respondent No.1, however, allowed the claim No.1 of respondent No.1. The Arbitrator, while dealing with the question as to whether there was delay in completing the project, came to hold that the delay could not have attributed to respondent No.1 herein. The reasons given by the Arbitrator for his view are as under:-

> " *My views are as under:*
>
> *(a) The NBCC has been informing the PSEB about the reasons for delay of the completion of work beyond contractual period from time to time and in this connection, the agency's letter dated 7.4.1999 can be referred which contains the references of 16 letters written in this regard to the department.*
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> *(b) There has been abnormal delay in releasing the payments of RA bills of the NBCC by the PSEB which was even more than three months in some cases and the total amount withheld as on 9.3.99 from the various RA bills was Rs.50.70 lacs from the perusal of Annexure-A of the replication dated 22.01.2011 of the claimant.*
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> *(c) It was informed by the NBCC vide their letter dated*

*23.02.1998 to PSEB that the decision for A.O.L. has been clarified/finalized on 22.01.98 and procurement of these from USA and installation thereafter would take at least four months. Further vide their letter dated 12.9.98 stated that all misc. works including fixing of Aviation Lights would be completed by 31.12.98 as per the discussions held in the chamber of Member (G) of PSEB on 12.9.98 provided the pending payment of their bills of Rs.48 lacs was made.*

*(d) The approval for external paint shade for brick red cement paint was conveyed to the agency by the PSEB during Nov. 1998 involving 6000 sq. mtrs of painting area to be executed in 30 vertical bands with three coats. This work was started in Dec. 98 and completed in March 1999. These facts stand cited in the claimants letters dated 12.10.1999, 3.12.2001 and 19.06.2002 appended with the claims.*

*(e) As per the original proposal the gas analyzers were to be provided during construction of flues at level 66 mtrs and 76 mtrs. The decision of the Tata consultant of PSEB to provide gas analyzer at the new level 13.125 mtr. Was conveyed to NBCC on 12.01.99. Thereafter NBCC got the design and drawings for access platforms and the work was got executed during shut down units which were made available during March 99 and Sept. 99. These facts have been mentioned by the claimants in the claims and in the replication as well."*

10. This court has gone through the record of this case and found that with their claims, respondent No.1 had produced on record number of letters issued by it to the appellant from time to time and on the basis of the record, the Arbitrator gave finding of claim No.1 in favour of respondent

No.1. It is not disputed that initially the work was to be completed by 14.01.1997, however, the same was extended upto 14.12.1998 whereas, respondent No.1 sought extension upto 22.12.1999. However, the correspondence produced on record shows that respondent No.1 was regularly pointing out the reasons for the delay in completion of work to the appellant; (i) delay in payments, (ii) delay in approval of AOL, which led to a delay in procuring the same from USA, (iii) delay in approval of external paint shade, amongst others. No doubt there is delay on the part of respondent No.1 in completing the work, however, the same was on account of the above factors and respondent No.1 alone cannot be held responsible for the delay in completion of work. As such, it cannot be said that the Arbitrator has exceeded his jurisdiction and has gone beyond the terms of the agreement, while passing the award in dispute. The case laws relied upon by learned counsel for the appellant are not applicable to the facts and circumstances of the present case.

11. An argument has also been raised by learned counsel appearing on behalf of the appellant therein that sufficient time was not given to lead evidence in the said matter by the Arbitrator. However, this argument is belied by reflecting upon the proceedings that were held by the Arbitrator on 25.01.2011. On the said date, the replication was filed and on that very date oral arguments were carried by the parties. It was specifically recorded by the Arbitrator that "Both the parties stated that they have nothing more to add or say in this case. As such, this Arbitration case is closed for decision". It was incumbent upon the appellant herein to have sought time to lead evidence other than making the statement to the effect above. Therefore,

this argument as raised, is devoid of any merit.

12. In view of the above, this court does not find any illegality or perversity in the impugned order. Accordingly, the appeal in hand is hereby dismissed.

**(JAISHREE THAKUR)**
**JUDGE**

**February 27, 2019**
*vijay saini*

Whether speaking/reasoned Yes/No
Whether reportable Yes/No