

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

**FAO No.7230 of 2015 (O&M)
Date of Decision: May 10, 2019**

The Chairman and DGOF, Ordnance Factory Board and another

...Appellants

Versus

Cable Tech Machines, CTM House and another

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. Alok Kumar Jain, Advocate
for the appellants.

Mr. A.P. Bhandari, Advocate
for respondent No.1.

JAISHREE THAKUR, J.

1. The instant appeal has been filed against the order dated 23.07.2015 passed by the Additional District Judge, Chandigarh whereby, the objection filed by the appellants herein under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') to set aside the award dated 16.01.2012, has been dismissed.

2. Briefly, the facts of the case are that bids were invited by appellant No.2 for supply of 01 no. anti-twist armouring-cum-Laying Machine in a two bid system i.e. technical bid and financial bid. The advertisement was published in the newspaper on 26.03.2007 and tender was to be opened on 08.05.2007, which was later on extended. Ultimately,

bid of respondent No.1 was found to be the lowest, supply order was placed on 03.04.2008. The value of the supply order was ₹ 1,93,16,916/- and the delivery period was given six months i.e. upto 10.10.2008. The terms and conditions governing the relations between the parties were mentioned in the supply order itself. It was clearly mentioned that the delivery of the machine shall be affected by 10.10.2008 at the Ordnance Cable Factory, Chandigarh. As per clause 14 of the said supply order, the machine was to be inspected by the appellant or his authorized representative prior to dispatch at the works of respondent No.1. The trial material was to be arranged by the appellant on returnable basis free of cost. As per clause 15 of the supply order, which deals with payment terms, 90% of the basic value plus 100% taxes and duties were to be paid after pre-dispatch inspection and receipt of the machine at Chandigarh. Balance 10% of the basic value plus erection and commissioning charges was to be released after 30 days of successful commissioning of the machine against submission of performance security deposit equal to 5% value of the contract valid for the warranty period of 12 months. Clause 16(m) to 16(o) deals with various situations where the contract could be terminated and also with regard to liquidated damages. Clause 16 (s) deals with dispute resolution mechanism through arbitration.

3. It is submitted that respondent No.1 initially accepted the supply order without any objection, however, a modification was sought with regard to the delivery date. Vide the letter dated 30.04.2008, respondent No.1 requested that the delivery date be stipulated in the supply order as 31.12.2008 on the ground that the bid documents, the supply period

have been mentioned as 6 to 8 months. The said request of respondent No.1 was accepted by the appellants and date of delivery was stipulated as 10.12.2008. Thereafter, vide letter dated 11.09.2008, respondent No.1 offered certain features/modifications of the machine with regard to the electrical control panel. An inspection was carried out in the works of respondent No.1 by the officers of the appellant on 08.10.2008 and detailed minutes were recorded, which were signed by the representative of the parties, in which apart from others, it was specifically mentioned that 65% of the work had been completed as on the date of inspection i.e. 08.10.2008. Respondent No.1, vide letter dated 21.10.2008 requested the appellants to intimate about the completion of the flooring work so that marking of the pocket and blank area required to rotate the floor could be carried out. Vide letter dated 19.11.2008, appellant No.2 intimated respondent No.1 that the flooring had already been completed and that a representative be deputed to visit the site for further action in terms of clause 13.1 of the technical bid. In addition, the modifications/requirements with regard to the electrical control panel were intimated to respondent No.1. Respondent No.1 made a lot of hue and cry about the so called modifications directed by the appellants, whereas the same were not modifications, but merely a clarification of the terms already incorporated in the supply order. It was incumbent upon respondent No.1, who has submitted security deposit @ 5% of the contract value within 30 days of the signing of the contract valid for a period of three months from the date of receipt of last consignments. In fact, as per clause 6 of the supply order, inspection was to be carried out only after receipt of the security deposit whereas, respondent No.1

miserably defaulted in the discharge of its application. Respondent No.1 was directed to submit the performance guarantee by the appellant letter dated 20.11.2008. Respondent No.1 addressed letter dated 05.12.2008 to the appellant stating therein that the manufacturing process of the machine was in the final stages but the completion scheduled had been hampered due to power restriction imposed by the State Govt. In that view of the matter, respondent No.1 requested for extension of time upto 28.02.2009 for delivery of the machine. Respondent No.1 also requested the appellants to arrange trial material for pre-dispatch inspection before deputing the inspection team at the works of respondent No.1. Vide letter dated 20.11.2008, respondent No.1 had been directed to submit performance bank guarantee of 5% of the value of the contract. In compliance thereof, vide the letter dated 06.12.2008, respondent No.1 furnished the bank guarantee of ₹ 9,65,846/-. Since, respondent No.1 had defaulted in the discharge of its contractual obligation to supply the machine by 10.12.2008, the appellant was left with no alternative but to terminate the contract vide letter dated 26.12.2008. The security deposit furnished by respondent No.1 was also forfeited in terms of the supply order.

4. It is submitted that after the contract have been terminated, the appellant received a letter dated 29.12.2008 from respondent No.1 again praying for extension of time on account of power cuts imposed by the State Govt. Since this letter was written after the termination of the contract, the appellants were not required to respond to the same. On receipt of letter of termination, respondent No.1 addressed a series of letters to the appellants requesting for review of the decision. Respondent No.1 invoked the

provision of the arbitration clause and an application under Section 11 of the Act was preferred in the Punjab and Haryana High Court. The said application was disposed by the Chief Justice vide the order dated 14.12.2009 with the direction that an arbitrator be appointed and the arbitration proceedings be conducted thereafter and concluded within a period of 6 months from the date of filing of reply to the claim statement. Thereafter, respondent No.1 filed statement of claims along with various documents, which was replied by the appellants along with documents. The rejoinder was also filed by respondent No.1. Evidence was led by the parties. After hearing the parties, respondent No.2 was pleased to make and publish the award on 16.1.2012 and copies thereof were supplied to the parties on 16.1.2012 itself. Aggrieved against the award passed by the Arbitrator, the appellants herein challenged the same by filing objection petition under Section 34 of the Act, which was dismissed by the Addl. District Judge, Chandigarh. Aggrieved against the order passed by the Addl. District Judge, Chandigarh, the instant appeal has been filed.

5. Mr. Alok Kumar Jain, learned counsel appearing on behalf of the appellants argues that the Addl. District Judge has only given the findings on the issue whether the letter dated 19.11.2008 is in the nature of clarification or it tantamounts to modification of the specifications and all other objections raised have not been decided. It is contended that the Addl. District Judge has wrongly presumed that the said letter amounts to modification whereas, there was no evidence led by respondent No.1 to prove that those said modifications would had required how much more time and how much more time was desired to be extended. In fact,

respondent No.1 sought extension of time only on the premises of erratic electrical supply. It is also submitted that the delivery period was consented to be 10.12.2008 and the machine has not been supplied till date. It is contended that there is no evidence on record to show that respondent No.1 had incurred such huge expenses and the Addl. District Judge has failed to consider the fact that in the said letter, it has been specifically stated that the floor area is ready for the installation of the machine, but the said fact has been absolutely negated.

6. Mr. A.P. Bhandari, learned counsel appearing on behalf of the respondent No.1 argues that the award was passed in accordance with law as well as in accordance with the agreement entered into between the parties. It is argued the Additional District Judge has rightly dismissed the objection petition filed by the appellants. It is contended that the Arbitrator has not exceeded his jurisdiction, while passing the award, therefore, no ground is made out to interfere with the award or with the well reasoned order passed by the Additional District Judge.

7. I have heard learned counsel for the parties and have gone through the case file.

8. The Addl. District Judge, while dismissing the objection of the appellant, has observed as under:-

“28. The arguments advanced by the learned counsel for both the sides were heard apart from perusing the record. The Arbitrator has in the present matter though held both the parties responsible for delay, but he mainly held the applicant responsible for the delay. The Arbitrator declined the submission of respondents that the electric

cuts were reason for delay on part of respondents. The Arbitrator held that the respondents must be aware about the electric cuts and respondent was required to take care of this fact before the agreement and he could get time accordingly. This observation of the Arbitrator is not challenged by the respondents by filing any application. On the other hand, the Arbitrator held the applicants responsible for delay due to many reasons and therefore he passed an award in favour of the respondent no.1. The applicants have raised the objection against the award of the Arbitrator and it is alleged that there was no delay caused on behalf of the applicant, rather the delay was caused on part of respondent No.1 only, therefore, respondent No.1 is not entitled for any award. It is alleged that the award of the Arbitrator is based on no evidence, the Arbitrator has exceeded his authority and thereby the Arbitrator has misconducted the proceedings and misconducted himself. In this regard, this court is of the view that this court cannot sit as appellate court over and above the award passed by the Arbitrator and cannot and need not to go in the details of the award. However, prima facie it is to be considered that whether there is any evidence adduced by the respondent No.1 and the award is based on the evidence or it is based on no evidence to know that whether the Arbitrator has exceeded his authority or not or whether the Arbitrator has misconducted or not. The core controversy in the present matter is as regard to the letter dated 19.11.2008 vide which certain modifications/requirements as regard to features of electric control panel were recommended by the applicants. It is to be considered that whether these recommendations are modifications in the order or these are in the nature of clarification only. If these are

in the nature of modification, then the applicants are responsible for the delay, if these are in the nature of clarification, then the applicants may escape delay on this ground (though they may be responsible for delay on other grounds).

29. The sequence of the developments which took place is like that during the process of manufacturing of the machine, the respondent No.1 wrote a letter dated 11.9.2008 to the applicants regarding the manufacturing of electric control mentioning the specifications therein. In the last of the letter, they writing that kindly confirm and if any modification please suggest. No reply of this letter was given by the applicants for a long time and ultimately, they gave reply vide letter dated 19.11.2008 in which they have recommended certain modifications which are as under:-

- 1. Drive should be Siemens make.*
- 2. Make of motors should be reputed like Siemens.*
- 3. Built in AC must be provided in control panel.*
- 4. Identification must be provided for important part of machine as per mechanic manual.*
- 5. Isolator must be covered with transparent sheet properly.*

30. The Arbitrator has held that these recommendations are in the form of modifications. In this regard, this court is also of the view that above recommendations are in the form of modifications and those cannot be said in the nature of clarification. Apart from that, upto that time most of the work was already done. Therefore, modifications were likely to take more time. The Arbitrator has rightly held that the recommendations were in the form of modifications. One the order stand modified, then more time is required to

fulfill the order. Therefore, the applicants are responsible for delay. Moreover, they have replied the letter at a very later stage and due to that also, the order could not be complied in time. The another reason for delay was that trial material was not supplied in time by the applicants. On this ground also, the applicants are responsible for delay. The respondents are alleging that the material was not supplied as security was not deposited, but depositing of security was not a pre-condition to supply the material. As such, the Arbitrator has rightly assessed the loss of Rs.1,93,16,916/- caused to the respondent No.1 i.e. amount of supply order. While assessing the amount, the Arbitrator has considered the fact of delay on part of respondents also, otherwise the amount could be more. Therefore, it cannot be said that the Arbitrator has not considered the fact of delay on part of respondents. Consequently, the Arbitrator has rightly granted the amount under the other heads also. The Arbitrator has rightly granted Rs.9,65,846/- for security deposit, damages for retaining the machine with overhead cranes in the factory premises from 28.2.2009 @ Rs.2.50 lacs per month, damages for blocked of funds due to cancellation of supply order amounting to Rs.1,11,00,000/-, 10% extra cost of machine on account of escalation of price, cost of legal expenditure and interest under some of the heads. It is not made out that the Arbitrator has misconducted the proceedings or Arbitrator has misconducted himself. It is also not made out that the award is against public policy. No grounds are made out to set aside the award”

9. During the course of proceedings before this court, on

20.03.2019 an offer had been made that the appellants are ready to still take the machinery subject to the terms that payment would be made of the 90% of the basic value plus 100% taxes and duties after pre-delivery inspection and receipt of machine in good working condition at the site at Chandigarh and balance 10% of basic value would be paid after 30 days of the successful commissioning of the machinery against the submission of performance security deposit equal to 5% of the value of the contract. This offer had been rejected by learned counsel appearing on behalf of the respondent No.1, who submitted that in case, the appellants herein wanted to take the machine 'as is where is' basis, he was agreeable to the same. Since this offer of 'as is where is' basis was not accepted, this court proceeded to hear the arguments on merits.

10. In the instant case, the main dispute involved is with regard to the letter dated 19.11.2008, vide which certain modifications/requirements regarding features of electric control panel were recommended by the appellants. The stand taken by the appellants herein is that these recommendations are in the form of clarifications only whereas, respondent No.1 claimed the said recommendations to be modifications. The Arbitrator in his award, after considering the evidence led by both the parties, has held that the said recommendations are in the form of modifications. Even the Addl. District Judge, Chandigarh, while dismissing the objection petition filed under Section 34 of the Act, has observed that the said recommendations are in the form of modifications. Under these circumstances, the Arbitrator came to the conclusion that once the order stands modified, more time should have been allowed to fulfill the order.

Another aspect, which was considered for delay, was that the trial material was not supplied in time by the appellants. Considering all the material factors into consideration, the award in question came to be passed, which was affirmed by the Addl. District Judge, while dismissing the objections filed by the appellants herein.

11. In the judgment rendered by the Double Bench of the Supreme Court in *Navodaya Mass Entertainment Ltd. vs. J.M. Combines, (2015) 5 SCC 698* it was observed as under;-

*“8. In our opinion, the scope of interference of the Court is very limited. Court would not be justified in reappraising the material on record and substituting its own view in place of the Arbitrator’s view. Where there is an error apparent on the face of the record or the Arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the Arbitrator. **Once the Arbitrator has applied his mind to the matter before him, the Court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the Arbitrator would prevail.** (See: *Bharat Coking Coal Ltd. Vs. L.K. Ahuja, (2004) 5 SCC 109; Ravindra & Associates Vs. Union of India, (2010) 1 SCC 80; Madnani Construction Corporation Private Limited Vs. Union of India & Ors., (2010) 1 SCC 549; Associated Construction Vs. Pawanhans Helicopters Limited, (2008) 16 SCC 128; and Satna Stone & Lime Company Ltd. Vs. Union of India & Anr., (2008) 14 SCC*”*

In view of the above ratio of law and after going through the award, this court is of the considered view that in the instant case the

Arbitral Tribunal had gone through all the relevant material placed before it and after going through the same, passed the award. Once the Arbitrator had applied his mind, no ground is made out to interfere with the award. An award can be set aside under Section 34 of the Act, if it is (a) contrary to the fundamental police of Indian law; (b) contrary to the interests of India; (c) contrary to justice or morality; or (d) patently illegal. The patent illegality should go to the very root of the matter and not a trivial illegality. However, an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. The Addl. District Judge, in the impugned order, has dealt with the objections so raised by the appellants and found the award of the Arbitrator to be legal and valid. The appellants have miserably failed to point out any illegality or infirmity in the impugned order so passed by the Addl. District Judge, as such, no ground is made out to interfere with the same.

12. In view of the above discussion, the appeal is hereby dismissed, being devoid of any merits.

May 10, 2019

vijay saini

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No