IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

(2.)

FAO-CARB-36-2022 (O&M)
Date of Decision:-11.10.2022.

Chandigarh Housing Board

……Appellant

Versus

Jai Bhushan Malik, Contractor and another

……Respondents

CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICEALOK JAIN

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Present: Mr. Gagandeep Singh Wasu, Sr. Standing Counsel with
Ms. Deepali Puri, Advocate for the appellant.

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ALOK JAIN, J.

CM-102-FACARB-2022

Prayer in this application is for condonation of delay of 03 days in filing the appeal.

For the reasons mentioned in the application, the same is allowed and delay of 03 days in filing the appeal stands condoned.

CM-103-FACARB-2022

Prayer in this application is for exemption from filing the certified copy of Annexure A-1 Judgment dated 08.08.2022.

For the reasons mentioned in the application, same is allowed and exemption is granted as prayed for.

FAO-CARB-36-2022 (O&M)

The present appeal has been preferred impugning the Award dated 11.11.2017 passed by the Arbitrator and the order dated 08.08.2022, whereby, the learned Additional District Judge, Chandigarh, has dismissed the petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') upholding the Award in totality. It is pertinent to mention here that the Award has been upheld in totality and there is no modification or change in the same.

The brief facts of the case, as the counsel for the appellant has submitted, are that the appellant floated a tender for providing Water Supply Lines, Sewer Lines, Storm Water Drainage System, Boosting Station and Rain Harvesting Structures for 8448 Small Flats at Dhanas, Chandigarh. The respondent was the successful bidder and was allotted the contract on 03.03.2011 for a value of Rs.12,09,44,793/- and the said contract had to be executed within eight months w.e.f. 01.04.2011. The stipulated date for completion of work was 30.11.2011 but admittedly 99% of the work was completed with a delay of 05 months and the entire work was completed on 30.06.2013. It is submitted that the final bill by the respondent was released on 06.08.2015.Subsequent thereto, the respondent raised the dispute and submitted his claim under the following heads:-

1. On account of Carriage of Earth Beyond 50m Distance.
2. On account of Timbering and Shuttering for Storm Water & Sewerage Trenches
3. On account of interest on Late Release of Security Deposit and Payment of Final Bill.
4. On account of charging Excess Water Charges.

5. On account of Illegal Recovery termed as Misc. Deposit Milestone.

6. On account of Recovery under the Head Misc. Recovery.

7. On account of Reimbursement of Losses and Damages Suffered due to prolongation of contract period which occurred due to various breaches of the Department such as non-availability of clear site; delay in supply of drainage, request for supplementary agreement etc.

8. On account of Illegal Recoveries.

9. On account of Loss of Business.

10. On account of interest @ 18% per annum (Pre-reference, *pendente lite* and future).

11. On account of Cost of Arbitration.

The learned Arbitrator after recording that the parties did not want to lead any oral evidence in the matter, and would plead their case based only on documents, proceeded to record, reasons on every claim and held in the following manner:-

Claim No.1	--	Allowed a sum of ₹ 19,16,375.90 on account of carriage of earth beyond 50m distance.
Claim No.2	--	Nil, on account of Timbering and Shuttering for storm, water and sewerage.
Claim No.3	--	Allowed 10% interest per annum for the delayed period of 14 months. Consequently an amount of ₹ 8,77,728.00

		is allowed.
Claim No.4 --		Nil, on account of charging excess water charges.
Claim No.5--		Allowed a sum of ₹ 15,11,810.00 on account of illegal recovery termed as miscellaneous deposit milestone.
Claim No.6	--	Allowed a sum of ₹ 1,72,183.00 on account of recovery under the head of miscellaneous recovery.
Claim No.7	--	Allowed a sum of total ₹ 2,89,73,055.00 on account of reimbursement of losses and damages suffered due to prolongation of contract period which occurred due to various breaches of the department such as non-availability of clear site; delay on supply of drainage, request for supplementary agreement etc.
Claim No.8	--	Allowed a sum of ₹ 5,04,639.00 on account of illegal recoveries.
Claim No.9--		Nil, on account of loss of business.
Claim No.10 --		Allowed 12 % interest per annum.
Claim No.11--		Nil, on account of cost of arbitration. However, if the respondent is legally bound to pay the GST and he validly deposits the same, the said amount shall

be reimbursed by the respondents.

The appellant preferred the petition under Section 34 of the Act before the learned Additional District Judge, Chandigarh by filing the objection petition and disputed the findings recorded by the Arbitrator. The learned Additional District Judge, Chandigarh, appreciating each and every objection raised by the appellant dealt with it as follows:-

> *"8. After considering the rival contentions of both the side, this Court observed that the petitioner Board, invited the tender for the work of Providing Water Supply Lines, Sewer Lines, Storm Water Drainage System, Boosting Station and Rain Harvesting Structures for 8448 Small Flats at Dhanas, Chandigarh. The respondent Firm quoted the lowest rates and thus the work was allotted to the respondent for an amount of Rs. 12,09,44,793/-, which was 16% above the estimated cost of the petitioner and 1.03% below the justified amount. The time period for completion of the work was 8 months, which was reckoned from 01.04.2011, as the official date for commencement of work. The stipulated date for completion of the work was 30.11.2011. The major component of the work was completed on 05.09.2012. The contract value of the remaining work was a mere (0.99%) of the original work, which was finally completed by the respondent agency on 30.06.2013.*

The respondent agency was given extension of time for completion of the said work from time to time on their representations by the petitioner board, as per the provisions of the agreement of the work. The petitioner board has paid the final bill of composite work on 04.08.2015 to the respondent agency. The respondent agency after taking the payment of the final bill had submitted the Arbitration Claims. It is also observed that the learned Arbitrator allowed a sum of Rs.19,16,775.90 on account of carriage of Earth Beyond 50 m Distance; a sum of Rs.9,33,630/- on account of interest of late release of Security Deposit and payment of final bill; a sum of Rs.15,11,810/- on account of illegal recovery termed as Misc. Deposit Milestone; a sum of Rs.1,72,183/- on account of Recovery Under the Head Misc. Recovery, a sum of Rs.2,89,73,055/- on account of reimbursement of losses and damages suffered due to prolongation of contract period on account of various breaches of the department; a sum of Rs.5,04,639/- on account of illegal recoveries; Interest claimed @18% per annum and claim on account of GST on the awarded amount. It is also observed that through the instant petition the petitioner has mainly challenged that the total amount of the contract was for Rs.12,09,44,793.00. The *estimated profit of the contractor, calculated @15% of the total value of the contract is Rs.1,81,41,718.95. It is further contended that the sum of award, awarded is Rs.3,40,12,093.00, which is 28% of the contract value and 187% more than the projected profit of the contractor calculated @15%. After going through the award it is observed that a detailed reasoning has been given by the Arbitrator against each claim. This Court has duly gone through the detailed award running into 30 pages and is of the considered opinion that there is no illegality in the award and same is well reasoned and perfect." Perusal of the award shows that the Arbitrator has taken into consideration the issues raised by the parties and dealt with the same by taking into consideration the evidence coming on the file. If the arguments of the learned Counsel for the petitioner are taken, these are the arguments on merits of the award which require re-appreciation of evidence and as per the settled proposition of law the civil court cannot go into re-appreciation of evidence which has already been considered and analyzed by the Arbitrator."*

After dealing with the objections, the learned Additional District Judge, Chandigarh concluded that the appellant had failed to demonstrate any violation or grounds available under Section 34 of the

Arbitration and Conciliation Act.

Learned counsel for the appellant has vehemently argued that the Award passed by Arbitrator and the order passed by the learned Additional District Judge is against the 'Public Policy' of India and beyond the scope of the contract and has tried to emphasize that the claims awarded by the Arbitrator especially under Claim 7 was beyond the purview of the contract. Learned counsel for the appellant has relied upon the judgment passed by the Bombay High Court in case titled as ***"Edifice Developers and Project Engineers Ltd. Vs. M/s Essar Projects (India) Ltd."***, decided on 03.01.2013,to submit that the claim granted by the Arbitrator on account of reimbursement of losses and damages suffered due to prolongation of contract period on account of various breaches by the department, in fact the Arbitrator has applied the Hudson formula without there being any specific evidence lead by the claimant.

That the said argument of the appellant is unfounded for the reason that the learned Arbitrator in his Award has recorded categoric findings that the breaches in the contract were at the end of the appellant on various accounts such as non-availability of clear site; delay in supply of drawings; delay in process of the supplementary agreement. Moreover, there was no evidence brought on record to demonstrate or counter the documentary proof of the delay and latches having occurred due to any non-cooperation of the respondent. Admittedly, even the final bill which was submitted in year 2013 was cleared in year 2015. The Arbitrator categorically recorded that it was the appellant (respondent in arbitration) who breached the contract and caused delay in the execution of work and therefore held that there were overhead losses, due to the prolonged stay at the sites and therefore the same resulted in loss of profit as well. Accordingly, while applying the Hudson formula, the Arbitrator granted the relief.

That the learned counsel for the appellant has vehemently argued that the award is against the public policy of India but could not point out as to how the award was against the four principles i.e. *(i) fundamental policy of the Indian Law; (ii) the interest of India; (iii) justice or morality and; (iv) if it is a patently illegal*, laid down for formulating the same to be against the public policy of India.

That another argument raised by the counsel for the appellant to say that another interpretation was plausible and possible does not inspire any confidence as the said ground is also not available as held by the Hon'ble Supreme Court of India in dicta of ***2022(4) SCC 116 - UHL Power Company Ltd. Vs. State of Himachal Pradesh*** as under:

> *"17. It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned Arbitrator proceeds to accept one interpretation as against the other. In* ***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. (2019) 20 SCC 1****, the limitations on the Court while exercising powers under section 34 of the Arbitration Act has been highlighted thus:*
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> *"24. There is no dispute that section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided*

therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."

Keeping in view the totality of the matter, in the light of the fact that the appellant has failed to bring the present appeal within the four corners of the definition of being opposed to 'public policy' of India coupled with the fact that the powers under Section 37 of the Act are extremely circumscribed. The appellant has failed to demonstrate any violation or grounds available under Section 37 of the Act which are further narrowed down. Section 37 of the Act which reads as under:-

*"**37. Appealable orders. -** (1) [Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders*

(and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:

[(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.]

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

It is settled by the dicta of the judgment passed by Hon'ble Supreme Court of India in ***2022 (4) SCC 116 - UHL Power Company Ltd. Vs. State of Himachal Pradesh***, wherein it has held as under:

"15. As it is, the jurisdiction conferred on Courts under section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under section 37 of the

Arbitration Act, the jurisdiction of an Appellate Court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. …………………..”

That a perusal of the above provision and the law laid down by the Hon'ble Supreme Court of India, the same clearly demonstrates that an Award can be challenged only on the grounds mentioned above and the scope of judicial review of Arbitral Award is very narrow. In the present case, the entire exercise by the appellant is only to procrastinate and delay and payment to the contractor and even the final bill which was submitted by the respondent on 30.06.2013, the same was released after two year two months by the appellant on 06.08.2015, which itself shows the act and conduct of the appellant.

However, in light of the above settled preposition of law coupled with the fact that the case of the appellant does not fall within the contours of Section 37 of the Act, the present appeal being devoid of any merits deserves to be dismissed.

Ordered accordingly.

(AUGUSTINE GEORGE MASIH)
JUDGE

(ALOK JAIN)
JUDGE

October 11, 2022.
Sandeep

Whether speaking/reasoned:- Yes/No
Whether Reportable:- Yes/No