

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

FAO no. 10682 of 2018 (O&M)

Date of Decision:27.04.2022

The Kalwan Raj Co-op L&C Society Limited

.....Appellant

Versus

**Sub Divisional Engineer, Haryana State Ware-House Corporation,
Fatehabad and others**

..... Respondents

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. Ravi Malik, Advocate
for the appellant.

LISA GILL, J(Oral).

Appellant-The Kalwan Raj Co-op., L&C Society Limited, has filed this appeal challenging order dated 03.11.2017, passed by the learned Additional District Judge, Jind, whereby application under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'Arbitration Act') filed by the present appellant, has been dismissed with a further prayer for setting aside of award dated 01.06.2011 as well.

Brief facts necessary for adjudication of the matter are that work of construction of 2500 MT., capacity or convertible position (except roofing road and E-1 work at FSD campus Narwana, District Jind was allotted to the Kalwan Raj Co-op L&C Society Limited, VPO Kalwan through its President Umed Singh Nain vide tender dated 13.02.2009 with the said work to be completed within 150 days. In view of urgency of work, the appellant is stated to have immediately purchased the material from 13.03.2009 to 08.07.2009.

Dispute arose between the parties as it was alleged that work could not be completed within time due to fault on part of the respondent-department and respondent-department alleging fault on part of the appellant. Chief Engineer, Haryana State Ware-House Corporation (HSWC) was appointed as Arbitrator by the Managing Director, HSWC, Panchkula, under clause 25-A of the Agreement/DNIT executed between the Society and the Executive Engineer, HSWC, Panchkula, to adjudicate on the claims/dispute between the appellant and the respondent. Seven (07) claims were raised by the appellant with five (05) counter claims being raised by the respondent-HSWC, which read as under:-

Claims of the Society:-

Claim no.1	No amount has been mentioned against this claim
Claim no.2	Refund of earnest money/security of Rs.1,00,000/-
Claim no.3(i)	Claim on account of work done- Rs.8,00,000/-
Claim no.3(ii)	Claim on account of raw material i.e., concrete –Rs. 25,000/-
Claim no. 3(iii)	Claim on account of raw material i.e., sand – Rs.40,000/-
Claim no.3(iv)	Claim on account of raw material i.e. crusher –Rs.15,000/-
Claim no.3(v)	Claim on account of steel- Rs.3,00,000/-
Claim no. 3(vi)	Claim on account of 100 bags of cement – Rs.25,000/-
Claim no.3(vii)	Claim on account of shuttering, submersible pump, Generator, ballies, challies, mixture, vibrator, kassi, tasla etc., -Rs.2,00,000/-
Claim no.3(viii)	Claim on account of transportation and labour etc.- Rs.1,00,000/-
Claim no.3(ix)	Claim on account of due profit of 10% - amount not mentioned.
Claim no.4	No amount has been mentioned against this claim.
Claim no.5.	Claim on account of mental tension, harassment, pain and agony and deficiency in service of the Corporation –Rs. 4,00,000/-
Claim no.6.	No amount has been mentioned against this claim.
Claim no.7.	The society has claimed 18% interest per annum on account of claim of Rs.25,00,000/-

	as mentioned above.
--	---------------------

Counter claims of the Corporation:-

Counter claim no.1	Amount of compensation recoverable from the Society – Rs. 34,120/-
Counter claim no.2	Amount recoverable due to storage losses –Rs. 11,81,000/-
Counter claim no.3	Amount recoverable on account of re-tendering/ re-allotment of work – Rs.50,000/-
Counter claim no.4	Loss of goodwill of the Corporation – Rs.10,00,000/-
Counter claim no.5	Interest @ 12% per annum on account of counter claims no.1 to 4 – Rs.1,94,366/-

Learned Arbitrator passed award dated 01.06.2011 while rejecting the counter claims of the Corporation, some of the claims of the appellant were accepted. A sum of Rs. 2,34,630/- was awarded in favour of appellant *qua* claim no.3 (i) and *qua* claim nos. 3 (ii) (iii) (iv) (v) and (vi) and it was concluded that sufficient opportunity was given to the society by the respondent-HSWC to lift the material and material (usable) should be taken in custody of the Corporation and due amount be measured afresh by associating the society representative. Rates of the material were fixed and it was directed that quantities of material should be measured afresh by associating the Societies representative. While awarding 5% loss of profit instead of 10% as claimed by the society, a sum of Rs. 2,48,699/- was awarded under claim no.3 (ix). Nothing was awarded under any of the other claims.

Aggrieved from the said award, appellant filed application under Section 34 of the Arbitration Act. Learned Additional District Judge, Jind, finding no merit therein, dismissed the same on 03.11.2017.

Aggrieved therefrom, present appeal has been filed by the appellant.

Learned counsel for the appellant has vehemently argued that learned Additional District Judge, Jind has erroneously dismissed the application under Section 34 of the Arbitration Act, filed by the appellant. Award dated 01.06.2011, passed by the learned Arbitrator should be set aside to the extent claims of the appellant have not been awarded in *toto*. Learned counsel for the appellant submits that learned Arbitrator has wrongly held the Society to be liable to pay a sum of Rs. 2,68,750/- to the Corporation and that action taken against the society under Clause-II of the Agreement with 10% penalty which was reduced to 5% by the Managing Director, HSWC, is unjustified. It is also argued that once learned Arbitrator has observed that the site in question was not free from encumbrance as wooden crates and poly covers were still lying thereon, appellant cannot be held liable for delay in completion of work in any manner. It is thus prayed that this appeal be allowed.

I have heard learned counsel for the appellant and have gone through the file with his able assistance.

At the very outset, it is gainful to refer to Section 34 of the Arbitration Act, which reads as under:-

“34. Application for setting aside arbitral award.—(1)

Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that —

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.”

It is a settled position that challenge to an award is permissible to a limited extent on the grounds so mentioned in the abovesaid provision.

The Hon'ble Supreme Court in **M/s Dyna Technologies Pvt. Ltd. v. M/s Crompton Greaves Ltd., 2019 (20) SCC 1** specifically held as under:-

“26. 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.

27. Moreover, umpteen number of judgments of this Court have categorically held that the Courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”

Allotment of work in question, arising of the dispute, passing of award dated 01.06.2011 by learned Arbitrator, is a matter of record. Primary argument raised by learned counsel for the appellant is that delay in carrying

out the work cannot be attributed to the appellant. This aspect has been duly considered by the Arbitrator. Learned Arbitrator has recorded his satisfaction that both the Society and the Corporation are equally guilty for delay in execution of the work and it is due to this reason that loss of profit has been awarded at the rate of 5% instead of 10% to the appellant. It is specifically observed in the Award that respondent-Corporation failed to handover the complete encumbrance free site to the society and appellant-Society equally failed to carry out work on the partially encumbrance free site. Furthermore, argument that counter claim no.1 has been allowed is clearly opposed to the record. Perusal of Award dated 01.06.2011, reveals that it is observed by learned Arbitrator that the issue does not fall within his purview. Observation that amount of Rs. 2,68,750/- i.e., the reduced amount of compensation from 10% to 5%, is payable in terms of the order passed in the appeal filed by the appellant before the Managing Director, has been made only with a view to indicate that the matter does not fall within the purview of the Arbitrator.

It has been held by the Hon'ble Supreme Court in **M/s Dyna Technologies** (supra) arbitral award should not be interfered with in a casual or cavalier manner unless perversity of the award goes to the root of the matter. Merely because there is a possibility of an alternate view on facts and interpretation, the same cannot be a ground for interference. It is a settled position of law that it is not for this Court to sit with a fine tooth comb and sift through the evidence with a magnifying glass or sit as a Court of appeal over the award of the Arbitrator and order passed by learned Additional District Judge, Jind. Learned counsel for the appellant is unable to point out anything on record to indicate the impugned award to be suffering from any perversity, error of law or that the Arbitrator

misconducted himself or any other ground which calls for setting aside of award dated 01.06.2011 or impugned order dated 03.11.2017 passed by the learned Additional District Judge, Jind.

No other argument has been raised.

There is a delay of 94 days in re-filing of this appeal. Keeping in view the fact that matter has been adjudicated on merits, question of delay in re-filing of this appeal is rendered academic. Application is accordingly disposed of.

Present appeal is accordingly dismissed with no order as to cost.

27.04.2022
s.khan

[LISA GILL]
Judge

Whether speaking/reasoned : Yes/No.

Whether reportable : Yes/No.