2024:HHC:12731

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Arb. Case No.18 of 2012
Reserved on: 21.11.2024
Decided on: 29.11.2024

Ashok Thakur ...Petitioner

Versus

State of H.P. & another ...Respondents

Coram
Hon'ble Mr. Justice Satyen Vaidya, Judge
Whether approved for reporting? Yes

For the petitioner: Mr. Sumit Raj Sharma, Advocate.

For the respondents: Mr. Sidharath Jalta, Deputy Advocate General.

Satyen Vaidya, Judge

By way of instant petition, the petitioner has prayed for setting aside award dated 22nd December, 2011, passed by the Arbitrator.

2. The petitioner was awarded contract to carry certain construction activities on Chilladhar-Bihar road Km 0/0 to 4/0 and Jibhi-Bahu road Km 0/0 to 7/0 by respondent No.2 *vide* award letter dated 29.06.2002 for a tendered cost of Rs.1,10,35,522/-.

3. The stipulated date for completion of work was 13.04.2003, but the work actually was completed on 31.10.2005.

4. The contractor (petitioner herein) raised certain disputes and invoked arbitration clause under the contract agreement. The Arbitrator was accordingly appointed.

5. Contractor raised following claims before the Arbitrator:-

"Claim No.1:	*On account of excess recovery of material amounting to Rs.99963.00*
Claim No.2:	*Sub claim No(i): On account of un-authorized recovery of material amounting to Rs.57,686/-*
Sub claim No.(ii):	*On account of compensation for delay Rs.5,51,776/-*
Claim No.3:	*On account of anticipated profit for the value of work awarded and actually got executed by the Deptt. amounting to Rs.5,34,619/-*
Claim No.4:	*On account of loss suffered due to prolongation of work amounting to Rs.20,07,800/-*
Claim No.5:	*On account of interest @ 24% on the amount payable.*
Claim No.6:	*On account of arbitration cost Rs.1,00,000/-*

6. The arbitrator vide award dated 22nd December, 2011 decided the claims of the contractor in the following terms:-

Sr No.	*Description of claim*	*Amount claimed*	*Amount awarded*	*Remarks*
1.	*Claim No.1: On account of excess*	*Rs.99963.00*	*Rs.nil*	

	recovery of material			
2.	*Claim No.2: Sub claim No(i): On account of un-authorized recovery of material*	*Rs.57,686/-*	*Rs.57,686/-*	
3.	*Sub claim No(ii): On account of compensation for delay*	*Rs.5,51,776/*	*Rs.nil*	*Clause-2 non arbitrable*
4.	*Claim No.3: On account of anticipated profit for the value of work awarded and actually got executed by the Deptt.*	*Rs.5,34,619/-*	*Rs.nil*	
5.	*Claim No.4: On account of loss suffered due to prolongation of work*	*Rs.20,07,800/-*	*Rs.nil*	
6.	*Claim No.5: On account of interest @ 24% on the amount payable*	*@ 24%*	*Simple interest @ 7.5% per annum of Rs.57,686/- w.e.f. 30.4.2006 to the date of award i.e. five years and eight months.*	
7.	*Claim No.6: On account of arbitration cost*	*Rs.1,00,000/-*	*Rs.nil*	*Both the parties shall bear their respective costs*

7. I have learned counsel for the parties and have also perused the record.

8. At the hearing of the petition, learned counsel for the contractor laid stress on the findings returned by the Arbitrator on claim No.2 Sub claim No(ii) and claim No.3. He contended that the award to that extent suffers from patent illegality appearing on the face of the award. It is submitted that the Superintending Engineer had levied a penalty of 5% of the entire contract amount, which was assailed by the contractor before the Arbitrator on the grounds firstly, that the levy should have been for the balance work to be executed and not on the tendered amount and secondly, the levy, if any, could be made only on the amount of work allowed to be executed by the contractor and lastly, the discretion used by the Superintending Engineer in levying the penalty to the tune of 5% was also alleged to be unreasonable. As per petitioner, the Arbitrator without going into any of the factual aspect of the matter has rejected the claim of contractor simply by placing reliance on a judgment passed by the Hon'ble Supreme Court in the matter of ***Vishwanath Sood*** *vs.* ***Union of India and another, AIR 1989, Supreme Court 952***. The Arbitrator allegedly has not appreciated the non-applicability of said judgment to the facts of instant case. It has further been submitted that the excepting clause contained in Clause 25 of the contract agreement was not applicable in respect of aforesaid claim of the contractor as the contractor had raised a dispute as

to existence of jurisdictional facts necessary for application thereof.

9. To similar extent has the challenge been made to the decision of the arbitrator on claim No.3. It has been submitted that the Arbitrator has wrongly rejected the claim of contractor by application of Clause 13 of the contract agreement, which was not applicable to the facts of the case.

10. Clause 2 of Conditions of Contract allows the discretion with Superintending Engineer to levy compensation on the contractor in case of delay in execution of work. The Superintending Engineer levied such compensation at the rate of 5% of the total contract cost. As evident from the statement of claim, the contractor raised various issues with respect to levy of above compensation by the Superintending Engineer viz the date from which the delay was to be construed; reasons for delay; the amount which was to be construed as contract amount and there being involvement of disputed questions of facts, the Superintending Engineer could not have decided the same.

11. The Arbitrator has proceeded to decide claim No.2 Sub claim No(ii) of the contractor in the following terms:

> *"**Claim No.2: Sub claim No.(ii): On account of compensation for delay Rs.5,51,776/-***
>
> *Since compensation under clause-2 is beyond the preview of Arbitrator as has been held in case of Vishwanath*

Sood, Appellant v. Union of India and another, Respondent; AIR 1989 Supreme court 952." Therefore, this is not to be decided by this Tribunal. The claimant/contractor may take up this matter at appropriate form."

12. Section 34(2)A of the Arbitration and Conciliation Act, 1996, (for short, "the Act") makes patent illegality on the face of award as a ground for setting aside the same.

13. The findings of the Arbitrator on claim No.2(ii) of the contractor, in my considered view, suffers from patent illegality for the reasons, *firstly* that the Arbitrator has not taken into account the facts of the case at all, *secondly*, the judgment in *Vishwanath Sood supra* has been applied without going into aspect of applicability of said judgment to the facts of instant case and *lastly*, no reasons have been assigned for arriving at its conclusion.

14. It is more than settled that the reasons are the showcase of a judicial or quasi-judicial decisions. The reasons reflect the application of mind to the given fact situation as also to the applicability of legal principles. In *Vishwanath Sood supra*, the penalty/compensation was not imposed by the Engineer-in-charge despite existence of a clause to the effect in the contract agreement. Clause 2 of the contract agreement in the instant case, no doubt, is akin to the clause involved in the case of *Vishwanath Sood supra*, yet there was a marked difference in fact

situation. In *Vishwanath Sood supra*, as noticed above, the compensation had not been levied by the Engineer-in-charge whereas in the instant case the compensation was levied. In *Vishwanath Sood supra*, the employer had raised the claim of compensation before the Arbitrator for the first time and it was in such context that the claim was held to be non-arbitrable. In the instant case, the compensation has been levied by the Superintending-in-charge, but the contractor had raised before the Arbitrator the questions as to its legality.

15. In J.G. Engineers ***Private Limited*** *vs.* ***Union of India & another, (2011) 5 SCC 758***, it has been held as under:

> *"17. Clauses (2) and (3) of the contract relied upon by the respondents, no doubt make certain decisions by the Superintending Engineer and Engineer-in-Charge final/final and binding/final and conclusive, in regard to certain matters. But the question is whether clauses (2) and (3) of the agreement stipulate that the decision of any authority is final in regard to the responsibility for the delay in execution and consequential breach and therefore exclude those issues from being the subject matter of arbitration. We will refer to and analyse each of the `excepted matters' in clauses (2) and (3) of the agreement to find their true scope and ambit :*
>
> *(i) Clause (2) provides that if the work remains uncommenced or unfinished after proper dates, the contractor shall pay as compensation for everyday's delay an amount equal to 1% or such small amount as the Superintending Engineer (whose decision in writing shall*

be final) may decide on the estimated cost of the whole work as shown in the tender.

What is made final is only the decision of the Superintending Engineer in regard to the percentage of compensation payable by the contractor for everyday's delay that is whether it should be 1% or lesser. His decision is not made final in regard to the question as to why the work was not commenced on the due date or remained unfinished by the due date of completion and who was responsible for such delay.

(ii) Clause (2) also provides that if the contractor fails to ensure progress as per the time schedule submitted by the contractor, he shall be liable to pay as compensation an amount equal to 1% or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work for everyday the due quantity of the work remains incomplete, subject to a ceiling of ten percent. This provision makes the decision of the Superintending Engineer final only in regard to the percentage of compensation (that is, the quantum) to be levied and not on the question as to whether the contractor had failed to complete the work or the portion of the work within the agreed time schedule, whether the contractor was prevented by any reasons beyond its control or by the acts or omissions of the respondents, and who is responsible for the delay.

(iii) The first part of clause (3) provides that if the contractor delays or suspends the execution of the work so that either in the judgment of the Engineer-in-Charge (which shall be final and binding), he will be unable to secure the completion of the work by the date of completion or he has already failed to complete the work by that date,

certain consequences as stated therein, will follow. What is made final by this provision is the decision of the Engineer-in-Charge as to whether the contractor will be able to secure the completion of the work by the due date of completion, which could lead to the termination of the contract or other consequences. The question whether such failure to complete the work was due to reasons for which the contractor was responsible or the department was responsible, or the question whether the contractor was justified in suspending the execution of the work, are not matters in regard to which the decision of Engineer-in-Charge is made final.

(iv) The second part of clause (3) of the agreement provides that where the contractor had made himself liable for action as stated in the first part of that clause, the Engineer-in-Charge shall have powers to determine or rescind the contract and the notice in writing to the contractor under the hand of the Engineer-in-Charge shall be conclusive evidence of such termination or rescission. This does not make the decision of the Engineer- in-Charge as to the validity of determination or rescission, valid or final. In fact it does not make any decision of Engineer-in-Charge final at all. It only provides that if a notice of termination or rescission is issued by the Engineer-in-Charge under his signature, it shall be conclusive evidence of the fact that the contract has been rescinded or determined.

(v) After determination or rescission of the contract, if the Engineer-in- Charge entrusts the unexecuted part of the work to another contractor, for completion, and any expense is incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him, the decision in writing of the

Engineer-in-Charge in regard to such excess shall be final and conclusive, shall be borne and paid by the original contractor. What is made final is the actual calculation of the difference or the excess, that is if the value of the unexecuted work as per the contract with the original contractor was Rs.1 lakh and the cost of getting it executed by an alternative contractor was Rs.1,50,000/- what is made final is the certificate in writing issued by the Engineer-in-Charge that Rs.50,000 is the excess cost. The question whether the determination or rescission of the contractor by the Engineer-in-Charge is valid and legal and whether it was due to any breach on the part of the contractor, or whether the contractor could be made liable to pay such excess, are not issues on which the decision of Engineer-in-Charge is made final.

18. Thus what is made final and conclusive by clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the Arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to

> *any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract.*
>
> *19. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal."*

16. Thus, dispute as to jurisdictional facts vis-a-vis the authority of the Superintending Engineer to levy compensation could not be held non-arbitrable by the Arbitrator. He was bound to decide the claim on merits.

17. Similarly, the finding of the Arbitrator on claim No.3 suffers from identical vice. The arbitrator has again without discussing the factual aspect of the matter invoked excepting clause by making reference to Clauses 12 and 13 of the Conditions of Contract. Clause 13 reserves the right in the Governor of Himachal Pradesh to reduce or alter the scope of the awarded work after its commencement. On such reduction or alteration of scope of work, the contractor has been barred from seeking compensation on account of any profit or advantage which he might have derived from the execution of work in full. The precondition is that the Engineer-in-charge shall give notice in writing of the fact of reduction or alteration to the contractor. In

the instant case, neither the scope of the work has been reduced by the Governor of Himachal Pradesh nor the contractor was put to any notice in that behalf by the Engineer-in-charge. The admitted fact is that a part of the awarded work had already been got executed by the respondents from some other source. The contractor claimed the amount of such already executed work to be reduced by Rs.35,64,132/-, on the other hand, the respondents had admitted the said work to be worth Rs.9,27,694/-. Again, the impugned award sans any discussion on the factual aspect and the applicability of Clause 13 of the Conditions of Contract to the facts of the case.

18. In ***Delhi Metro Rail Corporation Limited vs. Delhi Airport Metro Express Private Limited, (2024)6 SCC 357***, the three Judges bench of Hon'ble Supreme Court has delineated the contours of powers of court under Section 34 of the Act as under:-

> ***"34.*** *The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2-A) of the Arbitration Act, a domestic award may be set aside if the Court finds that it is vitiated by 'patent illegality' appearing on the face of the award.*
>
> ***35****. In Associate Builders vs. Delhi Development*

Authority, (2015)3 SCC 49 a two-judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it. This Court held with reference to Sections 28(1)(a) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are :

(i) based on no evidence;
(ii) based on irrelevant material; or
(iii) ignores vital evidence.

36. *Patent illegality may also arise where the award is in breach of the provisions of the arbitration statute, as when for instance the award contains no reasons at all, so as to be described as unreasoned.*

37. *A fundamental breach of the principles of natural justice will result in a patent illegality, where for instance the arbitrator has let in evidence behind the back of a party. In the above decision, this Court in Associate Builders v. DDA observed:*

> *"31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:*
> *(i) a finding is based on no evidence, or*
> *(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it*

arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

* * * *

42.1.....42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside."

38. *In Ssangyong Engineering & Construction Co. Ltd. vs. NHAI, (2019)15 SCC 131, a two-judge bench of this Court endorsed the position in Associate Builders (supra), on the scope for interference with domestic awards, even after the 2015 Amendment:*

"40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. ... Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

(emphasis supplied)

39. *In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have*

> *arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view.24 A 'finding' based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of 'patent illegality'. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice."*

19. As discussed above, the impugned award has been found to be without any reasons in so far as adjudication on claims Nos 2(ii) and 3 are concerned. Even otherwise the view taken by the Arbitrator while deciding said claims is irrational and in ignorance of vital evidence on record. No reasonable person would have ignored the basic tenets of law in the given facts and circumstances of the case, as has been done by the Arbitrator.

20. Though few of the claims have been decided in favour of the contractor, but since, there is no provision for either modification of the award by this Court in exercise of powers under Section 34 of the Act or to remand the matter back to the Arbitrator, the entire award is required to be set aside. Even, this Court cannot exercise power under Section 34(4) of the Act; as no submission or prayer to that effect has been made on behalf of the petitioner.

21. In result, the petition is allowed, award dated 22nd December, 2011, passed by the Arbitrator is set aside.

22. Pending application(s), if any, shall also stand disposed of.

23. Records be returned.

(Satyen Vaidya)
Judge

29th November 2024
(vt)