IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA.

Arb.Case No.21 of 2004.
Judgmet reserved on : Ist July, 2008.
Decided on: July 31 , 2008.

State of H.P. and another. …… Objectors/Plaintiffs.

Versus

M/s R.K. Construction Co. …….Non-Objector/Defendant.

Coram

Hon'ble Mr. Justice Surinder Singh, J.

Whether approved for reporting? No.

For the Objectors/Plaintiffs : Mr. J.S. Guleria, Law Officer.

For the Non-Objector/Defendant : Mr. J.S. Bhogal, Sr. Advocate with Mr. Suneet Goel, Advocate.

Surinder Singh, J.

The defendant Company vide letter of award dated 5.10.1993 was awarded a contract, for the construction of new MLA Hostel at H.P. Vidhan Sabha (SH: Construction of building portion of Block (P) Development of site i/c WS and SI) by the Objectors-Plaintiffs, for tendered cost of Rs.27,19,792.62 with a stipulated time of two years for its completion. Consequently, an agreement No.22 of 1993-94 (Annexure P1 & P2) was executed between the parties. The work was required to be completed on 10.10.1995, but it was actually completed on 30.9.1996.

2. Mainly the dispute inter-se the parties arose on the payment of bill for the work done, price escalation claimed by the claimant, claims for carriage of stone aggregate, payment for the items of

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Whether reporters of the Local papers are allowed to see the judgment? Yes.

pointing work and 8” x 4” tiles, payment for masonry alleged to have been demolished, payment for deviated quantity at market rates, payment for prolongation of the contract, payment of interest as also the counter claim relating to the recoveries proposed in the final bill by the plaintiff on account of cost of material issued and charges of vehicle used as well as empty cement bags.

3. After the finalization of the final bill, the non-Objector/ defendant Company raised a dispute on the above items, which was referred to the sole Arbitrator V.K. Bhandari, the then Superintending Engineer, 4th Circle, H.P. PWD, Shimla for making his award.

4. The non-Objector/defendant had filed nine claims amounting to Rs.13,03,337.23 lacs (Annexure P-3). The Objector-Plaintiffs filed the reply. After considering the claims filed by both the parties, the Arbitrator passed the impugned award (Annexure P-4) whereby an amount of Rs.9,84,748/- was awarded in favour of the non-Objector/defendant, with respect to four claims i.e. 1,2,3 and 9 out of entire nine claims.

5. It is alleged in this Objection Petition by the Objector/Plaintiff that the Arbitrator did not consider the pleas of the Objector/department and ignored the evidence on unreasonable grounds. Thus, the present objection petition has been filed, on the ground that the award is against the Public Policy of India. It is also contended that while deciding the Claim No.1, the learned Arbitrator misread the provisions of the Contract agreement and arrived at the wrong conclusion and further that the Claim No.2 allowed by the Arbitrator is totally against Clause 10 (c) of the Contract agreement and Claim No.3 was allowed by misreading the provision of the Contract agreement and Claim No.9 was decided without

considering the material evidence adduced on the record. Thus, prayed for setting aside the award.

6. The non-objector-defendant has filed its reply. According to them, the objection petition is not maintainable as it does not fall within the ambit of Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act) and the objection petition has been filed, trying to invite this Court to sit in appeal over the findings of the Arbitrator. On merits, the non-objector-defendant has supported the impugned award.

7. On 14th September, 2004, this Court had framed the following questions based upon the rival contention of the parties:-

> "1. Whether the impugned award is against the public policy, as alleged? OPO.
>
> 2. Whether the award is against the specific terms of the contract? OPO.

8. Both the questions are inter-linked, therefore, taken up for the just decision of the present case.

9. I have heard the learned counsel for the parties and have gone through the evidence on record.

10. Sub Section (1) of Section 34 of the Act provides for setting aside the award of the court on an application made by an aggrieved party, in case, the award suffers from the vice of sub Section (1) of Section 34. The bare perusal of this section shows that an arbitral award is not open to challenge save and except specifically provided under sub Section (2) of Section 34 of the Act read with grounds 13 and 16 of the Act.

11. In the instant case, the Objector/plaintiffs have assailed the award, within the purview of Section 34(2) of the Act. Now it has to be seen whether the grounds contemplated therein exists. The first question is what is the public policy of India.

12. In **OIL & NATURAL GAS CORPORATION LTD. V. SAW PIPES LIMITED [(2003) 5 Supreme Court Cases 705]**, the Supreme Court has dealt with the phrase "public policy of India" and held that **the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in *Renusagar* case; *[1994 Supp (1) SCC 644*,] it has to be held that the award could be set aside if it is patently illegal and the illegality must go to the root of the matter. The award which is unfair and unreasonable that it shocks the conscience of the court, such award is opposed to the 'public policy' and is required to be adjudged void.**

13. It is not the case of the Objector/plaintiffs that the award is the result of any fraud or corruption or contrary to the provisions of Section 75 or Section 81 of the Act weighing the concept of "public policy" on the basis of the judgment of the Apex Court referred above.

14. With respect to claim No.1, the non-Objector-defendant was paid the 6th running account bill by the Objectors-plaintiffs to the tune of Rs.34,50,690/-. The Non-Objector-defendant had shown the balance amount of Rs.1,07,499/- in addition to the amount paid to them in the 6th running account bill, whereas the Objector-plaintiffs had shown the

recoverable amount to the tune of Rs.1,33,198/- against Claim No.1, but this amount was deposited for the disposal of work. However, it was denied to them in the final bill on the ground that the rates were inclusive of disposal of unserviceable material in all leads and lifts. According to the Non-Objector-defendant the agreement did not include the carriage by mechanical transport, therefore, it was required to be paid as an extra item which in fact was paid in the 6th running account bill, which comes to Rs.1,50,000/- as per the measurements recorded by the respondent. The disposal in all leads would not include disposal by mechanical means, for that there should have been a specific clause in the agreement. In fact, the parties had agreed for the disposal of the surplus earth at the demarcated site. Quantity relating to the cutting in the said work and excavation in foundation was already mentioned and the rates were inclusive of disposal of unserviceable material within all leads and lifts. During the execution of work, the plaintiffs agreed to pay the defendant for disposal of surplus excavated soil and material for the load of 4 K.Ms, its entries in M.B. were also made. It is pertinent to note that agreement did not include any carriage by mechanical transport, therefore such carriage by mechanical transport has to be paid as an extra item which in fact was paid in the 6th running bill. The learned tribunal has rightly discussed the facts brought on the record and correctly held in the circumstances that the Non-Objector/defendant was entitled for the leads payable in 7 K.M. by applying the premium 68.64 % in H.P.S.R. 1987, as claimed, which was not disputed by the Objector/Plaintiffs, therefore, qua this I do not find any illegality while awarding Rs.70,596/- to the non-Objector/defendant and position of final bill was rightly rejected.

15. In so far as Claim No.2 is concerned, it is with respect to the price escalation. The objector/plaintiffs vide their letter No.SD-II-A-8-Vidhan Sabha-96-97 dated 21.5.97 referring to the letter of the non-Objector inter-alia informed them that no claim under Clause 10-C of the Contract

Agreement for quantities executed by them during the extended period will be admissible to them. The copy of the letter was endorsed to Superintending Engineer. On reply to it, the Objector/plaintiffs vide its letter dated 12.12.97 withdrew the above condition. He also endorsed the copy to the Superintending Engineer.

Clause 10-C of the Agreement reads as under:-

> **"Clause 10-C. If during the progress of the works, the price of any materials incorporated in the works (not being a material supplied from the Engineer-in-charge's stores in accordance with clause 10 hereof) and/ 0r wages of labour increases as a direct result of the coming into force of any fresh law, or statutory rule or order (but not due to any charges in sales tax) and such increase exceeds ten per cent of the price and/or wages prevailing at the time of acceptance of the tender for the work and the contractor thereupon necessarily and properly pays in respect of that materials (incorporated in the works) such increased price and/or in respect of labour engaged on the execution of the work such increased wages, then the amount of the contract shall accordingly be varied; provided always that any increase so payable is not, in the opinion of the Superintending Engineer (whose decision shall be final and binding) attributable to delay in the execution of the contract with the control of the contractor."**

In the instant case, no decision was taken by the Superintending Engineer. But, however, in **State of H.P.** v. **Jagdish Ram and Sons** Division Bench of this Court in **OSA No.4 of 1999,** has held that the clause 10-C between the parties were outside the scope of the Arbitrators jurisdiction and cannot be the subject matter of the arbitration award. Therefore, the award with respect to Claim No.2 is set-aside.

16. As far as Claim No.3 is concerned, regarding the carriage of grit, in view of the order dated 26th July, 1993, passed in Civil Writ Petition No.51 of 1993, this Court had issued the stay directing the stone crusher in Shimla and its suburbs particularly in the area on National Highway and state Highways and in the places of tourist importance were permitted to work only for 6 months from the date of the said order and the Non-Objector-defendant had to procure the aggregate etc. from the crusher at Panchkula and while calculating the amount, the Arbitrator has rightly appreciated the facts on record, and calculated the amount to the nearest crusher at Sujanpur and awarded Rs.51,848/-.

17. As far as the interest against Claim No.9 is concerned, the awarding of interest is perfectly within the discretionary powers of the arbitrator, which is otherwise reasonable and rational and cannot be interfered with.

18. To conclude the Objection petition qua claim No.2 raised by the Objectors-plaintiffs is sustainable and accordingly the award with respect to claim No.2 is set-aside, whereas, qua claim Nos. 1,3 and 9 is not tenable. The questions are accordingly answered.

19. In result, the Objection-petition is partly allowed.

Parties to bear their own costs.

(Surinder Singh)
Judge

July 31, 2008.
(Pds)