HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

A. A. no. 27/2008

Date of Decision: 08.10.2010

Union of India **Vs.** **M/S Sunny Builders**

Coram:

HON'BLE MR. JUSTICE SUNIL HALI, JUDGE.

Appearing Counsel:

For the Petitioner(s): Mr. Sachin Gupta, Advocate.
For the Respondent(s) Mr. R. K. Gupta, Advocate.

i) Whether to be reported in Press, Journal/Media : Yes
ii/ Whether to be reported in Digest/Journal : Yes

For manufacture and supply of Furniture at Nagrota, a contract was entered between the Commander Works Engineers 138 and the respondent-claimant by contract agreement CA no. CWE/JP-83A/05-06 on 09.02.2006. The value of the contract agreement was Rs. 11,85,025.00. The contract was to commence from 09.01.2006 and 31.01.2006 and the completion date was fixed as 30.07.2006, which, subsequently was extended to 07.12.2006. It seems that the first consignment is stated that have been supplied by the claimant, for which an amount of Rs. 2,35,920/- was released in his favour. On completion of second set of supplies a bill to the tune of Rs. 3.35 lacs and odd was raised. This bill is stated to have not been cleared by the petitioner, as a result of which clause 37 of the agreement was invoked by the claimant for

referring the matter to the arbitrator. On reference being made to the arbitrator, he is stated to have entered into the reference on 17.12.2007. As many as ten claims were laid by the claimant. Except claim nos. 3 and 5, all other claims were allowed by the arbitrator. The counter-claims raised by Union of India were rejected. Feeling aggrieved of this award, the objector has filed this petition under Section 34 of the J&K Arbitration and Conciliation Act of 1997 for setting aside the arbitral award dated 22.05.2008.

The grounds for setting aside the award relates to the fact that arbitrator has passed the award ignoring the stipulations in the contract and, without referring to the stipulations of the contract, the arbitrator has accepted the claims of the claimant. It is contended that articles supplied by the claimant were to be accepted strictly in consonance with the contract specifications. The arbitrator by traveling beyond the scope of the contract has allowed the claims. The second ground is that while accepting the plea of the claimant in accepting the supplies made by him in violation of the specifications provided in the contract, misconduct of the arbitrator is apparent. What is being contended is that, as the supplies were not found in consonance with the contract specifications, claimant was informed by letter dated 28.10.2006. In this behalf reference was also made to General Condition of IAFW-1815Z (General Condition of contracts for the supply of stores and material to

the MES) which stipulated that Engineer-In-charge shall have the full power to reject the material brought to site by the claimant, which are not in accordance with the contract specifications and accordingly the material supplied by the claimant was rejected by Engineer-In-Charge. It is further contended that as per the condition of the contract, GE is the final authority in deciding whether the supplies are of quality inferior to that contracted for or otherwise under Condition 20 of IAFW-1815Z and the decision of the GE in this regard shall be the final. It is also contended that recommendations of the Board of Officers has not been concurred by the accepting officers. In nut shell the objection raised is that the supplies which are not in conformity with the specifications of the contract, as such, cannot be accepted and the arbitrator has no authority to allow the claims in this behalf.

The stand of the claimant is that reliance placed by the petitioner on general conditions of the agreement stands superseded by clause/ note 8 of the contract executed with the claimant, which provides as under:-

> "Board of Officers will be convened by the Accepting Officer immediately after acceptance of samples by G.E. The G.E shall intimate to the Accepting Officer for convening of the Board for approval of the supplies."

Elaborating the manner in which the claim has been rejected by the objector, it is stated by the claimant that it submitted furniture items on 29.07.2006. A request was made

by the G.E to the Accepting Officer to convene the Board of Officers for inspection and approval. The Board of Officers, after inspecting the supplied items, found the same to be in order and as per the contract specifications. The claimant submitted his first RAR on 18.09.2006 and payment of Rs. 2,35,920/- was made to him. The second set of samples to the G.E Nagrota was submitted on 09.11.2006 and after approval of the same by the G.E, the supplies were made on 10.11.2006. Same procedure, as envisaged vide Note 8 of the Contract Agreement, was followed. The Board of Officers assembled and found the furniture items as per the specifications of the Contract Agreement. No defects were pointed out by the Board of Officers. The claimant submitted the second RAR on 05.02.2007 which has been denied to it.

It is further contended that no communication dated 28.10.2006 was received by the claimant, intimating him that quality of wood used in the manufacture of furniture was not in accordance with the specifications. The general condition of the contract, as indicated in para no. 4 and 5 of the petition, stood superseded by specific condition/ note in the agreement executed with the claimant by the petitioner. The other contention raised is that when the first RAR was submitted, same procedure was followed by placing reliance on note 8 of the contract agreement while releasing the first payment. What is contended is that on the recommendations of the Board of

Officers, who inspected the material supplied by the claimant, payment was released but here in this case different stand was taken by taking recourse to general conditions of the contract. This, in nut shell, is the stand of the claimant.

I have heard the learned counsel for the parties.

An award of the arbitrator can be set aside only on the following conditions:-

> "An arbitral award may be set aside by the Court only if:-
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> (a) the party making the application furnishes proof that:-
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> (i) a party was under some incapacity; or
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> (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:
>
> ……."

Analyzing the import of the controversy raised, what is being insisted by the petitioner is that Claus 2(iv) of the Act is sought to be invoked which contemplates following conditions:-

> " (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."

The specific case of the petitioner is that the arbitrator has allowed the claims of the claimant on the issue which it had no

jurisdiction to adjudicate. The claimant was supposed to supply the furniture strictly in consonance with the stipulations provided in the contract and it is only after it is testified that same has been done in accordance with the specifications, that he would be entitled to receive payment for the same. The arbitrator could not have directed the petitioner to make payment by accepting the supplies, which were not in conformity with the specifications of the contract. This was a matter beyond the scope of submission to the arbitration.

As already stated herein supra, the claim of the claimant was rejected on the ground that supplies were not made in conformity with the specifications provided, as such the claim was rejected. There is no dispute with this proposition of law that arbitrator cannot decide a matter which is beyond the scope of submission to the arbitration. The arbitrator was called upon to resolve the dispute, strictly in consonance with the terms of the contract. The decision of the arbitrator would be illegal in case it is found that the arbitrator has allowed the claim which was beyond the scope of the contract. He could not have, as in the instant case, directed the petitioner to accept the supplies in violation of the specifications provided by the contract. This was beyond the scope of the submission to the arbitration.

Having said so, the only question is as to whether the supplies have been accepted in violation of the specifications

provided by the contract. The plea of petitioner is that, general conditions of the contract provide that, supplies have to be accepted by the G.E and in case there is no such acceptance, claims cannot be allowed. However, it be seen that note 8 attached to the agreement executed by the claimant, clearly provides that if the samples are accepted by the G.E, the matter is referred to the Board of Officers to accept the supplies made by the claimant, and thereafter the amount is required to be paid. The specific condition in the contract would over ride the general provisions of the contract. It is contended by the claimant that it was not a case where supplies were accepted which were not in conformity with the specifications, but a case where the G.E had, in violation of the contract, refused to make the payment to the claimant. The supplies were accepted and the arbitrator, who is the master of facts and law, has rightly interpreted the terms of the contract by allowing the claim.

The other aspect of the matter is with respect to bar in contract against admissibility of claim. This prohibits the department but not the arbitrator from entering such a claim.

It be seen that Regulation 439 of the MES Regulations, 1968, fixes the pecuniary jurisdiction of the Chief Works Engineer at Rs. 20,000/- only. He cannot accept any claim above 20,000/-.The matter can be decided by the arbitrator. I am supported in taking this view by a judgment of Supreme Court delivered in *Asain Techs Limited vs. UOI and Ors*, reported as

(2009) 10 SCC, 354, where it has been held as under:-

> "The stipulation in the contract regarding finality of the decision of CWE (the competent authority specified in the contract) for fixation of rates for any work order which was incapable of being calculated by the methods specified read with the stipulation saving the rights of the parties to correct any mistake in rate fixation even after receipt of the last payment make it clear that the finality provided by the former stipulation applied only to cases of "deviation" and not in a case when there was a material alteration and addition in the work done. Moreover, Regulation 439 of the MES Regulations, 1968 fixes the pecuniary jurisdiction of the CWE at Rs. 20,000 only. The CWE has no jurisdiction to decide the dispute where the valuation is above Rs. 20,000, as in the present case. The finality of the decision of the CWE applies only where the dispute is not exceeding Rs. 20,000. Hence the arbitrator was within his jurisdiction to decide the matter ion question."

Regarding the other claim, it be seen that damages have been awarded on the basis of with-holding of the amount of the claimant. In this aspect, be noted that, where in a works contract, the party entrusted the work commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. I am fortified in this view by a judgment of Apex Court delivered in case *M/S A. T. Brij Paul Singh and Bros. vs. State of Gujarat*, reported as **AIR 1984 SC, 1703**, where their lordships have held as under:-

> "where in a works contract, the party entrusted the work commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What must be the measure of profit and what proof should be

> tendered to sustain the claim are different matters. But the claim under this head is certainly admissible."

Therefore the contention raised by the petitioner is not sustainable as such is rejected.

What is concluded is that:-

(a) Supplies made by the claimant were referred to the Board of Officers constituted by the G.E, who inspected the same and his rejection was not proper;

(b) It is further found that it is not a case where the arbitrator had permitted a claim regarding supplies of the material in violation of the specifications provided under the contract but a case where the material was accepted in conformity with the specifications of the contract, as the same were accepted by the Board of Officers.

(c) Regarding other claims it be seen that about the jurisdiction of the arbitrator to award damages/ compensation for loss of profit, profit turn over, loss due to blockage of capital as also interest, nothing has been spelled out by the petitioner on this count that it violates any one of the conditions stipulated by Section 34 of the Act.

For all what has been said above, this application is rejected. The award of the arbitrator is directed to be enforced as a decree.

(SUNIL HALI)
Judge

JAMMU:
08. 10. 2010
Anil Raina, Secy.