

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**FAO No. 6635 of 2014 (O&M)
Date of Decision: 29.08.2017**

National Fertilizers Limited

..... Appellant

Versus

M/s Kumar Builders and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE JASWANT SINGH

Present: Mr. Vipin Mahajan, Advocate
for the appellant.

Mr. Jagmohan Bansal, Advocate
for respondent No. 1.

Service of respondent Nos. 2 & 3 is
dispensed with vide order dated 25.11.2014.

JASWANT SINGH, J.

The appellant invoking jurisdiction under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'Act'), has filed present appeal, aggrieved from the Order dated 31.05.2014, whereby, his application under Section 34 has been dismissed by Ld. Additional District Judge, Bhatinda on the ground that there is no reason to interfere with award dated 07.04.2010 passed by Arbitrator.

2. Mr. Vipin Mahajan, Counsel for the appellant has argued that the Ld. Additional District Judge, Bathinda fell in an error by declining the application of the appellant under Section 34 of the Act against the award. The arbitrator vide his award dated 07.04.2010 has erroneously decreased the amount of liquidation damages on shortfall in lifting ash, holding that there were two contracts and not one contract. The Ld. Counsel has assailed the order passed by Ld. ADJ, Bathinda as well as award passed by the

Arbitrator on the following counts;

- i) Letter dated 27.12.2007 (**Annexure A-7**) followed by contract dated 25.01.2008 (**Annexure A-8**) is not a new contract but it is an extension/addition of earlier contract dated 01.03.2007. As per terms and conditions incorporated in notice inviting tender dated 14.10.2006, the appellant had unilateral power to extend contract for additional value up to 25% of awarded quantity for further 3 months on the basis of same rates, terms and conditions of awarded contract; The respondent was required to lift 5.05 lakh cms ash in total 13 months i.e. 10 months original period and 3 months extended period. The respondent failed to lift 40116.31 Cms ash within specified period i.e. original and extended period. The shortfall in lifting ash within stipulated period cannot be attributed to only second agreement dated 25.01.2008 as it is extension of old agreement and not an independent agreement;
 - ii) The Arbitrator acting beyond his jurisdiction has granted interest @ 18% on payment delayed beyond 20.05.2010;
 - iii) The Arbitrator vide letter dated 11.02.2010 asked the respondent to submit stamp paper of ₹ 1500/- for publishing his award and the respondent purchased stamp paper on 08.02.2010 which shows that stamp paper was purchased prior to date of said communication and smacks of mis-conduct on the part of arbitrator.
3. In nutshell, the Ld. Counsel urged that the objection court has wrongly rejected objection petition as purchase of stamp paper on 08.02.2010 smacks suspicion and respondent itself in various bills treated both the agreements as one contract. Clause 17 of contract dated 01.03.2007

clearly provides that Arbitrator shall not award interest on the awarded amount more than the rate of SBI-PLR or actual interest rate paid by the NFL, whichever is lower prevailing on the date of award of contract, hence, post award, the Arbitrator has wrongly granted interest @ 18%.

4. On the other hand, Mr. Jagmohan Bansal, counsel for the respondent No. 1 has argued that there is no infirmity and illegality in the Impugned Order dated 31.05.2014 and arbitration award dated 07.04.2010 because two agreements were executed on different dates. The appellant issued letter dated 27.12.2007, extending the work for disposal of another 1 lac cum and executed fresh agreement dated 25.01.2008. If the second agreement was just addition/extension of earlier contract, there was no need of execution of second agreement. No doubts, terms and conditions of NIT and contract enabled the appellant to extend quantity as well as period of contract but the second contract is an independent contract. The purchase of stamp paper is a matter of co-incidence. The respondent due to blockage of funds was worried and over conscious and purchase of stamp paper does not indicate in any manner that findings of the Arbitrator and Ld. ADJ are contrary to contract or law of the land. On the question of interest Ld. Counsel drew my attention to Section 31(7) of the Act, 1996. He argued that Clause (b) of aforesaid Section 31(7) of the Act deals with different facts and circumstances than Clause (a) of said sub-section. Clause (a) is circumscribed by agreement between the parties but Clause (b) is circumscribed by arbitral award and not agreement between the parties so the Arbitrator on the basis of un-amended Sub-section (7) of Section 31 of the Act has rightly awarded interest @ 18% from the expiry of 42 days from

the date of award i.e. post award.

5. After hearing Ld. Counsel for the parties and perusing the record, this Court is of the opinion that present appeal is devoid of any merit and same is liable to be dismissed.

6. The undisputed facts emerging from record of the case are that vide award dated 07.04.2010, Ld. Arbitrator held that contract dated 01.03.2007 and 25.01.2008 are two contracts and not one so appellant is entitled to liquidated damages in respect of second contract and liquidated damages would not spread over both the contracts. The appellant retained a sum of ₹ 11,78,670/- as liquidated damages whereas the Arbitrator determined liquidated damages ₹ 1,55,600/-. The Arbitrator has awarded interest @ 12% from 28.10.2008 to till the payment is released. The interest rate has been increased from 12% to 18% in case payment is delayed beyond 20.05.2010, in other words interest @ 12% has been awarded till the date of decision plus grace period of 42 days. Interest @ 18% is applicable, in case the appellant fails to make payment within 42 days from the date of award. Ld. ADJ has rejected application under Section 34 on the ground that Court cannot sit in appeal over the award passed by the Arbitrator and award passed by arbitrator is legal and can not be set aside. It is apt to notice that the appellant released security deposited with respect to first contract.

7. It would be gainful to consider the law laid down by Hon'ble Supreme Court, with respect to interference of Courts in arbitral award. The Supreme Court in ONGC versus Saw Pipes, 2003(2) R.C.R. (Civil) 554:2003 (5) SCC 705 held:

31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a

wider meaning. It can be stated 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 is required to be held that that award could be set aside if it is patently illegal. The result would be-award could be set aside if it is contrary to:

- (a) Fundamental policy of Indian law; or*
- (b) The interest of India: or*
- (c) Justice or morality, or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

74. *In the result, it is held that:*

- (A) (1)** *The court can set aside the arbitral award under Section 34 (2) of the Act if the party making the application furnishes proof 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 or the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) *The court may set aside the award:*

(i) (a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) Failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) *The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to :*

(a) fundamental policy of Indian Law; or

(b) the interest of India: or

(c) Justice or morality, or

(d) If it is potently illegal.

(4) *It could be challenged:*

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

(B) (1) *The impugned award requires to be set aside mainly on the grounds:*

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract:

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from

the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) Liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Section 73 and 74 of the Contract Act and in the present case by specific terms of the contract.

The Supreme Court in case of *Associate Builders versus Delhi Development Authority* 2015 (3) SCC 49 in Para 22 held:

22. Here again, the Division Bench has interfered wrongly with the arbitral award on several counts. It had no business to enter into a pure question of fact to set aside the Arbitrator for having applied a formula of 20 months instead of 25 months. Through this would inure in favour of the appellant, it is clear that the appellant did not file any cross objection on this score. Also, it is extremely curious that the Division Bench found that an adjustment would have to be made with claims awarded under claims 2, 3 and 4 which are entirely separate and independent claims and have nothing to do with claims 12 and 13. The formula then applied by the Division Bench was that it would itself do "rough and ready justice". We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression "justice" when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot

possible include that the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the Arbitrator's view and does what it considers to be "justice". With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact.

As per various judgments of Supreme Court, the Court should refrain from interfering in award if there are two possible views; pure question of facts is involved; illegality is of trivial nature and it does not go to the root of the matter; award is not against the public policy. The Court should interfere, if there is patent illegality, however, must go to the root of the matter, there is violation of the public policy and it should be so patent and unreasonable as to shock conscious of the Court; the arbitration agreement is not valid under the law to which the parties have subjected etc.

8. By applying the parameters of Section 34 and law laid down by Hon'ble Supreme Court in various judgments, this court finds that in the present case, there is dispute of pure facts qua number of contracts. As per the appellant, there is one contract and as per the respondent there are two contracts and this is a pure question of fact. The Arbitrator has recorded specific findings that there were two agreements as security of first agreement was returned, fresh agreement was signed. Objecting court has dismissed objections of the appellant holding that there is no ground to interfere in the award. The view expressed by the Arbitrator is a plausible view and view expressed by the Arbitrator in no way can be held as against the law or public policy. The arbitrator noticing the fact that security of first agreement has been returned and second agreement was signed by both the

parties, has held that there were two agreements and shortfall in lifting of ash can not be spread over both the agreements. Court finds that view expressed by arbitrator is a plausible view and it is not appropriate to take a view contrary to view expressed by the Arbitrator.

The counsel for the appellant has pleaded that stamp papers were purchased prior to date of communication. It is mere suspicion and suspicion can never take place of evidence. The appellant failed to lead any evidence before Ld. ADJ as well as this Court to show that there was connivance or fraud on the part the respondent and the Arbitrator. The award could be passed on plain paper because award is required to be printed on stamp paper for the sake of execution. Court does not it a ground to interfere as it seems to be a mere co-incidence or at the most oral communication by the Arbitrator.

9. Ld. Counsel of the appellant has not disputed interest @ 12% but interest @ 18%. The Arbitrator has granted interest @ 12% for the period during which matter remained pending before award. The award was passed on 07.04.2010 and the appellant was granted time for making payment till 20.05.2010. The appellant was made liable to pay interest @ 18% in case payment is delayed beyond 20.05.2010. Section 31 (7) of the Act is relevant for the just decision of this issue. The said Section reads as under:

“(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action

arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment”.

The aforesaid Clause (a) of Section 31(7) of the Act is circumscribed by agreement/contract between the parties whereas Clause (b) is circumscribed by arbitral award. In case the Arbitrator does not grant interest from the date of award to the date of payment, award carries interest @ 18%. In the present case, the Arbitrator granted more than 30 days to make payment and interest @ 18% starts from 20.05.2010. As per aforesaid Section, interest is payable @ 18% from the date of award whereas the Arbitrator has granted a period of more than 30 days to make payment. Had the Arbitrator not granted interest, the appellant was otherwise liable to pay interest @ 18% from the date of award. Therefore, the Arbitrator was well within his jurisdiction to grant interest @ 18%.

In view of the discussion made above, no ground for interference is made out and accordingly the instant appeal is dismissed and consequently award dated 07.04.2010 and impugned order dated 31.05.2014 stands affirmed.

August 29, 2017

'dk kamra'

**(JASWANT SINGH)
JUDGE**

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|---------------------------|--------|
| Whether Speaking/reasoned | Yes/No |
| Whether Reportable | Yes/No |