

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

CFA No.18/2014
IA Nos.91/2014, 2/2015, 3/2015 &
1/2017

Reserved on :17.02.2022
Pronounced on : 09.05.2022
(through virtual mode)

Union of India ...Appellant(s)

Through:- Mr. Pranav Kohli, Sr. Advocate with
Mr. Rahul Sharma, Advocate

V/s

M/s D.Khosla and Company ...Respondent(s)

Through:-Mr. Sourabh Malhotra, Advocate

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. Union of India through Chief Engineer (P) Sampark is in appeal under Section 39 of J&K Arbitration Act, 2002 (1945 A.D.) [“the Act”] against the order and judgment of the Principal District Judge, Jammu [“the Court below”] dated 11.01.2014 passed in File No.42/Award titled M/s D Khosla and Company v. Chief Engineer (P) Sampark. The Court below vide its judgment dated 11.01.2014, impugned in this appeal, has dismissed the application of the Union of India filed under Section 30 and 33 of the Act for setting aside the arbitral award dated 04.01.2008 passed by Brig (Retd.) B.V.Ahuja, the sole arbitrator.

2. Before advertng to the grounds of challenge pleaded and urged by the appellant-Union of India to sustain challenge to the impugned order of the Court below, it would be necessary to allude to the background facts leading upto the filing of instant appeal.

Pursuant to an NIT issued by appellant for allotment of work of “Design and Construction of Permanent Bridge Over River Niara Tawi at 65.51 on Akhnoor-Poonch Road in J&K State under Project Sampark” the respondent-the contractor was found to be the successful bidder and accordingly, a contract agreement was entered into between the Union of India and the contractor on 14.06.1987. The lumpsum value of the contract to be executed by the contractor was Rs.90,59,000/- with the completion period of 24 months. The date of commencement of the work was stated as 8th August, 1988 and was to be completed and handed over by the contractor by or before 7th August, 1990. It appears that on account of certain delays and technical problems, the work could not be completed within the stipulated period. On the request of the contractor, time to complete the work in question was extended from time to time and as per the last extension granted, the contractor was to complete the work by 31st March, 1993. It appears that the contractor during the currency of the contract approached the appellant for interim arbitration on the ground that certain disputes between the parties were affecting both, progress of the work and the payments. The Union of India did not oblige in the beginning but later agreed to interim arbitration, which, however, did not materialize thereafter. But, instead, the contract was terminated on 14.06.1993. Feeling

aggrieved by the termination of the contract agreement by the appellant, the contractor approached the designated authority (Director General of Border Roads) for appointment of an arbitrator under Clause-70 of the General Conditions of the contract. The designated authority did not act on the request of the contractor, which constrained him to approach the Court of Principal District Judge, Jammu for appointment of an arbitrator in terms of Clause 70 of the General Conditions of Contract to adjudicate upon the disputes between the parties arising out of the contract. While the matter was pending consideration of the Court below, the designated authority appointed Brig. Sudhir Kumar as sole arbitrator to arbitrate the dispute between Union of India and the contractor. The Civil Court, however, did not accept the appointment of the arbitrator made by the designated authority under the contract agreement and appointed Brig. (Retd.) B.V.Ahuja, as sole arbitrator in the matter. The order of the Court below appointing Brig. B.V.Ahuja as sole arbitrator was called in question by the Union of India before a Single Judge of this court and after having failed before the Single Judge, before the Division Bench of this Court. In short, the order passed by the District Judge, appointing Mr. B.V.Ahuja as sole arbitrator was upheld.

The sole arbitrator entered the reference and issued notices to Union of India and the contractor on 16th August, 1996 to put forth their respective claims and counter claims. Both the parties filed their statement of claims/counter claims and also filed statement of defense to the statement of claims filed by the opposite party. It may be noted that the

Division Bench, which upheld the appointment of Mr. B.V.Ahuja, as sole arbitrator, directed the appointed arbitrator to conclude the proceedings within four months.

The proceedings commenced as above; parties were asked to lead evidence; on the conclusion of the evidence of both the parties, the matter was slated for final arguments on 3rd October, 2007. The matter was adjourned on couple of hearings. As it has come out from the arbitration award that on the hearing that took place on 17th December, 2007, both the parties appeared before the Arbitrator but on the last and final hearing, which took place on 28th December, 2007, it was only the contractor, who was present whereas there was nobody present on behalf of the Union of India. The matter was heard by the arbitrator in the absence of the Union of India and the award was passed on 4th January, 2008. The Arbitrator awarded the following claims in favour of the contractor.

S.No.	Amount claimed	Amount awarded by the arbitrator
Claim No.1	Rs.32,58,578.00	Rs.32,58,578.00
Claim No.2	Rs.3,02,173.00	Rs.3,02,173.00
Claim No.3	Rs.20,14,068.91	Rs.20,14,068.91
Claim No.4	Rs.6,06,500.00	Rs.6,06,374.00
Claim No.5	Rs.16,532.82	Nil

Claim No.6	Rs.50,06,047.95	Rs.50,06,047.95
Claim No.7	Rs.1,40,488.50	Rs.1,40,488.50
Claim No.8	Rs.1,25,000.00	Rs.1,25,000.00
Claim No.9	Rs.11,665.00	Nil
Claim No.10	Rs.5,000.00	Nil
Claim No.11	Rs.1,50,000.00	1,50,000.00
Claim No.12	Rs.70,000.00	Rs.70,000.00
Claim No.13	Rs.9,65,56,567.48	Rs.7,23,52,488.35
Claim No.14	Rs.25,14,000.00	Rs.25,14,000.00
Claim No.15	18% Interest per annum from the termination of the award	Interest @ 18% per annum on claim No.1 to 14, except on claim No.13 from the date of cancellation of contract i.e. 14.06.1993 to the date of reference i.e. 27.07.1996
Claim No.16	Interest @ 18% per annum from the date of	Interest @ 18% per annum on claim No.1 to 14, except on claim No.13, from the date of reference

	reference to the date of publication of the award	to the date of publication of the award.
Claim No.17	Interest @ 18% per annum on all the claims from the date of publication of the award upto the date of payment or upto the court decree	Interest @ 18% per annum for all the claims from the date of publication of the award upto the date of payment or upto the court decree, in the event of non-payment of the total awarded amount against all claims earlier, by the Union of India.
Claim No.18	Rs.9,55000.00 as cost of arbitration	The parties to bear their own costs

The Arbitrator, thus, awarded a total amount of **Rs.8,65,39,218.70** along with interest @ 18% per annum in the manner detailed above. So far as the amounts claimed by the Union of India are concerned, the arbitrator has awarded the same in the following manner:-

S.No.	Amount claimed	Amount awarded
Claim No.(a)	Rs.17,27,245.00	Nil

Claim No.(b)	Rs.7,16,583.00	Nil
Claim No.(c)	Rs.1,00,000.00	Nil. Parties to bear their own respective cost of arbitration
Claim No.(d)	Rs.30,000.00	Nil
Claim No.(e)	Rs.62,84,243.00	Rs.47,13,182.25
Claim No.(f)	Rs.10,34,235.00	Nil
Claim No.(g)	Rs.4,390.00	Nil
Claim No.(h)	Rs.50,000.00	Nil

The Union of India has, thus, been awarded an amount of Rs.47,13,182.25 without awarding any interest. This is in a nutshell the proceedings conducted by the arbitrator and the award passed by him

3. Feeling aggrieved by the award passed by the sole arbitrator, the Union of India filed an application under Section 30 and 33 of the Act for setting aside the award on several grounds before the Court below. The application was contested by the contractor and on the basis of pleadings of both the parties, the Court below vide its order dated 01.06.2010 framed the following issues:-

“1. Whether the arbitrator has travelled beyond the ambit of contract agreement? OPR

2. Whether the award amount is disproportionately excessive?
OPR

3. In case issue No.1 and 2 are answered in affirmative, whether the arbitrator is guilty of misconduct? OPR”
4. From a reading of the impugned order passed by the Court below, it transpires that the parties did not lead any evidence and instead argued the matter on the basis of documents and records. The Court below considered the matter in the light of rival contentions and after making claim-wise discussion, upheld the award vide its judgment dated 11.01.2014, impugned in this appeal.
5. The Union of India is aggrieved and has challenged the impugned order of the Court below, inter alia, on the following grounds:-
 - i) The Court below has not appreciated that the award dated 04.01.2008, impugned before it, was a nullity, in that, the arbitrator having been directed by the Division Bench of this Court to conclude the arbitration proceedings by 18.12.2007 could not have proceeded beyond the said period and published the award on 04.01.2008, more so when the Division Bench of this Court had not granted any extension.
 - ii) The Court below did not appreciate that a bare reading of the award of the arbitrator clearly suggested and demonstrated that it was one sided award passed without taking into account the case projected by Union of India before the arbitrator.
 - iii) The Court below has failed to consider and appreciate that the manner in which the arbitrator had conducted his proceedings was demonstrative of the legal misconduct of the arbitrator.

- iv) The huge amount of more than eight with exorbitant interest @ 18% per annum awarded, in the given facts and circumstances of the case, shocks the conscious of the Court and, therefore, cannot be maintained.
- v) The award is outcome of vengeance against Union of India for having taken up the matter of appointment of arbitrator upto the level of Supreme Court.
- vi) The arbitrator did not provide adequate opportunity to Union of India to defend its case and, therefore, without formally proceeding ex-parte against the Union of India, conducted the proceedings at the final stage at the back of Union of India.
- vii) Most of the claims awarded by the arbitrator are way beyond the terms and conditions of the contract and, therefore, outside the submission and jurisdiction of the arbitrator. This aspect has not been considered by the Court below.
- viii) The award passed by the arbitrator suffers from error apparent on the face of record and, therefore, was not sustainable. The Court below has completely ignored this aspect and has put its seal of approval on all the claims awarded by the arbitrator.
- ix) That the arbitrator by awarding interest at a rate as high as 18% per annum past, *pendente lite* on all items excluding item No.13 and 18% per annum future interest on all claims, has mis-conducted himself as well as the proceedings. The Court below by putting its seal of approval on the aforesaid

exorbitant rate of interest has even acted against the spirit of Section 29 of the Act.

- x) The Court below has not appreciated that the arbitrator, who awarded huge sums in favour of the contractor arbitrarily, rejected the counter claims of Union of India except claim No.(e), which, too, appears to have been awarded to strike balance and justify the award of almost all the claims except claims for meager amount in favour of the contractor.

6. The appeal is vehemently opposed by the Contractor. Learned counsel appearing for the contractor relying upon several pronouncements of the Supreme Court on the issues raised in the appeal, submitted that the Union of India has not made out a case for interference with the award of the arbitrator, as upheld in *toto* by the Court below.

7. Having heard learned counsel for the parties and perused the material on record, it is necessary to first set out Section 30 and Section 33 of the Act.

Section 30 reads thus:-

“30. Grounds for setting aside award-An award shall not be set aside except on one or more of the following grounds, namely :-

- (a) that the arbitrator or umpire has mis-conducted himself or the proceedings;
- (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;
- (c) that the award has been improperly procured or is otherwise invalid.”

Section 33 reads as under:-

“33. Arbitration agreement or award to to be contested by application.-Any party to an arbitration agreement or any person

claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.”

8. Since there is no challenge laid by the appellant to the existence or validity of the arbitration agreement, as such, Section 33 of the Act may not call for any elaborate discussion in the instant case. The entire case of the appellant rests on the grounds of challenge enumerated in Section 30 of the Act.

9. Before adverting to the rival contentions, a quick recapitulation of the legal position with regard to the grounds of challenge available to an aggrieved party seeking setting aside of the arbitrator’s award may be profitable.

10. An award of the arbitrator can be challenged only on the grounds enumerated in Section 30 of the Act and on no other ground. The Court hearing an application for setting aside award or hearing appeal against the order of the Court below refusing to set aside the award does not sit in appeal over the decision of the arbitrator. The award of the arbitrator can be interfered with only, if it is the result of corruption, fraud or when there is/are errors apparent on the face of award. In case of a speaking award, the Court can look into the reasons for the award. However, in case of unreasoned award, it is not open to the Court to probe the mental process of the arbitrator and speculate as to what impelled the arbitrator to arrive at his conclusion. For example, in the instant case, too, the arbitrator has set

down the claims and then awarded certain amounts without giving any reason in support of his conclusion. As per the terms and conditions of the contract, the arbitrator was under no obligation to pass a reasoned award. In the absence of any reasons given for making an award, it may not be open to the Court to interfere with the award by re-appreciating the facts and law. The arbitrator is a forum selected by the parties of their own and, therefore, the arbitrator must be conceded the power of appreciation of evidence. As is said that arbitrator is sole judge of the quality as well as quantity of evidence and it will not be for the Court to take upon itself the task of being a judge on the evidence before the arbitrator. (See **Hindustan Steel Works Construction Ltd. v. C. Rajashekhar Rao, (1987) 4 SCC 93** and **Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar and another, (1987) 4 SCC 497**).

11. An award, as is well settled, may be set aside on the ground of errors apparent on the record of award but the award would not be invalid merely because by a process of inference and arguments it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion. The award can also be interfered with by the Court, if it is found that the arbitrator has travelled beyond his jurisdiction and has awarded claims which would be beyond the scope of submission. The award will also be bad, if the arbitrator, who himself is a creature of the contract agreement travels beyond the terms and conditions of the contract and awards claims on the excepted items. Such award would be invalid and can very well be interfered with by the Court.

12. The arbitrator's award which, on the face of it, is arbitrary, irrational and awards claims, which are shockingly disproportionate and defy logic, would also be invalid in law.

13. In paragraph No.20 of the judgment rendered in the case of **Himachal Pradesh State Electricity Board v. R.J.Shah and Company, (1999) 4 SCC 214**, the Supreme Court has held thus:-

“20. The reading of the decision cited above shows that the principle followed was that by purporting to construe the contract the court could not take upon itself the burden of saying that the award was contrary to the contract and as such the arbitrators had acted beyond their jurisdiction.”

14. Equally relevant are the observations made by the Supreme Court in paragraph Nos.24 and 25 of the judgment rendered in the case of **Associate Engineering Company v. Govt. of Andhra Pradesh and others, (1991) 4 SCC 93**, which, for facility of reference are reproduced hereunder:-

“24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract; his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

25. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is

derived from the contract and is governed by the [Arbitration Act](#) which embodies principles derived from a specialised branch of the law of agency (see Mustill & Boyd's Commercial Arbitration, Second Edition, p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see Halsbury's Laws of England, Volume II, Fourth Edition, Para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.”

15. As is held by a three-Judge Bench of the Supreme Court in the case of **State of Andhra Pradesh and others v. R.V.Rayanim and others (1990) 1 SCC 433** that in the matter of challenging the award there are often two distinct and different grounds, one is error apparent on the face of award and the other is that the arbitrator has exceeded his jurisdiction. In the latter case, the Court can look into arbitration agreement but in the former it cannot, unless agreement was incorporated or recited in the award. The award may be remitted or set aside on the ground that the arbitrator, in making it, had exceeded his jurisdiction and evidence of matters not appearing on face of it will be admitted in order to establish whether the jurisdiction was exceeded or not, because nature of dispute is something which has to be determined outside the award----whatever might be said about it in the award or by the arbitrator. In a case of error apparent on the face of record, it has to be established that an item or amount, which

the arbitrator has no jurisdiction to take into consideration, has been awarded or granted.

16. In another case of **West Bengal State Warehousing Corporation and another V. Sushil Kumar Kayan and others, (2002) 5 SCC 679**, Hon'ble the Supreme Court in paragraph No.11 held thus:-

“In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether claimant can raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit to the parties to raise a point before the arbitrator and if there is a specific bar in the contract to the raising of the point then the award passed by the arbitrator in respect thereof would be in excess of his jurisdiction.”

17. Legal position with regard to the scope of interference by the Court with the arbitral award under Section 30 of the Act is summed up by the Supreme Court in **Rajasthan State Mines and Minerals Limited v. Eastern Engineering Enterprises and another, (1999) 9 SCC 283**. Para 44 whereof is reproduced hereunder:-

“44. From the resume of the aforesaid decisions, it can be stated that:

(a) It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled arbitrator to arrive at his conclusion.

(b) It is not open to the Court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question

submitted for his adjudication then the Court cannot interfere.

(d) If no specific question of law is referred, the decision of the Arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

(e) In a case of non-speaking award, the jurisdiction of the Court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. Arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h) The award made by the Arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the Court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of specific bar stipulated

by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of wider arbitration clause such claim amount cannot be awarded as agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in Continental Construction Co. Ltd.(supra) by relying upon the following passage from M/s. Alopi Parshad Vs. Union of India [1960] 2 SCR 703 which is to the following effect: - There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. [The Contract Act](#) does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of event which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an unanticipated turn of events, the performance of the contract may become onerous.

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

(j) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law.”

18. It is, thus, trite that, though, the scope of interference by the Court with the arbitral award is minimalistic, yet award of the arbitrator can be

set aside, if it has been made by the arbitrator acting arbitrarily, irrationally, and capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests disregard of his authority or misconduct on his part but it may tantamount to *mala fide* action. It is, thus, well settled that the arbitrator is creature of the contract between the parties and, therefore, if he ignores the specific terms of the contract, it would be a question of jurisdictional error, which could be corrected by the Court and for that limited purpose the agreement is required to be looked into. Reference to the points of contract is, therefore, must for arriving at a conclusion with regard to whether the arbitrator has exceeded his jurisdiction or not.

19. It is in the light of legal position adumbrated herein above, award passed by the arbitrator needs to be examined. Learned senior counsel appearing for the appellant has laid more emphasize on his contention that the learned arbitrator has not only ignored the terms and conditions of the contract while awarding certain items/claims but has also exceeded his jurisdiction by awarding claims even on the excepted matters.

20. The argument of Mr. Malhotra, learned counsel appearing for the respondent, however, is that this Court may not enter into the mental process of the arbitrator and that even if two views are possible on the interpretation of the different clauses of the contract, the interpretation put by the arbitrator is to be accepted. The Court does not sit in appeal while considering application under Section 30 of the Act for setting aside the award. Instant case is a case of appeal against judgment of the learned

District Judge rejecting application of the appellant under Section 30 of the Act and, therefore, jurisdiction of this Court to interfere is far less.

21. With a view to appreciate the rival contentions, we need to consider few important terms and conditions of the contract as also certain claims awarded by the arbitrator.

22. Clause-70 of the General Conditions of the Contract in question provides for arbitration and is, thus, reproduced hereunder:-

“70. Arbitration.- All disputes, between the parties to the Contract(other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineer officer to be appointed by the authority mentioned in the tender documents. Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Work or termination or determination of the Contract under Condition Nos. 55, 56 and 57 hereof. Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies. Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government’s right of recovery from the contractor as provided in Condition 67 hereof. If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place. The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence. The Arbitrator may proceed with the arbitration, *ex parte*, if either party, in spite of a notice from the

Arbitrator fails to take part in the proceedings. The Arbitrator may, from time to time with the consent of the parties, enlarge, the time upto but not exceeding one year from the date of his entering on the reference, for making and publishing the award. The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute. The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion. The award of the Arbitrator shall be final and binding on both parties to the Contract.”

23. From a reading of arbitration clause, it clearly transpires that the parties have agreed to settle all disputes between them pertaining to the contract except those matters upon which the decision of C.W.E. or any other person is by the contract expressed to be final and binding. This relates to the excepted items with regard to which the jurisdiction of the arbitrator is taken away by the parties to the contract.

24. It is the contention of Mr. Pranav Kohli, learned senior counsel appearing for the appellant, that **claim No.1** is awarded by the arbitrator on account of cost of extra work done by the respondent. It is submitted that as per NIT drawings of the contract agreement, the foundation level of Akhnoor side abutment was reduced level (RL) 245.89m and Safe Bearing Capacity stipulated was 79.T/Sq.m. However, on reaching foundation level RL 245.89m, the plate load test to ascertain the suitability of the foundation strata was conducted and the same was found to be 25T/Sq.m instead of the required safe bearing capacity of 79 T/Sq.m. The contractor was, accordingly, instructed to go two meter deeper by way of deviation and

accordingly, deviation order No.08 dated 04th November, 1991 was issued. In compliance, the contractor went two meter deeper for which he was paid in accordance with Annexure-1 to Schedule-A, which mentions the rates for deviation for every one meter increase in depth level in bottom level foundation. This, appellant submits, was in accord with Clause 11(b) of the contract agreement.

25. In order to examine the argument of learned counsel for the appellant, it is necessary to have a look at Clause-11(b) of the contract agreement, which for facility of reference is reproduced hereunder:-

“11. Sub soil investigation:

- (a) Sub soil investigation at the site has been carried out by the Regional Engineering College Srinagar. Their recommendation have been incorporated in the tender specifications and complete sub soil investigation reports available for reference at the office of Chief Engineer (Project) Sampark and HQ DGBR.
- (b) The results obtained from bore holes are not to be assumed by the contractor as a warranty with regard to the nature of the sub-soil and is to be considered only as a guide. The contractor may carry out exploratory bore holes to ascertain stratum of foundations at his own cost. Any change in design construction procedure necessitated due to variation in soil strata from the bore hole data will be contractor's responsibility and the cost thereof will be deemed to be included in the lumpsum amount. However, any variations in the foundation level due to changes in soil parameters will be adjusted as per quoted rates and will be treated as deviation......

26. From a bare reading of Clause-11 in particular clause(b), it clearly comes to fore that sub-soil investigation at the site was carried out by Regional Engineering College, Srinagar and their recommendations were incorporated in the tender specifications. Clause 11 of the contract agreement provides that the results obtained from bore holes are not to be assumed by the contractor as a warranty with regard to the nature of sub-soil and is to be considered only as a guide. The contractor may carry out exploratory bore holes to ascertain the stratum of foundations at his own cost. Any change in design construction procedure necessitated due to variation in soil strata from the bore hole data will be contractor's own responsibility and the cost thereof will be deemed to be included in the lumpsum amount. However, any variation in the foundation level due to changes in soil parameters will be adjusted as per quoted rates and will be treated as deviation. Clause 11 is, therefore, very specific and categorical that, if any change occurs in design construction procedure due to variation of soil strata, it shall be the contractor's own responsibility for which he would not be paid anything extra but the amount incurred on account of such variation shall be deemed to be included in the lumpsum amount. However, if variation in the foundation level is due to change in soil parameters, the variation shall be treated as deviation and paid accordingly.

27. In claim No.1 of the award, the arbitrator without making any reference to Clause-11 of the contract agreement has treated the work necessitated due to variation of the foundation level because of change in soil parameters as an extra item of work and awarded the claim by

reference to Annexure-II forming part of the contract, whereas the amount was payable as per Annexure-1 of the contract.

28. By ignoring Clause 11 of the contract and acting in derogation therefrom, the arbitrator has admittedly travelled beyond his jurisdiction and has acted contrary to the terms and conditions of the contract of which he was a creature. I am aware that interpretation of a particular clause by the arbitrator may not be open to scrutiny by this Court, however, instant case is not of interpretation to any clause but is a apparent case of ignoring clause-11 of the contract agreement. The Union of India had paid the contractor as per clause-11 and, therefore, no claim could have been raised by the contractor and adjudicated upon by the arbitrator in his favour.

29. The arbitrator also appears to have ignored clause-21(c)(ii) of the contract agreement, which requires the contractor to quote rate per meter of depth for increase or decrease in the bottom level of foundation per support. The contractor had quoted rates for pricing deviation as per Annexure-I to Schedule-A. Otherwise also, Schedule-A of the contract makes it mandatory for the tenderer to quote their rates for increase/decrease per meters in the depth of bottom level foundation as per Annexure-1 to Schedule-A.

30. Admittedly, the contractor had been paid strictly with the aforesaid terms and conditions of the contract but the arbitrator set aside all those terms and conditions of the contract and took up the deviation as an extra amount of work to be paid in terms of Annexure-II forming part of the contract.

31. **Claim No.2.** This claim relates to pit, which remained open due to foundation level being dug two meters more deep. The arbitrator has awarded a sum of Rs.3,02,173.00 on this account.

32. Learned counsel for Union of India refers to clause 3.2 of the contract agreement, which deals with the foundation and relevant extract whereof is reproduced hereunder:-

“The firm should carry out trench excavation and span excavation to large depth is not advisable. This disturb the bed and bank to a very large extent, therefore, to avoid disturbance only trench excavation should be followed. Tenderer has to devise suitable method to reach the foundation level either by trench excavation or by sinking well to required level. Lumpsum quoted rates by the contractor will be inclusive of whatever method adopted by him.

All spaces excavated not occupied by abutments, piers or other permanent works shall be refilled

33. The award on claim No.2 is also, on the face of it, contrary to Clause 3.2 of the contract agreement. From a reading of discussion made by the arbitrator under claim No.2, it is difficult to deduce as to whether the claim has been awarded by interpreting clause 3.2 or by acting in derogation thereof. The conspicuous act of the arbitrator not to refer to stand of the appellant and the provisions of Clause 3.2 makes it abundantly clear that the arbitrator brushed aside clause 3.2 and awarded the claim.

34. **Claim No.3** pertains to loss occasioned to the contractor on account of unprecedented floods. This claim has not been seriously disputed by the appellant. It is, however, contention of Mr. Pranav Kohli, learned senior

counsel appearing for the appellant that there was no evidence before the arbitrator to demonstrate that the flood level crossed 262.59 meter, which is defined High Flood Level (HFL) in terms of the contract agreement.

35. Be that as it may, the arbitrator has found that the evidence produced before him, in the shape of certificates issued by the government authorities, substantiated the claim of the contractor. I do not find that claim awarded is either in violation of the terms and conditions of the contract agreement or beyond the terms of submission of the arbitrator.

36. **Claim No.4.** This claim of the contractor, which is awarded by the arbitrator for a sum of Rs. 6,06,374.00, pertains to cost of re-designing of Poonch side abutment and Akhnoor side abutment. Again, as pointed above, the arbitrator has ignored specific terms and conditions of the contract agreement incorporated in Clause-11(b) of the agreement.

37. **Claim No.5.** Under this heading, the contractor has raised a claim of Rs.16,532.82 and the same has not been awarded by the arbitrator.

36. **Claim No.6.** This is a claim on account of escalation in the price of labour, fuel etc. The claim has not been seriously contested by the appellant nor do I find that the same violates any term and conditions of the contract or is otherwise beyond jurisdiction of the arbitrator.

37. **Claim No.7** pertains to the amounts payable to the contractor not included in the bills. The total amount claimed under this head is Rs.1,40,488.50. The Union of India has disputed this amount and claimed that the entire amount for the work executed by the contractor stood paid. This is a disputed question, which, on the basis of material before the

arbitrator, has been decided by him and no interference is, therefore, called for.

38. **Claim No.8.** This claim pertains to extra expenses incurred by the contractor in conducting mix design and cube test. Clause 17 of the contract agreement deals with this aspect and the relevant extract of Clause 17 is reproduced hereunder:-

“17(g) Testing facilities shall be provided by the contractor at work site for testing concrete cubes and materials to be incorporated into work to the satisfaction of Engineer-in-Charge.”

39. It is contended that the arbitrator acted in violation of Clause 17(g) and exceeded his jurisdiction in awarding a sum of Rs.1,25,000/- for extra expenses. In an agreement with the learned counsel for the appellant that on the face of clear stipulation in Clause 17(g) of the contract agreement, the contractor could not have charged any amount incurred by him to carry out mix design and cube tests. This claim, too, runs contrary to the terms and conditions of the contract agreement and, therefore, not sustainable.

40. **Claim No.9 and 10:** It may be pertinent to mention that this claim pertains only to a meager sum of Rs.11,665/- and has not been awarded by the arbitrator. Similar is the position with regard to claim No.10, which is also for a meager sum of Rs.5000/-.

41. **Claim Nos.11 and 12** pertain to refund of retention money. Claim No.12 pertains to refund of security deposit. Both claims have been awarded by the learned arbitrator.

42. Once the arbitrator came to the conclusion that termination of the contract was unfair and illegal, the contractor was entitled to refund of his security deposit as well as retention money. Therefore, no fault can be found in the award insofar as claim No.11 and 12 are concerned.

43. **Claim No.13**, which was amended by the contractor through letter dated 17.12.2007 pertains to hiring charges and cost of material etc. Once the arbitrator after considering all aspects has concluded that the cancellation of contract by the Union of India was not fair and in consonance with law, he was well within his right to award compensation on account of hiring charges for shuttering material, machinery and T&P, office stores, quarters and camps. The arbitrator was also well within his power to award cost of material. The important aspect, which the arbitrator has not considered while awarding hiring charges for shuttering material, machinery, T&P, office stores, quarters and camps etc is that the arbitrator has awarded hiring charges, which are way far hiring than the cost of this material. It is well settled that hiring charges of any material or machinery cannot exceed the actual value of such material and machinery. For a contract of the value of Rs.90,59,000/-, the contractor could not be expected to have deployed the machinery and collected shuttering material, constructed office stores, camps, quarters etc by incurring more than Rs.10,00,00,000.00. The arbitrator has awarded Rs.6,60,05,918.43 as hiring charges for shuttering material, machinery, T&P etc and Rs.1,29,874.50 as hiring charges for office stores etc. While no fault can be found with award of hiring charges for office stores, quarters etc and Rs.62,16,695.51 on account of cost of material as on the date of termination but award granting

hiring charges for shuttering material, machinery, T&P etc, which have far exceeded the cost of such material and machinery, cannot be sustained. The arbitrator has committed an error, which is apparent on the face of award. In such situation, the arbitrator could have at the maximum granted the contractor the cost of shuttering material, machinery and T&P deployed on the site rather than awarding highly inflated hiring charges of more than six crores.

44. **Claim No.14.** This is by way of compensation for the losses suffered by the contractor for breach of contract and other faults on part of the Union of India. The arbitrator, after considering all relevant evidence on record, has awarded Rs.25,14,000.00 as compensation. Since the arbitrator has, on facts, found termination of the contract unfair and contrary to the terms and conditions of the contract, as such, the arbitrator was well within his power to award compensation for breach of the terms and conditions of the contract. There could be dispute between the parties with regard to the quantification of the compensation but this Court hearing an appeal against the order of the District Court, rejecting application of the appellant for setting aside the award, cannot go into that aspect. The parties shall do well to accept the findings of their chosen judge i.e. arbitrator.

45. **Claim Nos.15, 16 and 17** pertain to grant of interest. The arbitrator has awarded interest @ 18% per annum from the date of termination of the contract till the date of payment or upto the Court decree. This constitutes pre-reference, *pendente lite* and future interest. Award is unreasoned award and, therefore, the arbitrator has not spelt out any reason for awarding this amount.

46. Indisputably, 18% per annum is not contractual rate of interest. As a matter of fact, the contract agreement does not provide for any rate of interest to be awarded to the party being successful before the arbitrator in getting his claim against other party. The Jammu & Kashmir Arbitration Act, 2002 also does not make any provision for grant of interest @ 18%. Even RBI does not permit grant of such exorbitant interest on the deposits received by the banks. Even lending rate of interest is far less than the interest awarded. By awarding interest @ 18% per annum, the arbitrator has acted arbitrarily, irrationally, capriciously and has committed misconduct.

47. From a reading of entire award, I have also found that the arbitrator has not applied his mind at all and has awarded all the claims in toto except those, which were for meager sum. Similarly, with a view to balance the award and to make it look fair, the arbitrator has even gone to the extent of awarding one of the counter claims to the Union of India.

48. I am aware of the limitations which are put on the Courts by law in regard to interference with the arbitral awards but Court cannot shut its eyes to the fact that arbitration has become an additional source of income of the contractors. Here is a case where original allotment of contract is for Rs.90,59,000.00 and the work was to be executed in twenty four months. The date of commencement of the work is 8th August, 1988 and was required to be completed by the contractor by 7th August, 1990. Because of certain changes in design due to variation in soil strata, the work could not be completed by the contractor and was granted extension up to 31st March, 1993. He could not complete the work and, accordingly, Union of India

terminated the contract agreement on 14th June, 1993. By 14th June, 1993, the contractor had executed only 45% of the work for which apart from the payments, which have been released to him from time to time, the arbitrator has awarded a total of Rs.8,65,39,218.70, which is more than eight times the value of contract, that too along with pre-reference, *pendente lite* and future interest @ 18% per annum.

49. Be that as it may, in view of the discussion made above, I am of the considered view that the arbitrator has clearly exceeded his jurisdiction and has awarded most of the items of claims by either ignoring the terms and conditions of the contract or acting in derogation therefrom.

50. The appellate Court has not applied its mind and has endorsed the award as it is. It is interesting to note that the District Court has not even followed Section 34 of the Code of Civil Procedure for the purpose of exercising its discretion to grant *pendent lite* and future interest. The Court below has awarded 18% interest *pendente lite* and future, which is, ex facie in violation of Section 34 of the Code of Civil Procedure.

51. For the foregoing reasons, the appeal is partially allowed. The award passed by the arbitrator is set aside to the extent of claim Nos. (1), (2), (4), (8), (13), (15), (16) &(17) and to the aforesaid extent the judgment of the Court below is also set aside. The contractor-respondent is held entitled to interest @ 6% per annum from the date of termination of contract till the amount is actually paid. The Registry shall draw the decree-sheet accordingly.

52. For determination of claims of the contractor i.e. claim Nos. (1), (2), (4), (8), (13), (15), (16) &(17) , the matter is remitted back to the arbitrator.

However, if for any reason whatsoever, the learned Arbitrator, who has passed the award, is not available or is otherwise incapable to conduct further proceedings; matter shall be referred to Sh. Vinod Sharma, Retired Chief Engineer, Resident of H.No.42, Sector-1-A, Trikuta Nagar, Jammu, Mobile No. 9419180988, who shall enter the reference and decide the claims of the contractor aforesaid within a period of four months. The arbitrator is left free to determine his fee having regard to the 4th Schedule of the Arbitration and Conciliation Act, 1996.

(Sanjeev Kumar)
Judge

Jammu
09.05.2022
Vinod.

Whether the order is speaking : Yes
Whether the order is reportable: Yes