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SUTLEJ CONSTRUCTION

v.

UNION TERRITORY OF CHANDIGARH

(Civil Appeal No. 20885 of 2017)

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DECEMBER 05, 2017

**[J. CHELAMESWAR AND SANJAY KISHAN KAUL, JJ.]**

*Arbitration:*

*Award of contract – By respondent to appellant – Termination of contract by respondent – Arbitration clause invoked – Award partly allowing claim of appellant and rejecting counter-claims of respondent – Objections against the award u/s. 34 of Arbitration and Conciliation Act, 1996, rejected by Addl. District Judge – High Court set aside the award – On appeal, held: When it comes to setting aside of an award under the public policy ground, the award should shock the conscience of the court and the court should not substitute its view for that of the arbitrator – An arbitrator is a chosen judge by the parties and it is on limited parameters that an award be interfered with – High Court acted as if it was the first appellate court against a decree – The dispute had resulted in a reasoned award after proper appreciation of evidence – Enforcement of award in toto is upheld.*

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**Allowing the appeal, the Court**

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**HELD: 1. The dispute in question had resulted in a reasoned award. It is not as if the arbitrator has not appreciated the evidence. The arbitrator has taken a plausible view and the correct view. The ability of the appellant to comply with its obligations were inter dependent on the respondent meeting its obligations in time, to facilitate appropriate areas for unloading of the earth and for its compacting. At least it is certainly a plausible view. [Para 11] [140-B, D]**

**2. When it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the court and would not include what the court thinks is unjust on the facts of the case seeking to substitute its**

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view for that of the arbitrator to do what it considers to be  
“justice.” [Para 12] [140-E] A

*Associate Builders v. Delhi Development Authority*  
(2015) 3 SCC 49 – relied on.

3. The approach adopted by the Additional District Judge  
was, thus, correct in not getting into the act of re-appreciating B  
the evidence as the first appellate court from a trial court  
decree. An arbitrator is a chosen Judge by the parties and it is  
on limited parameters can the award be interfered with. [Para  
13] [140-F-G]

*Sudarsan Trading Co. v. The Government of Kerala* C  
[1989] 1 SCR 665 ; *Harish Chander & Co. v. State of*  
*U.P AIR 2016 SC 4257 : [2016] 8 SCR 773 ; Swan*  
*Gold Mining v. Hindustan Copper Limited 2014 (4)*  
*ArbLR 1 (SC) – relied on.*

4. The High Court ought to have restrained itself from D  
getting into the meanderings of evidence appreciation and  
acting like a second appellate court. In fact, even in second  
appeals, only questions of law are to be determined while the  
first appellate court is the final court on facts. In the present case  
the High Court has, thus, acted in the first appeal against E  
objections dismissed as if it was the first appellate court against  
a decree passed by the trial court. The impugned order cannot  
be sustained and is accordingly set aside and the enforcement of  
the award in toto is upheld. [Paras 15-16] [141-A-B]

Case Law Reference

(2015) 3 SCC 49	relied on	Para 11	F
[1989] 1 SCR 665	relied on	Para 12	
[2016] 8 SCR 773	relied on	Para 12	
2014 (4) ArbLR 1 (SC)	relied on	Para 12	G

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 20885  
of 2017.

A From the Judgment and Order dated 01.04.2015 of the High Court of Punjab and Haryana at Chandigarh in F.A.O. No. 1621 of 2014 (O&M).

Nidhesh Gupta, Sr. Adv., Tarun Gupta, Puneet Varshney, Advs for the Appellant.

B Rimali Batra, Ravi Prakash, Ms. Nikita Choukse, Chandra Prakash, U.T. Chandra Prakash, Advs for the Respondents.

The Judgment of the Court was delivered by

**SANJAY KISHAN KAUL, J. 1.** Leave granted.

C 2. The appellant was awarded a contract by the respondent of earth excavation work and loading into trucks and unloading for purposes of widening of the approach road Sukhna Choe on Chandigarh Kalka Road, Chandigarh vide memo No.201 dated 5.1.1996. The earth was required to be lifted from the first source near the regulator and carried through trucks from Golf side initially. There was a second source of lifting the earth as per permission of the Superintendent Engineer but it is not necessary to go into the details of the contract for the present purposes. Suffice to say that the respondent alleges that the appellant did not fulfil its obligations while the appellant, on the other hand, alleges that what was required to be done by the respondent to facilitate execution of the contract was not so done. This resulted in the respondent terminating the contract on 12.11.1996.

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F 3. The conditions of the contract provided for arbitration and despite the appellant invoking the arbitration clause, the Superintendent Engineer failed to nominate an Arbitrator resulting in the appellant approaching the Court. In the course of the said proceedings Mr. R.N. Singal, retired District & Sessions Judge was appointed as an arbitrator in terms of order dated 31.7.2002 of the learned Civil Judge (Senior Division), Chandigarh.

G 4. The parties put forth their respective claims before the arbitrator. The appellant laid the claims while the respondent filed the counterclaims. The arbitrator made and published an Award dated 18.12.2013, partly allowing the claim of the appellant while rejecting the counterclaims of the respondent. The claims laid and the extent awarded as well as the counterclaims laid are as under:

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CHANDIGARH [SANJAY KISHAN KAUL, J.]**

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Claims made by the Appellant			Amounts awarded by the Arbitrator	
S.No.	Particulars	Amount (in INR)	Particulars	Amount (in INR)
1.	Balance payment accruing from the last running bill	2,00,014	Claim No.1 and amount deposited by way of earnest	1,20,299 32,000
2.	Payment due on account of transportation or earth not measured by department	1,11,231	Claim No.3	65,076
3.	Payment due on account of less lead paid	95,400	Claim No.4	7,74,375
4.	Idle hour charges of heavy earth moving machinery and labour deployed on the machinery	31,22,280	Claim No.6	45,435
5.	Payment due on account of earth eroded by heavy rains due to non-compaction of earth and leaking water pipelines	1,69,206	--	--
6.	Payment on account of loss of profit on balance work	90,835	--	--
7.	Loss due to prolongation of work	12,80,000	--	--
8.	Litigation expenses	25,000	--	--
	<b>Total</b>	<b>50,93,966</b>	<b>Total</b>	<b>10,37,185</b>

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A Interest @ 12% per annum was also allowed by the arbitrator in favour of the appellants.

<b>Counterclaims made by the Respondent</b>			
B	1.	Liquidated damages and the expenses incurred by it for completion of work	8,01,808
	2.	Loss due to delay in completion of work	20,00,000
		<b>Total</b>	<b>28,01,808</b>

C 5. The respondent aggrieved by the Award filed objections under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'said Act'), which were, however, rejected by the learned Additional District Judge, Chandigarh vide order dated 23.7.2013. The respondent thereafter preferred an appeal before the Punjab & Haryana High Court and the said appeal succeeded whereby the Award was set aside opining that the contract was rightly terminated and the Department rightly imposed the penalty.

D 6. We have heard learned counsel for the parties and have perused the record. The Award is a reasoned one. The arbitrator has taken note of the peculiar features of the contract *inter se* the parties that while the work of excavation of the earth, its loading into the trucks, unloading and transportation to site of the work was awarded to the appellants as contractor, the spreading of the earth brought to the site of the work by the contractor and its compaction was to be done by the respondent Department itself. It is, thus, that the appellants claimed that even though they had taken up the work with right earnest to complete it within the scheduled period, the breaches of the respondent has caused the delay. Such breaches enumerated are:

- E a. Obstruction in the disposal area due to overhead lines and poles;
- G b. Delay in making available approached to the disposal site, want of lighting arrangement at the excavation as well as disposal sites by the respondent;
- H c. Inadequate compaction plant and machinery and other auxiliary equipment

It is in order to cover up their own lapses it is alleged that the respondent chose to terminate the contract. A

7. The respondent, of course, denies the aforesaid allegations but on the other hand contended that the work was carried on by the appellant at slow pace leaving the respondent-Department with no alternative but to levy penalty and to finally terminate the contract vide letter dated 12.11.1996. B

8. In the opinion of the arbitrator the performance of the contractual obligations by the appellant were dependent on reciprocal performances by the respondent. On appreciation of evidence on record it was concluded that the respondent had failed to comply with its obligations and, thus, held the contract to be illegally terminated. Thereafter the arbitrator, once again, on appreciation of evidence decided to award the amounts as specified aforesaid. C

9. The learned Additional District Judge, Chandigarh while dismissing the application of the respondent under Section 34 of the said Act came to the conclusion that the findings of the arbitrator were based on appraisal of evidence and it was certainly not the function of the Court to re-appreciate the evidence so long as it is not a case of completely devoid of evidence. Since the spreading of the earth and its compaction was required to be done by the respondent, the non-carrying out of that activity would naturally impede the performance of the obligations by the appellant. Accessibility to the site was obviously an important part of the execution of the contractual obligations. In fact, the contract was carried over a period of four and a half years against the original time period of 45 days, which would show the unpreparedness of the respondent. D  
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10. The learned single Judge of the High Court, however, appears to have made an endeavour to re-appreciate the evidence and sought to come to a different conclusion than what was arrived at by the arbitrator, the objections to which were dismissed by the learned Additional District Judge, Chandigarh. The reasoning of the learned single Judge is predicated on the absence of any contractual obligation that the spreading of the earth brought to site was to be done by the Department nor was there a stipulation that the overhead lines and poles had to be removed by the respondent to make the area accessible. The G

A respondent-Department had not specified any space for unloading of the earth but only charges up to 5 kilometres were to be paid. Thus, the finding is that the arbitrator mis-conducted himself by acting contrary to the terms of the contract.

B 11. We are not in agreement with the approach adopted by the learned single Judge. The dispute in question had resulted in a reasoned award. It is not as if the arbitrator has not appreciated the evidence. The arbitrator has taken a plausible view and, in our view, as per us the correct view, that the very nature of job to be performed would imply that there has to be an area for unloading and that too in the vicinity of 5 kilometres as that is all that the appellant was to be paid for. C The route was also determined. In such a situation to say that the respondent owed no obligation to make available the site cannot be accepted by any stretch of imagination. The unpreparedness of the respondent is also apparent from the fact that even post termination it took couple of years for the work to be carried out, which was meant to D be completed within 45 days. The ability of the appellant to comply with its obligations were inter dependent on the respondent meeting its obligations in time to facilitate appropriate areas for unloading of the earth and for its compacting. At least it is certainly a plausible view.

E 12. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the court and would not include what the court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be "justice." (Associate Builders v. Delhi Development Authority<sup>1</sup>)

F 13. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of re-appreciating the evidence as the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. (Sudarsan Trading Co. v. The Government of Kerala<sup>2</sup>; Harish Chander & Co. v. State of G U.P.<sup>3</sup> and Swan Gold Mining v. Hindustan Copper Limited<sup>4</sup>).

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<sup>1</sup> (2015) 3 SCC 49

<sup>2</sup> (1989) 1 SCR 665

<sup>3</sup> AIR 2016 SC 4257

<sup>4</sup> 2014 (4) ArbLR 1 (SC)

15. The learned single Judge ought to have restrained himself from getting into the meanderings of evidence appreciation and acting like a second appellate court. In fact, even in second appeals, only questions of law are to be determined while the first appellate court is the final court on facts. In the present case the learned single Judge has, thus, acted in the first appeal against objections dismissed as if it was the first appellate court against a decree passed by the trial court.

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16. We have, thus, no hesitation in concluding that the impugned order cannot be sustained and is accordingly set aside and the enforcement of the award in toto is upheld.

17. The appeal is accordingly allowed but in the given facts of the case we do not impose costs.

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