

(2018) 05 SHI CK 0047
In the High Court Of Himachal Pradesh
Case No : Arb. Case No.42 of 2012

Pradeep Sharma	Vs	APPELLANT
Executive Engineer, Shillai		RESPONDENT

Date of Decision : 07-05-2018

Acts Referred:

Citation : (2018) AAC 1152 : (2018) LatestHLJ 842 (HP) : (2018) 2 ShimLC 727

Hon'ble Judges : SURESHWAR THAKUR

Bench : Single Bench

Advocate : B.C. Negi, Nitin Thakur, Kritika??Dipta, Hemant Vaid, Yudhveer Singh Thakur, Dy.??A.G.

Final Decision : Partly Allowed

Judgement

Sureshwar Thakur, J.

1.The petitioner was awarded works, for construction, of, Kando Chittli Road KM 0/0 to 8/060 (SH:Formation cutting 5/7 mtr. Wide, X-Drainage work, R/Wall, Logo Sign Board, Passing Places etc., KM0/0 to 8/060) under package No. HP10-32. A period of 12 months was prescribed in the apposite contract, executed inter se the petitioner herein, and, the respondent herein, for completion, of, awarded works. However, before the awarded works could be completed by the petitioner, the contract was rescinded, on 10.07.2008. The rescission of the contract executed inter se the petitioner, and, the respondent, was a sequel of certain landowners, whereupon whose lands, the awarded work was to be executed, rather causing hindrance(s), in the execution of the work, by the petitioner. Consequently, on anvil of the relevant clause 55.1, of, the contract executed inter se the petitioner, and, the respondent, provisions whereof stand extracted hereinafter,

the respondent concluded, of, the performance of the contract being hence frustrated, whereupon, it was constrained, to, rescind it.

55. Release from Performance 55.1 If the contract is frustrated by the outbreak of war or by any other event entirely outside the control of the Employer or the Contractor, the Engineer shall certify that the Contract has been frustrated. The Contractor shall make the Site safe and stop work as quickly as possible after receiving the certificate and shall be paid for all work carried out before receiving it and for any work carried out afterwards to which a commitment was made.

2. Uncontestedly, the apposite contract, contains an arbitration clause, and, on anvil thereon, the disputes with respect to, all, the claims raised by the petitioner herein against the respondent, where hence referred, for, their arbitration vis-a-vis the Arbitrator. The Arbitrator concerned, pronounced his award, wherein, he allowed the petitioner's claim, for monetary indemnification, arising, from his plant, machinery and equipments besides man power remaining idle, only, from, 2.8.2007 to 25.11.2007, whereas, he refused to allow indemnification in respects thereof, from 2.8.2007 to 10.07.2008 also the Arbitrator refused, to, in consonance with the rates, claimed, by the petitioner vis-a-vis the expenditure(s) incurred towards defrayment(s) of rent vis-a-vis machinery, equipments, and, manpower hence maintained at the relevant site, hence mete vis-a-vis him, conspicuously for the aforesaid claimed period, rather he proceeded, to, discard the rates claimed by the petitioner, and, he proceeded to make monetary indemnification, in respect of various claims, reared before him, by the petitioner in the manner, encapsulated in the award.

3. The petitioner is aggrieved, on both, the aforesaid counts. Initially, the justifiability of the petitioner, to seek monetary indemnification, under various heads, from the period commencing, from, 2. 8.2007 to 10.07.2008 is to be set at rest. The Arbitrator had while restricting the apposite claim, espoused before him by the Contractor, had placed reliance upon communications addressed from 2.08.2007 to 15.11.2007. He also proceeded to place reliance, upon, Annexure P-3(Q), (a) Annexure whereof, is a communication addressed, on 15.11.2007 by the Executive Engineer, Shillai, to the

Assistant Engineer, Shilai, Sub Division, whereunder, an apposite information,

was purveyed, to him, (b) also a proposal occurs, therein, for closure of works, being referred to the higher authorities, on account of hindrances being created, by certain landowners, whereupon whose lands, the awarded work, was to be executed by the contractor, (c) and, hence the Arbitrator proceeded to therefrom also hence draw an inference, of the contractor being throughout aware, of the imminent closure of the project, (d) besides his also throughout holding the requisite knowledge, of imminent frustration of the contract, hence, was enjoined, to, in contemporaneity thereof, remove his man power, machinery, plant and equipments etc., from the relevant site, (e) whereas, his waiting for rendition, of, an order of rescission of contract by the authorities concerned, rendering him, rather estopped to claim the apposite monetary indemnification, from, the respondent.

4. The aforesaid reason(s), assigned, in the impugned award, are, per se pretextual besides flimsy, and, are a sequel of gross misreading, of, the mandate enshrined in clause 55.1, of, the apposite contract. The afore extracted mandate, occurring, in clause 55.1, of, the relevant contract, holds prescription, for rescission of the contract, upon surfacing, of, material vis-a-vis its imminent frustration, arising, from evident unavoidable circumstances. Hereat, the unavoidable circumstances, are, comprised in the landowners, whereupon, whose lands the awarded work was to be executed, by the contractor/petitioner herein, creating hindrances or obstruction(s) in its execution. There is a clear specific recital, in the apposite contract, of the Engineer, being enjoined to certify qua imminent frustration, of contract. Nowat, it is to be adjudged whether Annexure C-3 (Q), comprises a certificate, within the ambit, of clause 55.1 of the contract. On a close reading of its contents, it emanates, of its only containing, a proposal for closure, of project, and, also when the official concerned, who made thereunder an intimation to his superior official, obviously did not hold any authorization to rescind the contract, thereupon, rather the time whereat the contract stood ultimately rescinded by the authority hence superior to the authority, who prepared Annexure C-3 (Q), (a) rather constitutes, the apt tenable time, whereat, the rescission of contract occurred, besides also the time whereat, the apposite certification, qua imminent frustration, of the contract also hence ensued, (b) thereupon, 10.07.2008, is the apt date, whereat the contract stood rescinded, and,

is also the date, in contemporaneity whereof, the apposite certification within, the ambit of clause 55.1, of, the apposite contract, rather hence, ensued, (c) thereupon placing of any reliance upon Annexure C - 3(Q), by the Arbitrator, for, his hence concluding, of it, comprising the apposite certification or its constituting a valid order, of rescission of contract, hence being a sequel of gross misreading, of, clause 55.1 of the apposite contract, (d) concomitantly also any inference, of, in its making the contractor/petitioner herein holding the requisite knowledge, of imminent closure of works, is wholly insignificant, (e) repeatedly when the rescission of contract, occurred subsequent thereto, and was communicated, to the contractor only on 9.7.2008, and, also when the officials concerned, despite, being aware of its dispatch therewith, (f) thereupon, the apt proposal(s) contained in Annexure C-3 (Q), though, hence enjoined the authorised officials, of, the respondent with the quickest immediacy, hence, take a binding conclusive decision thereon, for hence avoiding any pecuniary damages being assessed vis-a-vis the contractor/petitioner, (g) contrarily theirs impeding, the pace of making, of, an apposite order of rescission, and, to in contemporaneity thereof, hence, also issue the apposite certification, renders the respondent liable, to, make the apposite pecuniary contractually prescribed indemnification(s) vis-a-vis the petitioner herein/contractor.

5. Furthermore, with the recital, occurring, in clause 55.1, of, the apposite contract, hence enjoining the contractor to remove his plant, machinery and equipments etc., from the relevant site, only after his receiving the apposite certification, (a) renders amenable an inference of the issuance, of, order of rescission of contract, by the competent authority, and, concomitantly in contemporaneity thereto, hence issuance of an apposite contractual certification also emanating, (i) rather being a prerequisite condition, for the contractor proceeding, to remove his plant, machinery and equipments etc., from, the relevant site, and, obviously his being also enjoined, to not, until his receiving the aforesaid certification, (ii) hence maintain the plant, machinery and equipments etc., at the relevant site. Further inferences therefrom, are, of any awareness of the contractor/petitioner, preceding 10.07.2008, of, the imminent frustration of contract, being insignificant nor thereat he was obliged, to hence remove, from, the site, the relevant machinery, plant and equipments etc., (iii) rather with his being contractually

obliged to remove the plant, machinery and equipments, from, the site, only upon, his receiving the apposite certificate or a valid order of rescission. Consequently, it is held that the petitioner, is, entitled for apposite

contractual monetary indemnification(s), comprised in Claim-A, and, in Claim-B from 2.8.2007 to 10.07.2008 instead of 2.8.2007 to 25.11.2007.

6. Be that as it may, the learned counsel appearing for the petitioner/contractor, has vehemently contended, that the negation by the Arbitrator of all

claims in the manner computed, by the contractor, being rendered in short shrift manner, and, also arising from his omitting, to revere the documentary

evidence adduced before him, by the Contractor/petitioner. However, the aforesaid submission, falters, as a perusal of the record, makes a clear

depiction, of, the documents tendered or placed before the Arbitrator by the petitioner/contractor , being merely photo copies, and, hence no reliance

being imputable thereon, besides obviously when the authors thereof remained unexamined, hence, the apposite claims as reared by the

petitioner/contractor, before, the Arbitrator, stood aptly rejected.

4. For the foregoing reasons, the instant petition is partly allowed and the award impugned before this Court, is, modified only with respect to Claim-A

and Claim-B and it is held that the petitioner/contractor is entitled, to the apposite monetary indemnification, from, 2.8.2007 to 10.07.2008,

instead of 2.8.2007 to 25.11.2007, at the rates, as adjudged by the Arbitrator, whereas, the award of the Arbitrator, on other counts, is affirmed

and maintained. All pending applications also stand disposed of. Records, if any, received, be sent back forthwith to the concerned quarter.