

**2023 STPL(WEB) 10 HP
HIGH COURT OF HIMACHAL PRADESH**

(HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.)

EXECUTIVE ENGINEER, I & PH, DIVISION, BILASPUR, H.P.

Petitioner

VERSUS

SH. RAMESH KHANEJA, GOVT. CONTRACTOR

Respondent

Arbitration Case no. 69 of 2016-Decided on 06-07-2023

Arbitration

Arbitration and Conciliation Act, 1996 – Section 34 – Arbitration Award – Escalation Cost – Challenge to Arbitration award – Award related to escalation cost in contract due to delay – Delay not attributed to contractor – Site made available to contractor with delay - Clause 60 in the contract providing claim for variation of price – Held: The nature of award is more or less is a consent award, based on the admitted facts with respect to handing over the partial site and delay in handing over the complete site causing non-completion of the work within stipulated period. It is also admitted fact that work was completed within one year of handing over the complete site to the contractor. No scope of interference – Petition dismissed.

(Para 6, 7, 8)

Advocate(s): For the petitioner: Mr. Anup Rattan, Advocate General with Mr. Rajesh Mandhotra, Additional Advocate General.

For the respondent: Mr. Sumeet Raj Sharma, Advocate.

JUDGMENT

Vivek Singh Thakur, Judge(Oral):-This petition has been preferred by the State, through Executive Engineer, I&PH Division, Bilaspur, H.P., under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the award dated 05.04.2016, passed by S.E. Arbitration, Solan, whereby the Arbitrator has awarded Rs. 57,45,832/- in favour of the respondent for escalation of price against claimed amount of Rs.61,74,863/-.

2. The respondent was awarded work of construction of LWSS Shri Naina Devi Ji including execution and supply of material vide award dated 30.07.2009. Work was to be completed within one year, i.e. upto 13.08.2010.

3. For non-execution of work, department intended to forfeit the performance bond of the petitioner, whereupon, respondent had approached the High Court, whereafter, order for appointment of Arbitrator was passed on 28.12.2010, and vide order dated 22.06.2011, Arbitrator was appointed and arbitration proceedings were started.

4. Respondent had put-forth his claim on six counts, i.e. (1) Escalation (2) General (3) 15th Final Bill (4) Prolongation (5) Performance Bond and (6) Litigation Expenses.

5. On conclusion of arbitration proceedings, the Arbitrator has awarded Rs. 57,45,832/- under Claim No.1 for Escalation, whereas, he has rejected the other claims of the respondent.

6. It is undisputed that during proceedings before the Arbitrator, department had acceded to the claim of the respondent that site was not made available to him till 14.02.2011 and only partial site was made available on 15.02.2011 and clear complete site was made available on 20.11.2011, whereafter he had completed work on 30.06.2012. The Arbitrator had recorded the admission and assent of the department with respect to claim of escalation, which has not been disputed in the present petition. The relevant portion recorded by the Arbitrator reads as under:-

“vi) From the series of events narrated in para (v) above and para (ii) & (iii) it clear that the contractor could not execute any work till 22.1.2011 because of non clearance of forest land. The delay happened on the part of respondent/EE in fulfilling his fundamental contractual obligation of handing over the site which he did in peace meal manner in extended period of execution of work. During the proceedings of 12th hearing held on dated 20.02.2016, it is apparently admitted by both the parties that the contractor could not do any work till 14.02.2011 and only partial site pertaining to civil structures including raw water tank was handed over to him on 15.2.2011, and further the site for clear water tank at Naina Devi Ji i.e. full site was made available to him on 20.11.2011. More so, even the respondent/EE admitted that the reasons of delay incurred cannot be attributed to the contractor because no penalty was levied upon him under clause 64 by then Executive Engineer.

vii) The defence of the respondent/EE that this claim is not payable because the variation in process incurred of labour, material etc. stood already covered within 10% under clause 60 of the agreement was found incorrect, because later on this claim when checked by him and submitted in 7th hearing on 19-5-2014 came out to be 57,45,832/-.

viii) From the paras above it I clear that the work was got executed from the contractor in the extended period without his defaults. From the aforesaid facts, surrounding circumstances and conduct of the contractor during execution of work at the relevant time, it can be construed that the contractor did not lack in deploying his resources as and when the site was made available to him and finally he completed the work on 30.06.2012.

ix) During the 6th hearing dated 21.4.2014, the respondent/EE agreed to the amount of this claim if preferred & adjudicated under clause 60 of the agreement. Accordingly in the 7th hearing the respondent/EE submitted the price escalation claim clerically checked for Rs.57,45,832/-. The claimant/contractor also agreed to this amount. In the light of discussion & reasons recorded above in para (i) to (ix), I am of the considered opinion that the contractor holds his entitlement for this claim. Therefore, this claim as checked by the respondent/EE is hereby allowed. As such the sum of Rs.57,45,832/- is awarded in favour of claimant/contractor against this claim.”

7. Learned counsel for the respondent, referring the pronouncement of the Hon'ble Supreme Court in case titled K.N.Sathyapalan (Dead) by LRs. vs. State of Kerala and Another, reported in (2007)13SCC43, has submitted that even in absence of Clause in contract for escalation, the Apex Court has held that in case of delay, not attributable to the Contractor, escalation is payable to the Contractor, whereas in present case, there is Clause 60 in the contract providing claim for variation of price and, therefore, respondent is entitled to claim under head of escalation.

8. The nature of award is more or less is a consent award, based on the admitted facts with respect to handing over the partial site and delay in handing over the complete site causing non-completion of the

work within stipulated period. It is also admitted fact that work was completed within one year of handing over the complete site to the contractor.

9. In the aforesaid facts and circumstances, I am of the considered view that there is no scope of interference by this Court in the impugned award. Accordingly, present petition is dismissed. Pending application(s), if any, also stand disposed of.
