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

**FAO No. 4507 of 2012**
**Date of decision : November 16, 2015**

**Bharat Sanchar Nigam Limited**
**....... Appellant**
**Versus**

**M/s S. Kumar Construction Company, New Delhi & another**

**........ Respondents**

**CORAM: HON'BLE MR. JUSTICE AMIT RAWAL**

Present:- Mr. K. K. Gupta, Advocate
for the appellant.

Mr. Rakesh Gupta, Advocate
for the respondents.

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1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

**Amit Rawal, J (oral).**

The challenge in the present appeal is to the order dated 7.5.2012 whereby the objections filed under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter called as 'the Act') have been dismissed.

Mr. K. K. Gupta, learned counsel appearing on behalf of the appellant submits that the award is not in consonance with the terms and conditions of the contract, inasmuch as that some of the bills submitted by the contractor were bogus. Infact, the contractor's claim had already been settled as a sum of ₹17,36,073/- had been paid. He further submits that the subsequent bills do not confirm as to whether the work actually at the site had been done or not. This fact had been admitted by the SDO in a statement. Rather, the SDO feigned ignorance about the execution of the work.

He further submits that the arbitrator, thus, has not taken into consideration the aforementioned statement suffered by the SDO while awarding the compensation with regard to the subsequent bills, though, the objecting court partly allowed the objections by deducting a sum of ₹3,63,856/-, but upheld the award of the arbitrator to the tune of ₹10,30,508/- besides other claims as the claim was to the tune of ₹32,58,302/-.

He further submits that the arbitrator exceeded in its jurisdiction in awarding interest at the rate of 15% per annum i.e. w.e.f. 1.10.2003 whereas the bills were submitted on 16.3.2005. Thus, prays that both the objecting court and the arbitrator has committed illegality and perversity in rendering the award, much less dismissing the objections.

On the other hand, Mr. Rakesh Gupta, learned counsel appearing on behalf of the contractor submits that the objections were not within the parameters of Section 34 of the Act and as none of the objections specify as to whether the award of the arbitrator suffers from the grounds mentioned therein.

He further submits that once the payment was due, the arbitrator has rightly awarded the compensation even if the bills were submitted in the year 2005. The contractor is liable for the interest from the date when it was due and accordingly ordered interest @ of 15% per annum w.e.f. 1.10.2003. He has drawn attention of this Court to the award of the arbitrator who extensively has dealt with the objections taken by the appellant viz-a-viz the awarding of the work, much less genuinity/authenticity of the bills and thus, submits that the scope of interference under Section 37 of the Act is limited, prays for dismissal of appeal.

I have heard learned counsel for the parties and appraised the paper book.

It would be apt to reproduce the relevant portion of the award:-

> *The first question would be easy to resolve if it was possible to physically check the work today. Both the claimant and respondent agree that it is not possible to do so as the physical situation changes in six months. The next possibility was to ask the field officers of the time as was requested by BSNL Rewari. The field officers namely JTOs responsible to verify the work 100% state without any reservations that the work is definitely done, the SDO responsible to verify the work 50% first stated that some work was definitely done and later in the next hearing expressed doubts over the same and the DET responsible to verify the work 10% stated that he found no work going on in the field during his visits. However, it is easy to see later statement of the SDO is doubtful as he does not deny issuing store for the work without which the work would not be possible. Secondly, the store issue slips carry the OB numbers by which the telephone connections were being installed and BSNL Rewari, though not confirming their existence also does not deny it. It is also on record that an explanation memo had been issued to JTO with regard to his statement before the arbitrator that the work has been done by the time the statement of DET and of the SDO expressing doubt on the work had been recorded and the DET also stated that he was aware of it. Also the store issue slip does not have any column for mentioning the contract number or work order implying the same are not required to be mentioned while issuing stores. BSNL Rewari's other objection also do not hold any water as the JTOs*

*and the claimant stated that it was the practice at that time to prepare estimates and issue work orders on or around the completion of work. This could be adduced from the date of issue of work orders, date of submission/ sanction of estimates, amounts mentioned in estimates being equal to the amount of bills etc. On being queried about it BSNL Rewari did not deny it but refused to give any information saying it does not appear related to the case and that precedence should not be used to decide the present case. However, I do not understand as to why this change in practice be allowed at this stage. BSNL Rewari has already made a payment of over 17 lacs under this tender. They could only have made it after checking the labuor license. The issue of wage and attendance register and hindrance register was never raised while making earlier payments as well as till date as the claimant had not received any letter to produce the same till now. Their absence may point to an incomplete formality rather than an absence of work. Regarding the non verification of MBs by the SDO and DET, why it was not carried out by the SDO and DET is not understood. Why other officers of BSNL did not ask them to do so in spite of the bills having been given to them in 2004 is not understood. But it is clear that the responsibility of verification was of that of BSNL and hence this non verification cannot be held against the claimant particularly when even a single direction has not been issued to the concerned officers to do their duty nor has any deficiency been pointed out to the claimant. Same is the case with acceptance testing. BSNL Rewari has also insinuated that the JTOs and SDO may have connived with the claimant. However BSNL Rewari does not have anything on record to show that for the six long years that the case was unsettled, they ever tried to find out the truth or take action against the officers they thought delinquent. It is also difficult to assume that almost all of the field officers together at one and the same time colluded with the claimant over the period of almost one year to defraud BSNL and no other authority in BSNL Rewari was able to check it. The respondent also has not raised any demand for deposit of store issued to the claimant which means they think it has been used for a legitimate purpose. Thus it is clear that the work was done.*

*BSNL, Rewari has also raised objections to the bills* *being dated prior to the date of agreement. No evidence has been presented by the respondent in support of their claim. These bills and MBs signed by the JTOs carry the contract number, rates applicable as per contract etc. The JTOs themselves state that they got the work done. BSNL Rewari has also raised objections to the bills having a long period/duration of work. It says penalties should be levied on account of it. However, there has been no objection from the concerned JTOs or SDO on this account. Rather one of them has stated that the work was done in reasonable time. Also the time within which the work is to be done has to be defined in the work orders which were never issued. Hence this presupposition that the penalties become leviable just because the tender prescribes a maximum speed at which the work could be carried out is untenable. Moreover, no notice prescribes a maximum speed at which the work could be carried out is untenable. Moreover, no notice has been issued for delay in work at any stage to the claimant. Hence the above contention also does not hold good. BSNL Rewari has raised objections about certain bills having date of issue of store prior to the date of agreement. But again no evidence is submitted. In view of the above, the amount of claim is reduced from Rs.15,88,924/- to Rs.13,94,364/- (the amount subtracted for bills considered settled by both parties = Rs.1,94,560/- viz. bill number 115, 117, 178, 179, 257 and 756).*

The contract/agreement did not envisage the specific amount of interest thus, as per sub section 7 of Section 31 of the Act, in case the contract is silent about the interest, the arbitrator has power to award maximum interest @ 18%.

From the perusal of the findings rendered by the Arbitrator, the plea of BSNL with regard to the awarding of the work has been negated on the premises that not only the store was issued but extent of work alleged to have been carried out by the contractor other than the claim, for which BSNL already settled the claim, has been proved.

As regards the procedure being referred to in the contract, the bills have to be submitted to the Divisional Engineer, the plea of Mr. K. K. Gupta, the same were not verified, is untenable for the reason that the DET before the arbitrator has admitted the allotment of work, much less its verification, was also got confirmed.

It is now a settled law that as to under what circumstances the award has to be interfered with. The question which has now been raised in the aforementioned appeal has already been answered by the Hon'ble Supreme Court in catena of judgments wherein it has been laid down that until and unless the award suffers from illegality as statutorily prescribed under Section 31 (3) of the Act, the same cannot be interfered with. In this context I intend to refer the judgments of Hon'ble Supreme Court in **Associate Builders Vs. Delhi Development Authority (2015) 3 SCC 49 and Navodaya Mass Entertainment Ltd. J. M. Combines (2015) 5 SCC 698.** In the aforementioned judgment the Hon'ble Supreme Court had culled out the ratio decidendi by holding that until and unless there is error apparent on the face of record or the arbitrator has not followed statutory legal position, it is only in these circumstances it would be justified interfering with the award. The High Court should not act as a Court of appeal and reappraise the material/evidence and embarked on a path by substitution in its own view. It is not the case of the appellant that the award is against the public policy or has violated the principles of judicial approach, much less against the statute and other provisions of Section 34 of the Act.

In my view the award of the Arbitrator does not suffer from any illegality in as much as, the Arbitrator who is expert has dealt with the matter and decided the claim of respective claimants to the parties to the *lis.*

It is now a settled law that the Arbitrator is the sole judge of quality and quantity of the evidence before him and decide on the basis of the available evidence.

In my view, no error of law arise from the award. The award is perfect and justified

There is no merit in the aforementioned appeal.

The appeal is accordingly dismissed.

**(AMIT RAWAL)**
**JUDGE**

**November 16 , 2015**
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