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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

FAO-3207-2013 (O&M)
Date of decision : 16.02.2016

State of Haryana

...Appellant

Versus

M/s TCI Infrastructure Finance Ltd.

...Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. D.K. Mittal, DAG, Haryana
For the appellant.

Mr. Naveen S. Bhardwaj, Advocate
for respondent.

Mr. S.K. Rana, Advocate
for the applicant.

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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)

CM-8760-CII-2014

Prayer in this application is for impleading the applicant as respondent No.2.

After arguing for some time, Mr. S.K. Rana, learned counsel appearing on behalf of the applicant seeks withdrawal of present application with the liberty to vindicate his grievance in a competent Court of law.

Ordered accordingly.

FAO-3207-2013

The appellant-State of Haryana through Chief Engineer, is aggrieved of the dismissal of the objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called 'the 1996 Act') seeking setting aside the Award dated 06.05.2010 passed by the Arbitrator accepting the claims No.1, 4 and 6 of the claimants as well as awarding of the interest @ 10% for pre reference period and future interest @ 12 %.

Mr. D.K. Mittal, DAG, Haryana, submits that the Award of the Arbitrator entertaining the claims No.1, 4 and 6 of the contractor was against the public policy, much less, terms and conditions of the contract and in this regard, objections were filed, thus, the same could not have been dismissed on the premise that these were not falling within the realm of Section 34 of the 1996 Act. As per the provisions of 28 (3) of the 1996 Act, the Arbitrator was required to confine within the frame work of the 'Concessionaire Agreement'. He submits that on 06.01.1999, a Concessionaire Agreement was entered with M/s TCI Infrastructure Finance Ltd., to complete the construction of Railway over Bridge (ROB) situated at Neelam Chowk within a period of 24 months and thereafter, collect the toll tax and retain during the such period of 8 years 9 months and 19 days including the construction period of two years. The bid was accepted on 23.12.1998 and the construction period was upto 22.12.2000. No doubt, the contractor completed the work of the Railway over Bridge in 22 months instead of 24 months. The contract also envisaged the closure of Railway Over Bridge situated at Neelam Chowk. However, in view of the interim order granted by the Court, Neelam Chowk remained open and therefore, it was not within the control of Government to stop the flow of the heavy traffic, much less, divert the traffic on the Railway over Bridge agreed to be constructed by the Contractor, therefore, claim Nos.1 and 4 could not be entertained by the Arbitrator and the same are liable to be dismissed. Claim No.6 was with regard to the encashment of Performance Security in the Form Bank Guarantee and the performance bank guarantee was not encashed on the ground that the Contract did not pay license fee and thus, prays for setting aside the Award of the Arbitrator and as well as the order under challenge.

Mr. Naveen S. Bhardwaj, learned counsel appearing on behalf of respondent-Contractor, submits that the contractor completed the construction of Railway over Bridge within 22 months, in essence, the construction was completed on 22.09.2000, but the same was inaugurated on 24.10.2000 and claim No.1 accepted by the Arbitrator is with regard to the loss of income for a period of three months having basis of the traffic projections as submitted in Form 4 with the bid document and the delay caused. As regard claim No.4, the Contractor could not earn the toll tax as it was required to maintain Railway over Bridge for 8 years 9 months and 19 days including the construction period of two years due to closure of the Railway over Bridge over Neelam Chowk. The Government ought to have issued a notification under Section 115 of the Motor Vehicles Act prior to calling of the Bid for construction of the "Railway over Bridge" in dispute, having not done so, the Contractor cannot be burdened with the loss of profits and in this regard, the Arbitrator after taking into consideration the decision of the Chief Engineer, who had assessed loss to the tune of ₹ 5,16,03,220/-, has awarded the compensation of ₹ 7,58,55,130/- viz-a-viz the claim No.6, the Chief Engineer could not en-cash the performance bank guarantee on account of non-deposit of the license fee. The Contractor could not earn the revenue as there were very less traffic on the Railway over Bridge at Neelam Chowk, thus, prays for dismissal of the appeal.

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is no merit in the appeal. The Arbitrator in my view has appreciated the evidence brought on record while determining the claim Nos.1, 4 and 6 and rejected the other claims. Though the Contractor filed the objections, viz-a-viz rejection of the plea but the same have been dismissed. The aforementioned facts reveal that it was the unilateral decision of the Department not to inaugurate the Railway over Bridge, after completion of the same, much less, sought the vacation of the interim order obtained by the Unions of the School which was affected on account of closure of the Railway over Bridge situated at Neelam Chowk. Obviously, the Contractor would not have paid license fee as prevented in not enjoying the benefits of building the Railway over Bridge on BOT, basis as the Contract envisaged the closure of the Railway over Bridge at Neelam Chowk. It was the duty of the Department to ensure that there would not be any future litigation before inviting the bid for Concessionaire Agreement on BOT basis.

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. Vs. 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. The arbitrator has dealt with the dispute which was contemplated and was within the scope of it.

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 of 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 as well as order impugned. The award is perfect and justified.

There is no merit in the aforementioned appeal.

The appeal is accordingly dismissed.

Stay granted by this Court stands vacated.

Mr. D.K. Mittal, DAG, Haryana submits that the Department shall be given three months' time to take approval from the Government for the payment of this amount but the same is rejected.

16.02.2016 **(AMIT RAWAL)**
yogesh **JUDGE**