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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO-4121-2013 (O&M)
Date of decision : 06.09.2016

State of Haryana

... Appellant

Versus

M/s Kundra Rubber & Plastic Industries and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Naresh Parbhakar, Advocate
for the appellant.

Mr. Ishpuneet Singh, Advocate
for respondent No.1.

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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 appellant is aggrieved of the dismissal of the objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called 'the 1996 Act') for setting aside the Award dated 06.02.2008, whereby the claim of the respondent(s) to the tune of ₹ 14,80,000/- on account of material supplied and ₹ 1,38,000/- on account of Sale Tax has been accepted.

Mr. Naresh Parbahkar, learned counsel appearing on behalf of the appellant submits that the State of Haryana had invited the tenders on 12.11.1999 for supply of material meant for hot and procured tyre retreading. The contract was awarded to the respondent(s). The condition of the contract was that the supplier was to open the office/sale depot in

Haryana and on finding the material substandard, the samples which were taken in pursuance to the provisions of the contract, were sent to Pune for assessment of quality. Report indicated that they were not meeting with the specifications and accordingly, the penalty was imposed. It is, in this background of the matter, the dispute arose and the matter was referred to the Arbitrator. The Arbitrator exceeded its jurisdiction in not referring to the terms and conditions of the contract, thus, the Award is against the provisions of sub-Section 3 of Section 28 of the Contract Act. The Contract did not envisage the situation of taking the samples in the presence of effected parties therefore, the legal material right had been affected. The imposition of penalty was in terms of the provisions of the contract. The objections were falling within the realm of Section 34 of the 1996 Act.

Mr. Parbahkar, during the course of the arguments, has referred to Clause 19 to contend that the material has to be supplied and billed from their sales office/depot in Haryana and the quality and performance of the material to be supplied had to be carefully monitored. The supplier supplied the material from Punjab and therefore, there was defiance to the terms and conditions of the contract and the penalty as per the Clause No.11 of the Agreement was imposed. Taking of the samples envisaged in pursuance to the conditions Nos.14 and 23 of the memo No.276 dated 12.01.2001. All these factors have escaped the notice of the Arbitrator, much less, the Objecting Court, thus, it is a fit case, where the order of the Objecting Court and as well as the Award are liable to be set aside.

Mr. Ishpuneet Singh, learned counsel appearing on behalf of the respondent No.1 submits that no opportunity of hearing for taking the samples was afforded. As regards the supply of the material from Punjab, a representation dated 08.12.2000 was submitted and the appellant kept on accepting the material and had made some payments in the shape of Form ST-38, thus, he does not lie in the mouth to allege and agitate regarding the opening of the office in Haryana. The inspection of the material was not done in the presence of the supplier and therefore, could not have been taken as sermon, thus, urges this Court for affirming the findings under challenge.

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is no merit and substance in the submissions of Mr. Naresh Prabhakar, for, it is a conceded position on record that the contract did not envisage the charging of the Sale Tax. It was part of the contract, yet the appellant deducted the Sale Tax. In my view, the recovery made from the claimant regarding the Sale Tax was arbitrary which on similar line also opined by the Arbitrator.

As regards the defiance to the terms and conditions of the contract, I am of the view that the Arbitrator can always follow the principles of natural justice and cannot strictly adhere to the terms and conditions particularly in view of the facts and circumstances narrated above inasmuch as in 20 samples taken out of 54 samples, the respondent(s) was not associated. The findings rendered by the Arbitrator on this point read thus:-

> *"As per the contents of supply orders it was specifically mentioned that the Brand Name of the Claimant Company was "K.T.". It was the duty of the department to check the material whether the engraved brand is same or not. Even otherwise,, if*

it is assumed that the claimant firm had supplied the material with the brand names Kundra Empire, "K.T." or without mark then also the department/respondent had accepted these materials which was not as per the terms and conditions as mentioned in the tender order and had sent only 20 samples to CIRT Pune. Also the presence of authorized representative of the firm was not secured when these samples were being sealed and dispatched to CIRT Pune. The department/respondent also failed to explain the reasons for using the material if the material was of sub-standard and not as per the tender terms and conditions. It was a lapse on the part of the department/respondent as they had accepted the material which should have been sent back to the firm with the penalty or should have been kept in the depots for showing the firm that the same was not as per the terms and conditions of the tender order and consequently penalty should have been imposed upon company.

It is again a lapse on the part of the department/respondent that they sent only 20 samples out of 54 samples. It seems that a pick and choose formula was adopted by the department/respondent and moreover, the authorised representatives of the firm were not called or allowed to witness the sealing/dispatching of the samples. No satisfactory reply or conclusive proof was extended by the department/respondent in this regard and the version of Respondent/Department cannot be accepted as gospel truth.

The department/respondent made the recoveries from the firm on the basis of the test reports of CIRT Pune. In the test reports, Institute had mentioned "the samples does not meet the critical requirement and is, therefore, not acceptable". According to this test reports, department should not have accepted/used the material. Despite that the department had used the same to the considered extent and proper procedure

> *for sending samples as per ASRTU Criteria was not followed and the claimant company can not be allowed to suffer for the same."*

I am in agreement with the findings rendered by the Arbitrator.

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

There is no merit in the aforementioned appeal.

The appeal is accordingly dismissed.

(AMIT RAWAL)
JUDGE

06.09.2016
yogesh

Whether speaking/reasoned **[✓ Yes]/ No**

Whether Reportable **Yes/ [✓ No]**