

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

FAO No.2635 of 2015 (O&M)
Date of decision: 10th May, 2016

State of Haryana and others

...Appellants

Versus

M/s Mehta Construction Company, Karnal and another

...Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

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

Present: Mr. Girish Agnihotri, Sr. Advocate with
Mr. Arvind Seth, Advocate for the appellants.

Mr. Sumit Gupta, Advocate for the respondents.

AMIT RAWAL, J.

The appellant-State of Haryana is in appeal against the order dated 14.10.2014, whereby objection filed under Section 34 of the 1996 Act, for setting aside of the award dated 05.12.2008, has been dismissed.

Mr. Agnihotri, Sr. Advocate assisted with Mr. Arvind Seth, learned counsel appearing on behalf of appellants in support of the grounds of appeal has raised following submissions to contend that neither the award nor the impugned order are sustainable:-

1. The Arbitrator has passed the award only on the basis of the statement of the claimants whereas claimants have failed to lead any evidence and

produce any evidence in support of the claimants. It is settled law that claimant has to stand on his own legs.

2. Witness of the claimant did not come forward for cross-examination and in the absence of the cross-examination, adverse inference was liable to be drawn and, therefore, the statement could not have been looked into.
3. The Arbitrator has gone beyond the terms of the agreement before the proceedings had taken place in defiance to the provision of Clause 26 of the Supplementary conditions of the contract. The aforementioned clause provides that the Contractor had to furnish the security deposit of some determined amount for seeking reference to the Arbitrator, in essence, the Contractor was required to deposit the amount equivalent 10% of the claimant and having failed to do so, the claim was not entertainable.
4. Even the Objecting Court has not noticed the aforementioned fact particularly the fact that the site where construction was to be carried out is a compound complex with the boundary wall and the entry and exit from the complex are regulated from gate card/security card and for the period concerned, record reveals that there is no entry of any machinery, materials or man power belonging to the Contractor/respondent-company and the entry and exit of the compound was regulated. There was no vacant place to shift the store or to keep the machinery or other articles for the purpose of raising the construction, like clearance of site, demarcation by the department and execution of the foundation and construction of godowns, and the material and machinery required for different stages is also different.

5. The Arbitrator and Objecting Court did not consider Clause 21 of the Supplementary Condition of the Tender document, for, every amount of work is liable to be increased or decreased and no claim on this account was entertainable.
6. There was no notice of appointment of sole arbitrator. The Arbitrator has exceeded its jurisdiction by not adhering to the terms and conditions of the Contract whereas on the contrary Contractor abandoned the contract without reserving any right and the legal notice did not ask for the damages, therefore, company stopped complaining about the damages.

On the contrary, Mr. Sumit Gupta, learned counsel appearing on behalf of respondent-company submits that PW1 Ashok Kumar witness of the appellant in cross-examination reveals that the appellant appeared before the Arbitrator and filed the reply, in essence, there was proper representation on behalf of the Department before the Arbitrator since the commencement of the proceedings till the disposal of the case. It further surfaced that tender was accepted on 12.12.2000 and the work was to be executed within five months from the date of acceptance. From 12.12.2001 to 14.04.2003, the appellant did not issue any letter to the respondent-company with regard to the impossibility of the execution of the work. He further submits that in case any Contractor could not execute work well within the stipulated period, the contract envisages to levy the penalty as per the Clause 2 and 3 of the agreement. He further admitted that Department had already approved for the refund of security on 12.02.2005 and to release the security on 05.04.2005. Claim of the company before the Arbitrator was that it had made all the arrangement for the execution of the work i.e. material required for the machinery and other articles

and labour was also earmarked but the work could not be done for the reasons that vacant site was not handed over and it was not provided till the abandonment of the Contract, thus, there was suspended animation with regard to the outcome of the Contract. The appellant wrote the letter dated 02.05.2003 (addressed to the Chief Engineer, HAFED) indicated to cancel the contract and thus, the claimant was victimized of the breach of the contract, whereas no effort or step was made/taken for handing over the vacant site and earnest money of ₹47,000/- was deposited on 20.09.2000 which was belatedly received as noticed above. Since the Contract involved resolution of the dispute of the arbitration, the said Clause was invoked. Accordingly, the claim for compensation of damages as per provision of Section 73 of the Contract Act was lodged. The Arbitrator being the expert has examined all these aspects and while considering the documents, held the respondent entitled to ₹55,000/- against the claim of ₹2,50,000/- and also awarded interest at the rate of 18% compounded quarterly in consonance with the provision of Section 31.7(b) of 1996 Act. The Arbitrator has further directed the Executive Engineer to return the cheque amount of ₹20,94,210/- to be deposited by the claimant in lieu of security deposit.

I have heard learned counsel for the parties and appraised the paper book and of the view that there is no force in the submission of Mr. Agnihotri, for, inescapably the vacant site for which the Contract was entered into was never handed over to the Contractor. On the contrary, the witness of the appellant had unequivocally, as urged by Mr. Sumit Gupta, spilled the beans regarding their inability to hand over the vacant site. The appellant has failed to prove that they were not represented before the Arbitrator whereas, there was proper representation on behalf of the Department. This Court cannot

sit in appeal over the decision of the Arbitrator, much less, Objecting Court until and unless objections are found to be within the provisions and parameters of Section 34 of 1996 Act. The operative part of the award of the Arbitrator reads thus:-

“After going through the material facts of the case and the pleadings of both the parties with their averments, I have come to the conclusion that there had been fundamental breach of the contract due to default of the respondent who did not provide the vacant site of work and prevented the claimant to execute the work within the prescribed period of 5 months stipulated in the contract agreement. The respondent after expiry of the time limit of completion of work did not inform the claimant the fate of the contract and kept silence for a long time, leaving the claimant in suspense. The respondent even did not reciprocate any instructions to the petitioner when he applied for extension of completion time on 9.2.2001 and later on for the refund of the earnest money during April, 2003, i.e. after about 3 years of the expiry of the contract period. The respondent further kept mum with regard to issuing any instructions regarding the execution of the work under the contract for another two years upto the date when the earnest money of the claimant was refunded to him on 5.4.2005.”

In my view, the respondent-Contractor has been able to prove the quantum of damages. Owing to the normal delay on the part of the appellant, Contractor was never given any information about the fate of the Contract till the refund of the earnest money i.e. from 12.12.2001 till 05.04.2005. Contract was commercial transaction. The claim under Section 73 of the Indian Contract Act, was maintainable. No objection had been taken with regard to the procedure adopted by the Arbitrator and, therefore, seeking cross-examination

of the witnesses of the claimant is ill founded. In case the procedure adopted by the Arbitrator is not agreeable to the party, the remedy has been provided under the Act. No steps have been taken by the appellant, therefore, procedure followed by the Arbitrator cannot be faulted with at this stage.

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 or for want of reasons 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. 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.

The award read as a whole is just, fair and reasonable. It is now a settled law that the Arbitrator or Committee 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 and all the objections filed against the same were wholly misconceived.

There is no merit in the aforementioned appeal.

The appeal is accordingly dismissed.

10th May, 2016

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**(AMIT RAWAL)
JUDGE**