IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

F.A.O.No.770 of 2016 (O&M)
Date of Decision: February 15th, 2016

Haryana Power Generation Corporation Limited, Panchkula

...Appellant

Versus

M/s Alstom Power, Boveeristrasse 22,D-68309, Mannheim, Postfach 100351, D-68128, Mannheim Germany and another

...Respondents

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

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?

Present: Mr.Puneet Jindal, Senior Advocate with
Mr.Amar Vivek, Advocate &
Mr.Siddhant Kant, Advocate,
for the appellant.

Mr.Akshay Bhan, Senior Advocate with
Mr.Alok Mittal, Advocate &
Ms.Priti Suri, Advocate,
for the caveators.

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**AMIT RAWAL, J.**

Civil Misc.No.2206-CII of 2016

For the reasons mentioned in the application, which is supported by an affidavit, delay of 57 days in filing the appeal is condoned.

CM stands disposed of.

F.A.O.No.770 of 2016 (O&M)

The appellant-Haryana Power General Corporation Limited (for short "HPGCL") is aggrieved of the impugned judgment dated 3.9.2015, whereby the objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "1996 Act") seeking setting-aside of the award and corrections to the award dated 1.5.2010, 25.7.2010 and 31.8.2010, have been dismissed.

Mr.Puneet Jindal, learned Senior Counsel assisted by Mr.Amar Vivek Advocate and Mr.Siddhant Kant, Advocate appearing on behalf of the appellant submits that on 28.8.1995, HPGCL invited bid proposals to refurbish and uprate 4 Units of 110 MW at the Panipat Thermal Power Station (PTPS) (hereinafter called "the Project"). M/s ABB Alstom Power India Limited-respondent No.2 (for short "APIL") gave the technical and price bid offer, which was later revised and the same was accepted on 11.12.1995. On 23.5.1997, the parties entered into agreements, i.e., Overall Agreement, Offshore Agreement and Onshore Agreement. Similarly, a side letter of even date was executed and signed by both the parties. On 31.7.1997, appellant signed two loan agreements with Kreditanstalt Fur Wiederaufbau (Kfw), an established financial institution of Germany for loans of DM 104,000,000 (`soft' loan) and DM 34,000,000 (`commercial' loan) to finance the cost of the contracts. The aforementioned loans were secured vide guarantee by an Indian Public Sector Financial Institution-The Power Finance Corporation Limited (PFC), which was furnished in pursuance to the agreement executed between HSEB and PFC on 15.10.1997. APIL-respondent furnished an advance payment guarantee No.21/40 amounting to INR 80,515,500.00, which was reduced to Rs.57,535,900.00. APG furnished an Advance Payment Guarantee No.700/ 9492 of DEM 12,251,100.00, which was reduced to DEM 8,949,534.90. Similarly, the aforementioned guarantees were furnished on 11.11.1997 and 4.11.1997. On 8.12.1997, APG furnished Performance Guarantee for an amount of DEM 9,027,400, whereas on 26.6.1998, APIL furnished Performance Guarantee for an amount of INR 53,677,000. On 26.2.1999, appellant wrote a letter to the respondent-Alstom stating that they were required to submit Special Package Bank Guarantee (for brevity “SPBG”) as per clause 12.2.2 of the Special Contract Conditions (hereinafter called “SCC”) and site letter dated 23.5.1997. The aforementioned request was again sent on 10.3.1999 and 17.3.1999. On 18.3.1999, HPGCL pointed out that the the invoices submitted by the respondent could not be paid because of want of SPBG for Unit No.2. On 31.5.1999, respondent-Alstom sent two draft bank guarantee formats, one for the first contract, i.e., the Offshore Contract and the other for the second contract, i.e., Onshore Contract, but on 7.6.1999, appellant brought to the notice of the respondent that the SPBG had not been furnished. However, on 11.8.1999, it was written to the appellant that the aforementioned SPBG was to be equivalent only to the amount of investment on Unit No.1 and the same would only be relevant after refurbishment works had been carried out for the purpose of conducting performance tests. On 22.12.1999, Alstom (APG) furnished a conditional SPBG, which was not acceptable to the HPGCL and accordingly vide letter dated 31.12.1999, it was pointed out that it has to be unconditional SPBG on the format sent by the appellant, whereas the Alstom, in reply to the aforementioned letter, requested the appellant to accept the SPBG as submitted by them. On 17.4.2000, respondents terminated the contract and thereafter lot of correspondences were exchanged for the revival of the agreement, but failed and ultimately on 23.5.2001, the appellant invoked and encashed two Advance Payment and Performance Guarantees aggregating to DM 17,976,934.90 in respect of

Offshore Contract of APG and 2 Contract Performance Bank Guarantees of INR 1,12,12,900 in respect of the Onshore contract of APIL. On 19.5.2001, APG sent a notice of arbitration to the appellant for initiating the arbitration proceedings owing to the dispute and accordingly the Arbitral Tribunal was constituted. On 27.3.2002, work of Unit No.2 was awarded to M/s BHEL for completing the leftover works at the approximate cost of ₹40 crores including of taxes. However, BHEL did not agree to the performance parameters, which were laid down in the contract awarded to M/s Alstom. The work was completed by BHEL in the month of February, 2003 and Unit No.2 was commissioned on 10.3.2003.

Before the Arbitrator, the appellant raised the counter claim dully supported by documentary evidence. He has further submitted, that Clause 11 or 12 of the SCC envisages liability of the owner, i.e., the appellant and of the supplier in case of happening of any eventuality and the Arbitral Tribunal was enjoined/called upon to decide which party was at fault in completion of the work, much less implementation of the agreements. It is further submitted that the Arbitral Tribunal has failed to advert to the counter claim and fastened the liability on the appellant by invoking Clause 11 of the SCC, whereas the case should have fallen within Clause 12 of the SCC as the termination was on account of the contractor's default and not of the owner's default and the Arbitral Tribunal failed to notice the aforementioned facts. He has drawn the attention of this Court to the complete arbitration award to demonstrate that there had been no deliberation or reasons in holding that none of the parties to the agreement had defaulted and yet ordered the appellant to refund all the bank guarantees and as well as payment of the materials already supplied. The Central

Generation Corporation had directed the appellant to lift the material supplied by the contractor even after termination of the contract and the contractor was called upon to take back the material as the material was lying unused, the appellant could not be burdened for payment of the said material. The contractor had left the material on the site which was of no use, yet the Arbitral Tribunal awarded the compensation regarding the same. Since the Arbitral Tribunal failed to adhere to the terms and conditions of the Contract, much less did not award compensation claimed in the counter claim, the objections under Section 34 of 1996 Act in this regard were filed and the Objecting Court also declined the same, holding that the same were not falling within the parameters and hence the present appeal.

Mr.Akshay Bhan, learned Senior Counsel assisted by Mr.Alok Mittal, Advocate and Ms.Priti Suri Advocate, appearing on behalf of the caveators has submitted that umpteen number of evidence has come on record to show that the Advance Bank Guarantees and Performance Bank Guarantees were to the tune of 15% and 10%, whereas the SPBG was only to the extent of 4½%. The Contract did not envisage any format of the SPBG. The said SPBG, as per the award of the Tribunal, was submitted, but the same was not acceptable, therefore, rightly so the contract was liable to be terminated on account of the fault of the owner and the Arbitral Tribunal has, thus, invoked Clause 11instead of Clause 12 of the SCC. The side letter also does not envisage the payment of the amount of interest incurred by the appellant vis-a-vis funding of the contract. The appellant failed to prove the counter claim, in essence no evidence has come on record to show that they incurred the loss of ₹40 crores or any other amount, in essence, the counter claim was to the tune of ₹200 crores, whereas on going through the averments of the counter claim, the appellant was not sure about the exact amount to be paid to the BHEL for having balance for leftover work. The witnesses of the appellant to a specific question as to whether material and equipments supplied by Alstom were lying erected or unerected answered in affirmative and to a specific question whether the BHEL or the appellant made any effort to find out the value of the materials, the answer was in negative. The answer vis-a-vis maintaining of the balance book of the contract qua Unit No.2 was also in negative. A specific question with regard to the maintaining of the register of the HPGC or BHEL was put, but the answer was that no register was maintained by the BHEL. So far as the HPCG, the witness did not know any answer. Even as per the counter claim set up by the appellant, it has been candidly admitted that the supply continued even after abandonment/unilateral termination of the contract.

Mr.Rehlan to specific question No.161 answered in affirmative that till date, no amount to BHEL had actually been paid by the appellant despite the fact that he was appointed as the person in-charge for verification/certification of the bills of BHEL. He further admitted that the BHEL's scope did not include the already erected material supplied by the Alstom to the Contractor. Even as per the communication dated 27.3.2002 addressed to the BHEL, on behalf of the appellant it has been mentioned that if any material supplied by the Alstom is made available to the BHEL and the same is found usable, shall be passed on to the appellant by the BHEL, in essence the material left by the respondent was used by the BHEL and rightly so, the Arbitral Tribunal has awarded compensation with regard to the aforementioned material. The other claims, which the Tribunal awarded were with regard to the encashment of the aforementioned bank guarantees, i.e., Performance Bank Guarantees and Advance Bank Guarantees, thus, there is illegality and perversity in the order under challenge.

The Objecting Court has also observed that the Tribunal, after examining both oral and documentary evidence, found that the respondents had furnished the requisite SPBG on 22.12.1999. The appellant has failed to lead any evidence in support of the counter claim and rightly so, it has been rejected.

Mr.Jindal, in rebuttal, has drawn the attention of this Court to Clauses 11 and 12 of the Contract and as well as the conditions of the side letter and submits that SPBG was tendered to the tune of ₹88 crores. The Arbitral Tribunal has not taken into consideration the factum of the insurance/damages incurred by the appellant. He submits that as per the admission in the cross-examination, it has come on record that there were purchase orders, where split of the prices were there and the work orders for execution of the job at the site depending upon the quantum of the job at the site, BHEL Standard Estimation Formats were used. The answer came to a specific question vis-a-vis payment of ₹44 crores paid to the BHEL. He has also drawn the attention of this Curt to Clause 7 of Section 1 of the Contract 1, i.e., the Offshore Contract, which provides that on termination of the contract, the work could be done at the risk and cost of the Contractor in accordance with the SCC and counter claim also included the management charges and the fees incurred by the appellant from the various financial institutions and prays that the award passed by the Arbitral Tribunal and the order passed by the Objecting Court declining the objections be set-aside.

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

The shorn of the facts and submissions made, it would be apt to reproduce Clauses of the Contract for adjudication of the controversy and for appreciation of the submissions. Clauses 11 and 12 of the Special Conditions of Contract and as well as the Clauses of the Side Letter read thus:-

> "*11. Termination of Contract Due to Owners Default.*
>
> *11.1 Notice of termination.*
>
> *The Contractor shall issue a notice to the Owner for terminating the Contract in the event of the Owner:*
>
> *(a) failing to pay to the Contractor the amount due under any certificate of the Engineer within (sixty) 60 days after the same shall have become due under the terms of the Contract, subject to any deduction that the Owner is entitled to make under the Contract, or*
>
> *(b) becoming bankrupt, or (being a company) going into liquidation other than for the purpose of a scheme of reconstruction or amalgamation.*
>
> *11.2 Removal of Contractor's Equipment*
>
> *Upon such termination of the Contract the Contractor shall with in reasonable time be permitted to remove from the site all Contractor's equipment brought by him thereon.*
>
> *11.3 Payment upon Termination.*
>
> *If the Contract is terminated as aforesaid, the Contractor shall be paid by the Owner (in so far as such amounts or items shall not have already been covered by payments on account made to the Contractor) for all portions of the Contract executed by the Contractor and accepted by the Engineer prior to the date of termination at the rates and prices provided in the Contract and in addition;*
>
> *a. the amount payable in respect of any preliminary items so far as the Works or Services comprised therein has been*

*carried out or performed and an appropriate portion as certified by the Engineer of any such items of the Works or Services comprised therein which has been partially carried out or performed.*

*b. any other reasonable expenses which the Contractor has expended for executing the Contract subject to being duly certified by the Engineer based on documentary evidence for having incurred such expenses.*

*Clause 12*

*12.0 Termination of Contract Due To Contractors Default of Non Performance.*

*12.1 The Owner is entitled to terminate the Contract after refurbishment in accordance with provisions of sub clauses 9.2.1 and 9.2.2.*

*In the event of successful completion of Performance Guarantee Test of the first Unit as stipulated in clause 8.1 read in conjunction with 9.2.1, the Owner shall give the clearance in writing for continuation of Works for the remaining Units within 15 days. In such case the Security Package stipulated below shall not apply. However the Owner reserves the right to give the clearance at an earlier point of time to start the work on the second Unit without prejudice to his various rights under the Contract with respect to the first Unit.*

*12.2 Security Package.*

*12.2.1 The Security Package shall apply in case of Contract Termination for non achievement of performance parameters of the first Unit as stated in clauses 9.2.1, 9.2.2 and 12.1.*

*12.2.2 In case of non performance of Unit No.1 after refurbishment as specified in clauses No.9.2.1, 9.2.2. and 12.1 and the Contract is terminated, the Contractor shall refund to the Owner the amounts for the first Unit received up to the date of termination of the Contract plus the related financing cost paid by the Owner to KfW including cost arising out of cancellation of the balance loan. For this purpose the Contractor shall indemnify the Owner through a bank* *guarantee of amount equivalent to investment on Unit No.1.*

*12.2.3 Notwithstanding the contents mentioned in clause 12.1 the Owner shall have the option to retain such equipment which will be found by them to be performing satisfactorily. The Contractor shall have the right to take back all the remaining equipment at mutually agreed terms between the Owner and the Contractor.*

*12.2.4 If the Owner decides to retain equipment supplied as a whole or parts of it the Contractor is entitled to deduct the pro rata value of such equipment from the reimbursement as per sub clause 12.2.2. The Procedure for settling an agreement on the pro rate value (s) of the equipment which the Owner keeps is to be mutually agreed upon between the parties in case of Contract termination by the Owner due to Contractors default.*

*12.2.5 Before the termination of the Contracts, the Owner and Contractor shall re-negotiate the Contractual terms for the purpose of continuation of the contract.*

*<u>Clauses of Side Letter</u>*

*1. The performance security of 10% of the Contract Price as per GCC clause 39 shall be part of the Security Package.*

*2. The bank guarantee of 15% for advance payment as per SCC shall also form part of the Security Package with the prevailing amount at the date of delivery of respective Units after adjusting its value as per effected supplies.*

*3. The difference between the required Security Package amount and item 1 and 2 shall be covered through a separate bank guarantee. The details of the amount of the Security Package for a specific Unit shall be worked out before commencement of supply of this special Unit.*

*4. When a Unit has been commissioned, TOC shall be issued for this Unit before the Security Package shall be extended to the subsequent Unit to be refurbished.*

*5. The payments for the respective Unit under this contract, to be considered in case of indemnification shall include also financing cost of KfW loan such as Management &*

*Commitment Fee, interest rate and other Financing Costs, which can be calculated and fixed at the time of contract termination.*

*6. The validity of the separate bank guarantee shall expire and shall be returned to ABB with issuance of TOC for the respective Unit.*

*7. ABB agree that advanced payment guarantee and performance security shall be used and can be drawn in case of contract termination due to non performance as defined in SCC subclauses 9.2.1 and 9.2.2.*

*8. The Security Package as well as the revolving security shall be in full satisfaction of the Contractor's liability with respect to contract termination and shall be invalid in case of contract termination is not causes by failing to achieve guaranteed performance."*

Mr.Jindal has heavily relied upon Clause 12.2.2 to submit that in case of non performance of Unit No.1 after refurbishment and the contract is terminated, the Contractor shall refund to the owner the amounts for the first Unit received up to the date of termination of the Contract plus the related financing cost paid by the owner to KfW (Financial Institution) including cost arising out of cancellation of the balance loan and for that purpose, the Contractor shall indemnify the owner through a bank guarantee of amount equivalent to investment on Unit No.1. It was the Contractor, who had not performed his part of the Contract, much less not furnished the Security Package Amount and the impasse continued and ultimately the matter was referred to the Arbitrator.

There is no force in plea of Mr.Jindal that the Security Package Amount was a condition precedent in view of Para 3 of the Side Letter, which clearly reveals that the difference between the required Security Package Amount and item 1 and 2 shall be covered through a separate bank guarantee. The details of the amount of the Security Package for a specific Unit shall be worked out before commencement of supply of this specific Unit. On going through the aforementioned Clause, I am of the view that there was no format of the Special Package Guarantee as it has been mentioned that the same shall be worked out before the commencement of the specific unit.

No doubt, the Contractor had submitted the bank guarantee dated 22.12.1999, but the same, for the reason, that it was not on prescribed format was rejected. There is no evidence on record that the format is a part of the contract, much less annexure thereto and the Arbitral Tribunal, after examining the matter threadbare, found that none of the parties were at fault and by invoking Clause 11 of SCC directed the appellant to make the payment of the Advance Bank Guarantee and the Performance Bank Guarantee, much less that of the material.

Vis-a-vis the counter claim, the Arbitral Tribunal found that the claimant did not lead any evidence vis-a-vis remaining work having been done from BHEL, in essence, no evidence has come on record as to how much more money the appellant had put in by getting the remaining work done from BHEL and moreover, the witnesses of the HPGCL admitted this fact. Through the testimony of the witnesses of the appellant, it has also been proved on record that they did not maintain any register or prepared inventory of the material, which has been utilised by the BHEL as per the letter dated 27.3.2003 and it is in these circumstances, the Arbitral Tribunal has directed the appellant to make the payment of the aforementioned material. The Arbitral Tribunal has not awarded any damages as it found that none of the parties to the contract were at fault and has only ordered for the refund of the Advance Bank Guarantee and Performance Bank Guarantee, which had been encashed by the appellant and as well as the payment of the material. Even the factum of non-maintaining of the register is evident from the testimony of the witnesses of the appellant which read thus:-

> "*Q.16: Are you aware whether any tenders were floated by HPGC before the LOI was placed on BHEL on March 27, 2002?*
> *Ans. No, I do not have any idea as this was looked after by ISBG, which looks after the marketing business of Renovation & Modernization (R&M).*
> *Q.17: Were you aware of the fact that there were material and equipments of substantial value supplied by Alstom, which were lying erected and unerected at the site of Panipat?*
> *Ans. Yes.*
> *Q.18: Did you or BHEL make any effort to find out the value of these materials?*
> *Ans. No.*
> *Q.20: In respect of the goods and equipments supplied by Alstom and lying unerected at site, was there any Materials Register (like for instance Register of Materials Handed Over) maintained at the site by HPGC or BHEL?*
> *Ans. For HPGC, I do not know. For BHEL, no such Register was maintained.*
> *Q. 21: When goods and materials supplied by Alstom were handed over to BHEL for carrying out refurbishment of unit 2, was there no record maintained of such goods materials and goods by HPGC or BHEL?*
> *Ans. I am not aware of any such records.*
> *Q.24: Other than the contract relating to unit 2 at Panipat, are you aware of a single other contract where such records as mentioned in question No.23 to your knowledge have not been maintained?*

*Ans. These are the site activities basically and as Head of the Centre it may not be coming to my knowledge. It is not in my knowledge of any such instance.*

*Q.160: Has HPGC actually paid any overrun charges on this account to BHEL?*

*Ans. Against both these activities we have made an agreement with BHEL to pay only Rs.20 lacs as overrun charges against the contract of electro static precipitator. However, the final payment against this contract to BHEL has not been liquidated because of some pending points under this activity.*

*Q.161: Would it be correct to say that your answer to question No.160 is that, till date no amount to BHEL has actually been paid by HPGC towards this account?*

*Ans. Technically yes.*

The relevant portion of the counter claim reads thus:-

"*95. That soon thereafter, came this Hon'ble Tribunal's direction of October 24, 2001 calling upon the parties to attempt to settle matters amicably. The issue of revival of Unit No.2 alone was one of the issues discussed during the settlement talks. These settlement talks failed on January 17, 2002. Consequently, HPGC was left with no alternative but to issue a letter of intent to Bharat Heavy Electricals Limited on March 27, 2002 to revive and restore shut down Unit No.2. The total price under this LOI was to vary depending upon how much of the materials delivered by the respondents at site would be utilizable and utilized by BHEL. Depending on the quantum of materials which BHEL could utilize, the price wold be lowered. I say that in its statement of counterclaims, HPGC had tentatively quantified its claim at Rs.44 crores (Rs.35 crores plus taxes and duties to the extent of 25% i.e. Rs.9 crores). I say that as against the above, HPGC has paid an amount of approximately Rs.35 crores to BHEL ( to be exact Rs.34,82,27,302/-). I crave leave to furnish further details in this regard as and when further payments are made and/or* *when the contract is closed. I must however, clarify that after the letter of intent dated March 27, 2002, a purchase order dated June 17, 2002 for Rs.2666.24 lakhs excluding taxes and duties and Works Order dated June 17, 2002 for Rs.837.76 lakhs had been issued to BHEL in this regard. A further letter of intent and purchase order dated October 12 and November 13, 2002 respectively or Rs.75 lakhs excluding taxes and duties and work order dated November 13, 2002 for Rs.125 lakhs excluding taxes and duties for short term refurbishment of the coal handling plant of the 110 MW unit Nos.1 to 4 had also been issued to BHEL pursuant to which they had restored, revived and re-commissioned unit on March 21, 2003 by which date they had also completed short term refurbishment of the coal handling plant. However, even after March 21, 2003 certain other connected works relating to the fire fighting system* and electricals of Unit No.2 are pending and in progress. In this regard, I append the following documents:-

(i) A copy of the LOI dated March 27, 2002 as Exhibit RW-DKR/7.

(ii) A copy of the Purchase Order dated June 17, 2002 as Exhibit-RW-DKR/8.

(iii) A copy of the Work Order dated June 17, 2002 as Exhibit-RW-DKR/9.

(iv) A copy of the further LOI dated October 12, 2002 as Exhibit-RW-DKR/10.

(v) A copy of the Purchase Order dated November 13, 2002 as as Exhibit-RW-DKR/11.

(vi) A copy of the Work Order dated November 13, 2002 as as Exhibit-RW-DKR/12."

As regards the non-consideration of the counter claim, I am of the view that as per the counter claim submitted by the appellant, there is no documentary evidence vis-a-vis the loss allegedly suffered by the appellant by getting the work done from BHEL except placing on record the letter of intent and purchase order issued in favour of BHEL. In other words, the amount allegedly claimed in the counter claim is not supported by report of any Supplier or Expert, who had visited the site or not, much less conducted spot inspection and assigned the alleged loss. Since the counter claimant also admitted the factum of receipt of material and equipments after the termination of the Contract, appellant is liable to make the payment of the same, much less no evidence has been brought on record to show that the material was lying in packed or unpacked condition or of no use.

It is now a settled law that in what circumstances, the award has to be interfered with. The question, which is now 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 34 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 judgments, 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 embark on a path by substituting its own view in support of the Arbitrator's 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 Arbitrator has dealt with the dispute, which was contemplated and was within its scope. The parties to the *lis* had participated in the proceedings and were given proper notice not only with regard to the appointment of the Arbitrator, but vis-a-vis proceedings. 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 claims of respective parties to the *lis.*

In my view, the award read as a whole is just, fair and reasonable. 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. Accordingly, I do not find any illegality and perversity in the award, much less the impugned order.

The appeal is accordingly dismissed.

**February 15th , 2015** **( AMIT RAWAL )**
**ramesh** **JUDGE**