

(2015) 02 OHC CK 0012
In the Orissa High Court
Case No : A.R.B.A. No. 34 of 2012

Chief Engineer and Others

APPELLANT

Vs

J.S. Construction Pvt. Ltd.

RESPONDENT

Date of Decision : 06-02-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 34, 34(2)

Citation : (2015) 119 CLT 1087

Hon'ble Judges : S.C. Parija, J.

Bench : Single Bench

Advocate : Milan Kanungo, S.K. Mishra, Y. Mohanty and S.N. Das, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S.C. Parija, J.—This appeal is directed against the order dated 09.05.2012, passed by the learned District Judge, Cuttack, in Arbitration Petition No. 229 of 2010, partly allowing the application of the appellants filed under Section 34 of the Arbitration and Conciliation Act, 1996, by setting aside the pre-award interest awarded by the learned Arbitrator and confirming the award passed in favour of the respondent Contractor for payment of Rs. 71,13,110/- minus Rs. 62,589/-, with 18% interest from the date of the award, till final payment is made.

2. The brief facts of the case is that the appellants (employer) floated a Global Tender for construction of "Birupa Barrage With One Regulator (Civil Works)" for Rs. 50,00,000/- through the erstwhile Department of Irrigation and Power, which has been subsequently renamed as "Department of Water Resources, Government of Orissa". The Claimant-Contractor was one of the tenderers for the said work and the contract valued for Rs. 5,30,92,822.65 paise was awarded in favour of the Claimant-Contractor with the stipulation to commence the work on 14.12.1981 and complete the same on 13.02.1986. Thereafter, there was dispute and differences between the Claimant-Contractor and the appellants (employer) with regard to measurement and final payment of the bill of the Claimant-

Contractor. Hence, the Claimant-Contractor sent a notice on 02.11.2005 to the employer to resolve the dispute. When the same was not responded to, the Claimant-Contractor filed a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the Act" for short), and on the intervention of the Hon"ble Chief Justice of Orissa High Court, the sole Arbitrator Shri Justice Basudev Panigrahi was appointed to arbitrate the dispute between the parties.

3. The Claimant-Contractor filed the claim statement before the learned Arbitrator, making claim on 15 heads, as according to the Claimant-Contractor, due to change of the drawings and designs and the extra work required to be done at the instance of the employer during execution of the work, which was beyond the terms of the contract, resulted in extra cost in execution. It was the case of the Claimant-Contractor that the aforesaid extra cost incurred in execution of the work being attributable to the direction of the employer, the Claimant-Contractor was entitled to claim on those heads with interest @18% per annum. The abstract of the claims made by the Claimant-Contractor on 15 heads were as follows:

4. The employer (appellants) resisted the claim by filing of defence statement with the averment that the claim of the Claimant-Contractor was not maintainable, being hopelessly barred by limitation as it had accepted the full and final measurement, except the measurement in respect of the earth work, as mention in item No. 1, through its Managing Director, while signing the final bill on 03.03.1992. The claims had also been resisted to be not maintainable on the ground of waiver and estoppel, inasmuch as, the Claimant-Contractor had not raised any dispute within the time stipulated, even though it had received the reply to his letter dated 30.07.2005 from the employer-Executive Engineer. So far as the claim of the Claimant-Contractor in respect of item No. 1, it was admitted that the said measurement was not final, but subsequently the Department having allowed the claim in part in respect of the said item, by approximation of the measurement of the extra work and agreeing to pay on 02.06.2001 for Rs. 2,21,000/- instead of Rs. 3,06,000/-, the claim was without any basis. The rest of the claims under other heads had been resisted to be not maintainable and also without any basis. It was also the plea of the appellants that the Claimant-Contractor was not entitled to interest, on any claim for any period prior to the date of the award or for the period from the date of the award till the date of payment, in view of the stipulation in Clause-57(e) of the General Conditions of Contract.

5. On the pleadings of the parties, learned Arbitrator framed the following issues:--

"ISSUES

1. Whether the claim made by the Claimant is maintainable in law? If so, whether it is barred by the law of limitation?
2. Whether the Claimant can maintain this proceeding after having signed in the

Final Bill?

3. Whether there is any cause of action for the Claimant to file this proceeding?
4. Whether the Claimant is entitled to any amount as claimed? If so, what is the quantum?
5. Whether the respondents could deny the claim of the Claimant?
6. To what relief, if any, the parties are entitled?"

6. Answering all the issues in favour of the Claimant-Contractor, the learned Arbitrator passed the award, holding that under claim item Nos. 1, 4, 5, 6, 10, 12 and 13, the Claimant-Contractor is entitled to an amount of Rs. 71,13,110/-, together with pre-award interest of Rs. 1,44,44,515/- minus Rs. 2,35,313/- (as awarded in favour of the employer), with 18% interest from the date of the award, till payment. The abstract of the award is as follows:--

7. Being aggrieved by the award passed by the learned Arbitrator dated 30.07.2010, in ARBP No. 60 OF 2005, the appellants moved the learned District Judge, Cuttack, in Arbitration Petition No. 229 of 2010, under Section 34 of the Act, for setting aside the award.

8. Learned District Judge, Cuttack, after considering the materials on record and examining the findings recorded by the learned Arbitrator, set aside the award with regard to grant of interest for the pre-award period amounting to Rs. 1,44,44,515/- and confirmed the award for payment of Rs. 71,13,110/- minus Rs. 62,589/-, with 18% interest from the date of the award, till final payment is made.

9. Learned Additional Standing Counsel appearing for the appellants has confined his challenge only in respect of claim item Nos. 4, 5 and 6 of the award. It was submitted that as regard claim item No. 4, which pertains to extra cost of dewatering, it was agreed in the contract that arrangement for dewatering from the working area would be at the cost of the Claimant-Contractor and therefore, they cannot claim any further cost for dewatering. It was submitted that after finalization of the tender, the detail drawings were made available from Central Water Commission and there were some modifications in the drawings earlier supplied to the Claimant-Contractor with the tender. However, as para-30 of the general specifications clearly specifies that the Contractor has to make his own arrangement for dewatering from the working area at his own cost, the claim for extra cost for dewatering is unreasonable, arbitrary and not tenable.

10. Coming to claim item No. 5, which relates to payment due towards fixation of Salitax Boards, learned counsel for the appellants submitted that during the time of execution of the contract work, it was decided by the Department to fix Salitax Boards instead of bituminous strips, to prevent possible harmful effect of water leakage as well as contraction and expansion in joint areas. Since the scope of work under Clause-32 of the General Conditions of Contract relating to "schedule

of quantities" was completely changed, it was decided to execute this item of work departmentally, through its own labour. Therefore, the claim made by the Contractor in respect of this item of work is not tenable.

11. As regard claim item No. 6, which relates to variation exceeding limits and payment due, learned counsel for the appellants submitted that the Claimant-Contractor had entered into a contract for a consolidated value of Rs. 5,30,92,823.00 and it was not an item-wise rate contract.

12. It was submitted that as per Clause-32 of the General Conditions of Contract, the rates quoted by the Contractor for the individual items shall apply for the quantities of work increased or decreased by not more than 30 percent for each of the items. Should the quantities of work actually involved under any item vary by more than 30 percent, the rate of such item of work shall be revised in accordance with the procedures prescribed for "extra items", under Clause-33 of the General conditions of Contract. The payment for the items will however, continued to be made at the original rate till the revised rate is decided. It was submitted that in the present case, as the extra item of work executed by the Claimant-Contractor did not vary by more than 30 percent, the claim made towards payment of revised rates is not maintainable.

13. Learned counsel for the appellants accordingly submitted that as the award in respect of the claim item Nos. 4, 5 and 6 has been passed by the learned Arbitrator in gross violation of the terms of the contract, the award is opposed to "public policy" and is therefore liable to be set aside. In this regard, learned counsel for the appellants has relied upon a decision of the apex Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., wherein the Hon'ble Court has held that if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered with under Section 34 of the Act. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such an award is opposed to "public policy" and is required to be adjudged void.

14. In response, learned counsel for the respondent-Contractor submitted that as the award passed by the learned Arbitrator is based on evidence on record, both oral and documentary and detailed findings have been recorded in respect of each items of claim, the same cannot be interfered with by the Court, unless the challenge comes within the ambit of Section 34(2) of the Act. In this regard, it is submitted that as the contentions raised by the appellants are all issues of fact, which the learned Arbitrator has decided on the basis of the evidence on record, the Courts have no right or authority to interdict an award on factual issues. In this regard, learned counsel for the respondent has relied upon the decisions of the apex Court in Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, and M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, .

15. Learned counsel for the respondent further submitted that as this Court does

not sit in appeal over the award of the learned Arbitrator by reassessing or re-appreciating the evidence, no interference is warranted, especially when no grounds have been made out to show that the challenge to the award falls within the ambit of Section 34(2) of the Act. In this regard, learned counsel for the respondent has relied upon three decisions of the apex Court in Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd., ; Kwaliti Manufacturing Corporation Vs. Central Warehousing Corporation, and Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran, .

16. On a perusal of the award in respect of claim item No. 4, it is seen that the Contractor-respondent had claimed Rs. 57,24,740/- towards charges for extra cost of dewatering during course of execution of the work due to revised design and drawing prepared by the Central Water Commission and accepted by the appellants. In this regard, the Chief Engineer to the Commissioner-cum-Secretary, Water Resources Department, vide letter dated 28.8.1998 had recommended for payment of Rs. 20,23,500/- towards extra cost of dewatering. Similar recommendations had also been made by the concerned Superintending Engineer and Executive Engineer in charge of the contract work.

17. Clause-33 of General Conditions of Contract, which relates to "extra items", stipulated that the Contractor shall be bound to execute the extra item of work as directed by the Engineer-in-charge. As there was no dispute that the Contractor had executed the extra item of work as per the instruction of the Engineer at the site, learned Arbitrator has proceeded to award an amount of Rs. 20,23,500/- towards extra cost of dewatering.

18. As regard claim item No. 5 relating to payment due towards fixation of Salitax Boards, learned Arbitrator has considered the materials on record, including the various communications between the parties, in coming to hold that there is no dispute with this item of work was to be executed by the Contractor and as the Contractor has undertaken the work of fixing the Salitax Boards to the tune of 2035 sqr. metre, he is entitled to Rs. 17,45,000/- for the same.

19. Coming to claim item No. 6, with regard to variation exceeding limit and payment due, learned Arbitrator has taken note of Clause-32 of the General Conditions of Contract, which provided that the "schedule of quantities" if increased or decreased by way of variation to the extent of more than 30 percent, the rate shall be revised and payment to be made at the revised rates in accordance with the procedure indicated for "extra items", under Clause-33. The rates for such extra items are to be determined by the Addl. Chief Engineer on the basis of actual observation and in consultation with the Contractor. On the basis of communication between the parties, including the letter of Chief Engineer to the Government, learned Arbitrator has come to find that the appellants had admitted in their pleadings about the extra items of work executed by the Contractor and in the absence of determination by the Addl. Chief Engineer with regard to the revised rate, learned Arbitrator considered it just and reasonable to award Rs. 15,50,000/- towards extra work executed by

the Contractor, keeping in view the escalated payments made on account of hike in wages.

20. The law is well settled that an award can be set aside only if the same comes within the ambit of Section 34(2) of the Act. In *Oil and Natural Gas Corporation Ltd. (supra)*, the Hon''ble Court has observed that the award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

"(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal."

21. It is now well settled that the Court, while considering the question whether an award passed by the Arbitrator should be set aside or not, does not examine the question as an appellate Court. While exercising the said power, the Court cannot re-appreciate the materials on the record for the purpose of recording a finding whether in the facts and circumstances of a particular case, the award in question could have been made. (See- *The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others*, .)

22. A similar view has been expressed by the apex Court in *B.V. Radha Krishna Vs. Sponge Iron India Ltd.*, , wherein it was observed:

"Bearing in mind the principles laid down by this Court in the above said cases, if we look into disposal of the matter by the High Court, it would be evident that the High Court has substituted its own view in place of the arbitrator's view as if it was dealing with an appeal. That is exactly what is forbidden by the decisions of this Court. Therefore, we have no hesitation to set aside the judgment of the High Court on this issue." 23. An error of law on the face of the award means that you can find in the award some legal proposition which is the basis of the award and which you can then say is erroneous. The Court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record for the purpose of finding out, whether or not the Arbitrator has committed an error of law. The Court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the Arbitrator had acted contrary to the bargain between the parties. If the view of the Arbitrator is a possible view, the award or the reasoning contained therein cannot be examined.

24. The apex Court in *P.R. Shah, Shares and Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd. and Others*, , has reiterated the legal position that a Court does not sit in appeal over the award of an Arbitrator by re-assessing or re-appreciating the evidence. An award can be challenged only on the grounds mentioned in Section 34(2) of the Act and in absence of any such ground, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

25. Keeping in view the legal position with regard to the scope of interference with an award of the Arbitrator, it is seen that in the present case, no material has been produced before this Court and no ground has been made out to show as to how the award is opposed to public policy or is patently illegal, so as to come within the ambit of Section 34(2) of the Act. The award reveals that the learned Arbitrator has recorded elaborate reasons in support of each of its findings, which are based on materials available on record. Moreover, it is not a case where the award is based on no evidence and therefore, the sufficiency of the evidence to accept a claim being within the exclusive jurisdiction of the Arbitrator to decide, no interference is warranted with regard to the merits of the award.

26. For the reasons as aforestated, I do not find any infirmity in the impugned order of the learned District Judge, Cuttack, dated 09.05.2012, passed under Section 34 of the Act, in Arbitration Petition No. 229 of 2010, so as to warrant any interference.

The appeal being devoid of merits, the same is accordingly dismissed. No costs.