
(2005) 07 OHC CK 0005
In the Orissa High Court
Case No : ARBA No. 33 of 2003

State of Orissa and Others	Vs	APPELLANT
Larsen and Toubro Ltd.		RESPONDENT

Date of Decision : 23-07-2005

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 13(5), 16(6), 34, 34(2)

Citation : AIR 2005 Ori 183 : (2005) 3 ARBLR 194 : (2005) 100 CLT 336

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : Additional Government Advocate, for the Appellant; S.K. Das, S. Swain, N.N. Mohapatra and S.R. Subhdi, for the Respondent

Final Decision : Dismissed

Judgement

L. Mohapatra, J.—This appeal is directed against the judgment dated 19.7.2003 passed by the Learned District Judge, Khurda at Bhubaneswar in Arbitration M.J.C. No. 131 of 2002 dismissing the application filed by the appellants u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").

2. The Government of Orissa entrusted the respondent the work of strengthening and widening of Sambalpur-Rourkela Road (00 Km. to 162.931 Km.) in three packages and the dispute arose in relation to Package No. S4 covered under Contract No. III/92-93/ABD/S4 dated 30.9.1992. The value of the contract was Rs. 41,86,46,497/- and the work was to be completed within 48 months from the date of commencement with a clause for extension of time under certain eventualities. The said agreement contained an arbitration clause vide Clause No. 67.3. The work commenced on 28.10.1992 and as per the terms of the agreement it was required to be completed by 27.10.1996. Extension of time was granted to the respondent for completion of work on undertaking that the respondent shall not claim any compensation for delay in completion of the work. The work was completed on 31.3.1997 and on 1.6.1997 the respondent issued a notice to the appellants claiming compensation for loss incurred by it on the

ground that the said appellants did not fulfil their part of obligations and committed breach of contract by providing defective drawings, inaccurate survey, delay in cutting and removing standing trees as well as acquisition of lands. The appellants rejected the claim and processed the final bill. The final bill was signed on 23.9.98 under protest and the respondent received a sum of Rs. 44,08,12,410/- without prejudice to its claim. On 2.11.1998 the respondent invoked Clause 67.3 of the agreement and gave notice to the appellant and appointed Sri Tathagat Roy as an Arbitrator from its side. As per the terms of the Arbitration clause the appellant nominated one Sri G. K. Behera as an Arbitrator from their side and the Ministry of Surface Transfer (Roads Wing), Government of India nominated Sri C. N. Ramdas as the Chairman of the Committee of Arbitrators. Before the Committee of Arbitrators claim petition was filed containing 16 items of claim. In course of hearing the claim Item No. 16 was withdrawn by the respondent. On consideration of materials placed before the Committee of Arbitrators, claim Item Nos. 2, 4, 11 and 15 were rejected and Claim Item No. 1 was allowed whereas in respect of other items of claims were partly allowed and a total sum of Rs. 4,06,65,696/- with pendente lite and future interest at the rate of 10% was granted.

3. Challenging the aforesaid award passed by the Committee of Arbitrators the appellants approached the Learned District Judge, Khurda at Bhubaneswar in an application u/s 34 of the Act. Before the Learned District Judge the award was challenged on the ground that the respondent having given an undertaking not to claim any compensation for delay in execution of the work, claim item No. 14 could not have been allowed by the Committee of Arbitrators. It was also contended that the award in respect of additional work under Claim Item Nos. 5 and 8 are hit under Clause 53.1, 53.2 and 53.3 of the agreement. This ground was also taken on the basis of the terms of the agreement that the respondent was required to give notice to the employer within 28 days after the event giving rise to the claims. The respondent took a stand that the undertaking not to claim compensation for delay in execution of the work was taken under duress and the same having been accepted by the Committee of Arbitrators there is no scope for the Court to interfere. The Learned District Judge on consideration of the rival contentions of both the parties, held that the award passed by the Committee of Arbitrators is not hit under Sub-section (2) of the Section 34 of the Act and accordingly dismissed the application.

4. Shri Debasis Das, Learned Additional Government Advocate appearing for the appellants challenged the award as well as the judgment passed by the Learned District Judge in respect of all items of claim. In para-4 of the impugned judgment it is observed by the Learned District Judge that Sri Das who was also appearing before the Learned District Judge though had raised several grounds in its application u/s 34 of the Act, most of them were dropped and were conceded. Controverting with the above, Learned counsel Sri Das appearing for the appellants submitted that he had never conceded any item of the claim and the observation made by the Court is not correct.

5. Considering the submission of Sri Das, I proceed to examine the grounds taken by the appellants in its application u/s 34 of the Act filed before the Learned District Judge. The grounds taken in the application u/s 34 of the Act are as follows ;

(1) For that, as per terms of the contract the arbitration proceeding ought to have been commenced under the Old Act, i.e., Indian Arbitration Act, 1940. In absence of any consent given by the petition-Employer the finding of the Learned Arbitration Tribunal that the same shall be governed under the Arbitration and Conciliation Act, 1996 is beyond the scope of reference as it does not fall within the terms of the agreement;

(2) For that, the limitation provided u/s 34 of the Act, clearly mentions that if a person is aggrieved by the award he is to make necessary application to set aside the same within a period of 90 days. In the instant case the Learned Arbitrator has grossly misconducted himself and in the proceeding by directing that the awarded amount shall be paid to the claimant within 45 days failing which the awarded amount will carry further simple interest @ 18% per annum. This direction is clearly in violation of principles of natural justice as well as it shows the bias attitude of the Learned Arbitration Tribunal;

(3) For that, the claimant having already given a written undertaking not to claim any compensation or damages for the extension of time to complete the work the claims and the finding in respect of those claims are opposed to public policy and the same is not sustainable in law;

(4) For that, as per the site visit report conducted by M/s. N. D. Lea International Ltd., who is the authorized consultant of Most (Roads Wing) to review the progress of work, it has been categorically found on several occasions that the delay on account of execution of the work was solely because of the laches and negligence on the part of claimant-respondent. The said site visit report though submitted before the Committee of Arbitrators as additional evidence on 11.10.2001 the Learned Arbitration Tribunal has failed to consider the same and appreciate the findings of the international consultant. The aforesaid report would clearly establish that the delay was exclusively attributable to the claimant. The Learned Committee of Arbitrators having not considered the same at all the entire award is vitiated, being in conflict with Public Policy;

(5) For that, the claimant having submitted no claim certificate several times during the course of execution of work for grant of extension of time, the claim on the said account is misconceived. The Learned Committee of Arbitrators have utterly failed to appreciate the said aspect of the matter and the award is therefore vitiated.

The first ground as mentioned above was not argued by the Learned Counsel for the appellant and accordingly the said ground need not be answered. The most important grounds are ground No. 3 to 5 wherein it is stated that the respondent having given written undertaking not to claim any compensation of damages for

extension of time to complete work, the Committee of Arbitrators could not have allowed any claim in respect of the said items. This ground relates to claim item No. 4. Under the aforesaid claim the respondent had prayed for compensation of Rs. 7,51,28,828/- towards extra cost incurred for the extended stay. The Committee of Arbitrators awarded a sum of Rs. 3,34,37,168/- in respect of the aforesaid claim. The Committee of Arbitrators after consideration of the documents placed before it observed that what clinches the issue is the fact that neither did the Engineer nor the consultant hold the claimant responsible for any part of the delay, nor did the appellants differ with this position at any time and insist on imposition of Liquidated Damages on the claimant-respondent. The Committee of Arbitrators also observed that in terms of the FIDIC conditions the Appellants would be liable for delay only under certain clauses. In interpreting Clause 42.2 (relating to delay in giving possession of site), it observed that the disturbance to the benchmarks and intersection points, and the consequent delay is sufficiently akin to delay in handing over of site so as to impose a similar liability on the appellants. On consideration of the documents, it further observed that the total length of extension finally taken by the claimants in 155 days and out of that it determined 82 days of delay to impose such liability, the remaining being chargeable to rain, bandhs, agitations etc. Accordingly for the delay of 82 days relating to giving possession of site for different reasons the Committee awarded a sum of Rs. 3,34,37,168.00. The only ground taken by the appellants in this regard is that time extension was granted on the undertaking by the claimant-respondent that they would not seek for compensation for the delay. In this respect as observed by the Committee of Arbitrators reference may be made to Clause 42.2 of the Agreement. The said clause provides as follows :

"If the contractor suffers delay and/or incurs costs from failure on the part of the Employer to give possession in accordance with the terms of Sub-clause 42.1, the Engineer shall, after consultation with the Employer and the Contractor determine :

- (a) any extension of time to which the Contractor is entitled Clause 44; and
- (b) the amount of such costs, which shall be added to the Contract Price, and shall notify the Contractor accordingly, with a copy to the Employer."

The respondent had produced documents before the Committee of Arbitrators to show that the decision in accordance with the terms of the Clause 42.1 of the agreement had not been given to it in time which resulted in delay in completion of work. Having taken note of the said documents, the Committee of Arbitrators found that under the aforesaid clause the respondent shall be entitled to such cost which shall be added to the contract price for the extended period. Accordingly, out of 155 days the Committee of Arbitrators found that the delay covering the eventuality of Clause 42.2 is 82 days and accordingly calculated compensation payable to the respondent as cost.

6. Section 34 of the Act lays down the grounds on which the Court can interfere

with an arbitral award. A question came up for consideration before the Apex Court in the case of Oil and Natural Gas Corporation Ltd. v. SAW Pipes Limited reported in 2003 (2) Arb.L.R. 5 and the Court observed as follows :

"A(1)The Court can set aside the arbitral award u/s 34(2) of the Act if the party making the application furnishes proof that:

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The Court may set aside the award :

(i) (a) If the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties;

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part-I of the Act.

(ii) If the arbitral proceeding was not in accordance with :

(a) the agreement of the parties; or

(b) failing such agreement, the arbitral procedure was not in accordance with Part-1 of the Act. However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part-1 of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(iii) 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 India law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal; (3) It could be challenged :

(a) as provided u/s 13(5); and

(b) Section 16(6) of the Act."

7. Now the contention of the Learned Counsel for the appellant needs to be examined in the light of the guidelines laid down by the Apex Court in the aforesaid case. In this connection, the observation made by the Committee of Arbitrators in respect of the Claim Item No. 14 is required to be scrutinized. Referring to Clause 42.2 of the agreement as quoted earlier the Committee of Arbitrators observed that under the aforesaid Clause the claimant-respondent is entitled to cost. While dealing with the question raised before this Court with regard to submission of No-claim certificate the Committee of Arbitrators have also observed that the claimant while asking for extension of time had come with No Claim Certificate and at a later stage they stated that they had given such undertaking under duress. Apart from the above the Committee of Arbitrators also observed that the claimant had signed the final bill under protest. The very fact that the claimant has signed the final bill under protest is an indication that the claimant never undertook to give up its claim for the extended stay. So far as this item of claim is concerned, the only objection raised is that the claimant had given a No Claim Certificate for the extended stay which is not only contrary to Clause 42.2 of the Agreement but also not acceptable because of the fact that the final bill was signed by the claimant-contractor under protest. The Committee of Arbitrators have taken note of these facts and held that the claimant-respondent is entitled to cost under the said item of claim. While examining the finding of the Committee of Arbitrators vis-a-vis the guidelines given by the Apex Court in the case of ONGC v. Saw Pipes Ltd. (supra), I find that such a ground is not available to be taken or entertained in a petition u/s 34 of the Act. The Committee of Arbitrators have acted within the parameters of the conditions of the Contract and having not traveled beyond the scope of the contract there is no reason for this Court to interfere with the award in respect of this item of claim. Learned Counsel appearing for the appellants had cited some more decisions with regard to jurisdiction of this Court in interfering with an award and on examination of the same I find that no different view has been taken than what has been laid down by the Apex Court in the aforesaid decision. Therefore, I have not referred to those decisions in the judgment.

On perusal of the award it further appears that in terms of Claim Item No. 14 though the claimant-respondent had claimed cost for extended stay of 155 days the Committee of Arbitrators allowed cost in respect of 82 days and detailed calculation in arriving at the figure has been given by the Committee of Arbitrators in the annexures attached to the award. Therefore it cannot be said that the Committee of Arbitrators while allowing this claim in part had not applied their mind to the facts of the case. It appears that the Committee of Arbitrators not only have given reasons in the award in respect of Claim Item No. 14 but also have given detailed calculation in annexures attached to the award supporting their finding. I am, therefore, of the view that no ground having been

made to interfere with the findings of the Committee of Arbitrators in respect of Claim Item No. 14, there is hardly any scope for this Court to interfere.

8. Shri Das, Learned Counsel appearing on behalf of the appellants also challenged the award on the ground that as per terms of the contract, the respondent was required to give notice to the employer within 28 days of an event giving rise to a claim. No such notice having been given, the claim is not entertainable. In this connection, the Learned Counsel for the respondent drew attention of the Court to several letters addressed to the employer and the consultant written by the claimant regarding the claims and such letters having been forwarded within the stipulated time, the ground also fails.

9. Next ground on which Learned Counsel for the appellants challenged the award is that though the statute provides for 90 days for filing application u/s 34 of the Act the Committee of Arbitrators have misconducted by directing the appellants to pay award amount within 45 days, failing which it shall carry further simple interest @ 18% per annum. True it is u/s 34 of the Act an application for setting aside an award may be made within three months from the date of receipt of the award. It appears from the award that pendente lite interest @ 18% per annum has been allowed by the Committee of Arbitrators. In the concluding paragraph of the award the Committee of Arbitrators have directed that the claimant be paid the award amount within 45 days failing which it shall carry further simple interest @ 18% per annum till the date of payment. On this score alone it cannot be said that the Committee of Arbitrators have misconducted themselves. This aspect can be corrected and therefore it is directed that further simple interest @ 18% per annum shall be payable with effect from expiry of three months from the date of receipt of the award by the appellant.

10. With the above modification, the appeal stands dismissed.