

(1996) 10 OHC CK 0008
In the Orissa High Court
Case No : Misc. Appeal No. 466 of 1994

State of Orissa

APPELLANT

Vs

Birat Chandra Dagara

RESPONDENT

Date of Decision : 01-10-1996

Acts Referred:

Arbitration Act, 1940 — Section 30

Citation : AIR 1997 Ori 142 : (1997) 83 CLT 182

Hon'ble Judges : Pradipta Ray, J

Bench : Single Bench

Advocate : Additional Government Advocate, for the Appellant; R.K. Rath, B.R. Sarangi and B. Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

Pradipta Ray, J.—The present appeal has been filed at the instance of State of Orissa against the judgment and order dismissing its objection against the award passed by the Arbitration Tribunal, Orissa in Arbitration Case No. 30-C of 1985.

2. The respondent contractor obtained the work of widening a portion of N. II.-42 on the basis of the agreement No. 104-F2-1980-81 at an agreed cost of Rs. 56,86,233/-. The contractor was to complete the work within 24 calendar months from the date of commencement of the work. The work commenced on March 25, 1981. Contractor could not progress with the work in accordance with the specified time schedule. He submitted revised programme for execution of the work, but he could not adhere even to the revised schedule. Ultimately contractor abandoned the work in an incomplete state after execution of work worth Rs. 13,30,741/-. Both sides have accused each other for being responsible for delay in execution of the work. As the respondent-contractor left the work incomplete, the contract was rescinded by the appellant after giving a show cause notice. Appellant-State also levied compensation for inability to execute the assigned work in accordance with the agreed time schedule.

3. The appellant-State of Orissa stated that from the very inception the contractor failed to show desired progress. In spite of reminders, he could not improve his performance and left the work incomplete. The balance work had to be re-tendered and State had to incur an extra expenditure of Rs. 10,73,000/- for completion of the work. A penalty of Rs. 10,73,000/- was imposed on the contractor. In spite of notice contractor did not attend final measurement. On the basis of the measurement recorded by the Department and after adjustment of penalty net value of the final bill worked out to be a negative amount of Rs. 236/-.

4. At the instance of the Respondent-Contractor the dispute was referred to the Arbitration Tribunal in accordance with the arbitration Clause contained in the agreement. Respondent-contractor claimed that failure to make necessary land available, negligence to give lay out of the culverts at proper time, non-supply of required number of road rollers and unauthorised deductions from the running bills stood in the way of executing the work with required speed. Although the State Government increased minimum wage of the labourers, they refused to bear extra cost on account of such enhancement of wages. The Contractor has claimed that as he could not be held responsible in any way or manner, he was entitled to get the value of the work executed by him.

5. Before the Arbitration Tribunal the State Government placed the entire responsibility on the Contractor and supported deductions from running bills, imposition of penalty and realisation of the extra expenditure the State had to incur because of failure on the part of the Contractor-Respondent to complete the work.

6. The basic dispute between the parties was who was responsible for the delay in execution of the work. Upon a consideration of the materials placed before it, Tribunal came to a finding that the State Government was mainly responsible for the delay. The Tribunal recorded that out of 84.28 acres of private land needed for executing the work, only 27.18 acres were delivered by the claimant during the period from 1981 up to the time when the Contractor abandoned the work. For non-availability of land, the Contractor was not allowed to construct at least 7 numbers of culverts in accordance with the agreement. The Tribunal also found that unauthorised deductions from the running bills crippled the contractor financially. Tribunal also found that refusal to allow additional amount for increase in the wages in spite of specific stipulation in the agreement rendered execution (sic) uneconomic and forced the Contractor to leave the work (sic) Tribunal held the State of Orissa responsible for the (sic) it disallowed withholding of running bills, imposition of penalty and realisation of extra amount spent by the State. Tribunal considered various claims under different heads and ultimately found that the Contractor was entitled to receive a sum of Rs. 3,09,689/- from the State.

7. The said award was sent to the Court of Civil Judge (Sr. Division), Bhubaneswar to make it a rule of the Court. The State filed objection under

Sections 30 & 33 of the Arbitration Act and prayed for setting aside the award. The Court below dismissed the said objection holding, inter alia, that the allegations of misconduct against the Tribunal were without any basis; that while considering the objection under Sections 30 and 33 of the Arbitration An, the Court cannot act as an Appellate Court and that Tribunal answered all the issues after considering the material facts and giving cogent reasons therefor.

8. In this appeal also learned Additional Standing Counsel has assailed the Tribunal's finding holding the appellant responsible for the delay. Although it has been submitted that Tribunal committed error in holding that the lands were not made available, it appears, no material was placed either in the court below or before this Court to refute the said finding of the Tribunal. In the objection before the court below, the appellant did not assert that land was available, but contended that disproportionate progress was not on account of failure to acquire lands. Nothing was placed before the Court below to show that the Contractor could not even execute possible work on the lands made available. The objection was vague and without any supporting reasons or material.

9. The objections raised by the appellant in the Court below were all founded upon the assertion that State had no responsibility and it duly performed its part at appropriate time. Nothing has been shown either in the Court below or in this Court that the Tribunal did not consider any material evidence having bearing on the findings recorded by the Tribunal or that there was any ex facie error vitiating the findings of the Tribunal.

10. It is well settled that the scope and jurisdiction of the Court while considering an objection Under Sections 30 and 33 of the Arbitration Act, is very limited. It has been observed in *Hindustan Tea Co. Vs. K. Sashikant Co. and Another*, (Para 2) :--

"The award is reasoned one. The objections which have been raised against the award are such that they cannot indeed be taken into consideration within the limited ambit of challenge admissible under the Scheme of the Arbitration Act. Under the law, the Arbitrator is made the final arbiter of the dispute between the parties. The Award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion or has failed to appreciate facts."

Similar view has been re-stated in *Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another*, . It has been observed (Para 4) :--

"Appraisalment of evidence by the arbitrator is ordinarily never a matter which the Court questions and considers. The parties have selected their own forum and the deciding forum must be conceded the power of appraisalment of the evidence. In the instant case, there was no evidence of violation of any principle of natural justice. The arbitrator in our opinion, is the sole judge of the quality as well as quantity of evidence and it will not be for this court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence the Court might have arrived at a different conclusion

than the one arrived at by the arbitrator but that by itself is no ground in our view for setting aside the award of an arbitrator."

In *Puri Construction Pvt. Ltd. Vs. Union of India (UOI)*, the scope of Sections 30 and 33 has been explained. It has been held :--

"..... Besides, a Court while examining the objections taken to an award filed by an Arbitrator is not required to examine the correctness of the claim on merits

xxx xxx xxx But this does not lead to the conclusion that for upholding an award the Court has to examine the merits of the award with reference to the materials produced before the Arbitrator. The Court cannot sit in appeal over the views of the Arbitrator by re-examining and re-assessing the materials."

The same view has again been reiterated in *The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others*, in the following words (Para 10) :--

"It is well known that the Court while considering the question whether the award should be set aside does not examine that question as an Appellate Court. While exercising the said power, the Court cannot re-appreciate all 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."

11. Learned Additional Standing Counsel on the other hand has referred to the decisions reported in 2 1991 C LT 749 (*Governor of Orissa v. Hindusthan Construction Co. Ltd*) LR 1987 Orissa 469 (*State of Orissa v. Dandasi Sahoo*), *Associated Engineering Co. Vs. Government of Andhra Pradesh* and another, in support of his submission that if the finding is perverse or there is no consideration of a material document or there is any error apparent on the face of the records or the Arbitrator travels outside the bounds of the contract, the award is liable to be set aside. There cannot be any dispute regarding legal propositions as put forward on behalf of the appellant-State. But there is no material to show that the impugned award was vitiated by any of the reasons as submitted on behalf of the appellant.

12. It has been submitted on behalf of the appellant that in due exercise of State's rights as contained in the agreement, the penalty was imposed, compensation was realised and security was forfeited. No doubt, agreement contained such clauses and conferred such power on the State. But those powers could be exercised only when the contractor was found to be responsible for delay in execution of the work. In the present case, the Tribunal upon consideration of the materials on record has found that the contractor could not complete the work because of failure on the part of the State to make required land available and because of arbitrary and unauthorised deductions of various amounts from the running bills. In view of such finding it cannot be accepted that there was any circumstances warranting invocation of clauses authorising the appellant to claim compensation to impose penalty and to forfeit the security.

13. Learned Additional Standing Counsel has questioned the legality and/or propriety of the finding that the State of Orissa was liable to allow escalation due to increase in wages by the State Government itself. According to him, Clause 33 of the agreement did not entitle the claimant to get compensation owing to statutory rise in wages of labour. The Tribunal has considered Clause 33 and interpreted the same to make the State liable to compensate the increase of cost due to enhancement of wages. It has been calculated by the Tribunal that due to wage rise there was an average rise of rates by 25% over pre-revised rates and thereby there was an increase of wage bill to the extent of 10% of the value of work done after wage rise. Clause 33 described as fair wage clause made it compulsory for the contractor to pay such wages as determined from time to time by the State. Compulsive nature of the clause necessarily implied an obligation on the part of the Department to compensate the increase in expenditure due to such wage rise. It is well known that a contractor submits its tender upon calculation of various costs including the cost of labour component. The entire agreement will be rendered uneconomic from the contractor's point of view if he is compelled to bear the burden of increase of wages over which he has no control. The extent of increase in the present case has been calculated and assessed by the Tribunal. In the circumstances, the construction of Clause 33 as made by the Tribunal cannot be said to be absurd or unreasonable.

14. Moreover, the Supreme Court in " Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, has observed:--

"Once the rates became irrelevant on account of circumstances beyond the control of the contractor it was open to the contractor to make a claim for compensation."

Approving the view taken in Tarapore & Co.'s case the Supreme Court in Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, has laid down that if there is no negative clause prohibiting any claim on account of price escalation the contractors are normally entitled to claim extra amount to compensate the extra expenditure due to cost escalation. It has been observed in the decision of Continental Construction Ltd. (para 10):--

"The question about specific reference on a question of law was examined by this Court recently in the case of Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, . There it was observed that if the agreed fact situation, on the basis of which agreement was entered into, cases to exist, the agreement to that extent would become otiose. If rate initially quoted by the contractor became irrelevant due to subsequent price escalation, it was held in that case that contractor's claim for compensation for the excess expenditure incurred due to the price rise could not be turned down on ground of absence of price escalation clause in that regard in the contract."

15. It has been held in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, that if the arbitrator remains confined to the parameters of

the contract and construes the provisions of the contract, the award cannot be interfered with unless the reasons given discloses an error apparent on the face of it. As already stated, in the present case the Tribunal has construed Clause 33 of the agreement and its construction cannot be held to be absurd or unreasonable. Accordingly it is not possible to accept the submission of the Additional Standing Council in this regard.

16. For the foregoing reasons, this Court does not find any illegality or infirmity in the impugned judgment and accordingly the appeal is dismissed. No order as to costs.

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