

(2009) 04 PAT CK 0021
In the Patna High Court
Case No : M.A. No. 344 of 2005

Union of India (UOI) and Others

APPELLANT

Vs

Trimurti Enterprises

RESPONDENT

Date of Decision : 06-04-2009

Acts Referred:

Citation : (2009) 04 PAT CK 0021

Final Decision : Allowed

Judgement

Mihir Kumar Jha, J.—Heard counsel for the Appellant and counsel for the Respondents.

2. This appeal is directed against the order dated 12.5.2005 in Misc. Case No. 11 of 2003 whereby and whereunder an arbitration award dated 23.8.2003 rejecting the claim of the contractor Respondent No. 1 and allowing the counter claim of the Appellant Railways by a Board of Arbitrators has been set aside with a consequential direction to the Appellants to pay a profit amount of contract work at the rate of 10% on the entire contract amount of Rs. 1,09,20,000/- with interest thereon with effect from 1.1.2008 and the Appellants were further directed to refund the earnest money and security money with a compound interest from the date of deposit to the date of its payment within a period of three months.

3. The facts which are not in dispute is that the Appellant-railway authorities had awarded the contract to the Respondent-contractor for manufacture, supply and loading of machine crushed tract ballast as per the specification of railway from railway quarry, Jamalpur for a period of one year from 1.1.1997 to 31.12.1997 in terms of the tender notice" dated 11.10.1996. The work order was issued by the Appellant-railway to the Respondent-contractor on 31.12.1996 for value of Rs. 1,09,20,000/- and the Respondent-contractor had deposited the earnest money of Rs. 50,000/- as also security money of Rs. 2,50,000/- for execution of the work whereafter a contract agreement No. DRM /129 dated 23.9.1997 was executed between the parties for the aforesaid work of manufacture, supply and

loading of machine crushed track ballast. It appears that the said contract however could not be performed and/or completed by the Respondent-contractor and a dispute arose on this very score between the parties in which the claim of the contractor was that since the mining authorities and the authorized authorities did not permit the contractor from taking up the operation on account of the expiry of lease of the railway on 21.6.1993 and the area being forest area protected under the Forest Act. The railway, however had claimed that there was no such impediment on the part of the contractor and that the contractor had failed to execute the work which was ultimately got completed by the railway by making alternative arrangement. The contractor, thereafter, had filed a writ application in this Court being CWJC No. 3625 of 1997 (Phuleshwar Yadav v. Union of India and Ors.) wherein this Court had by an order dated 26.7.1999 made an observation that the Petitioner was at liberty to invoke the arbitration clause under the agreement in respect of his claim against the railway. It appears that soon thereafter the Petitioner had filed a request case u/s 11 of the Arbitration and Conciliation Act being Request Case No. 46 of 1999 which was disposed of by recording the submission of the parties i.e. the contractor and railway that the three Arbitrators in terms of the agreement were appointed and as such, the said Request Case No. 46 of 1999 was held to have been become infructuous and was disposed of.

4. It is very significant to note here that out of three Arbitrators, two of them namely P.N. Pandey was the nominee of the contractor whereas Mr. A.P. Singh was the nominee of the railway and as per the stipulation in the agreement, the presiding arbitrator was appointed with the consent of the two Arbitrators and Mr. D.K. Dhusia was such presiding arbitrator. The three Arbitrators of course were the officers of the railway which was well permissible within the terms of the agreement. This Board of Arbitrators is said to have contradicted the proceedings and the contractor during the pendency of such arbitration proceeding on finding that there was undue delay in the disposal of the arbitration proceeding had filed a request case u/s 11 of the Act before this Court being Request Case No. 6 of 2003 but the said request case was not pressed by the contractor as is recorded in the order of this Court dated 25.4.2003 on the assurance given by the counsel for the railway that the arbitration proceeding shall be concluded within a period of three months. The Arbitrators thereafter are said to have given their award on 23.7.2003 wherein they had altogether rejected the claim of the contractor to the tune of Rs. 3,86,17,000/- and had allowed the counter claim of the railway of Rs. 2,32,59,600/- as against total claim of Rs. 4,10,79,267/-. It was this award dated 23.7.2003 which became the subject matter of the miscellaneous case before the Sub-Judge-I, Munger vide Civil Misc. (Arbitration) Cetee No. 11 of 2003 filed on 23.8.2003. Since the contractor had made all the three Arbitrators parties by way of opposite party Nos. 1, 2 & 3 in addition to the authorities of the railways as opposite party Nos. 4 to 9. Two separate rejoinders were filed controverting the allegations made by the Petitioner.

5. During pendency of the aforesaid miscellaneous case, the contractor-applicant had filed an application on 1.9.2003 which being very relevant for the best of this appeal needs to be quoted in-extenso:

In The Court of learned Sub-Judge I, Munger.

Civil Misc. (Arbitration) Case No. 11/2003

Trimurti Enterprises through Fuleshwar Yadav ... Applicant v. D.K. Dhusia and Others ...O.P.

Humble petition on behalf of applicant, most respectfully

Sheweth:

(1) That the Petitioner has filed a petition on 23.8.03 for setting aside of arbitral award on 23.8.2003 which has been admitted on 28.8.03.

(2) That three persons namely:

(i) D.K. Dhusia, Dy. F.A. & CAE. E.C. Railway, Hajipur.

(ii) Sri P.N. Pandey, Dy. COS/ DST/GR Kp, North Eastern Railway, Gorakhpur.

(iii) Sri A.P. Singh, Dy. COM/ FOIS/GKP.

North Eastern Railway, Gorakhpur, were appointed as arbiters so all the relevant papers regarding the agreements containing the deed of agreements and all the relevant documents and papers regarding the contract separately to all the three Arbitrators and Arbitrators have passed the award on this basis.

(3) That in this petition for setting aside, regarding those documents have been taken in this petition dt. 23.8.03. So it will be essential to determine the controversies between the parties on the basis of those documents.

(4) That the learned Arbitrators have passed the award quite illegally and arbitrarily.

(5) That the passing of award for counter claim has been illegally passed and which beyond the jurisdiction of Arbitrators. (6) That all the Arbitrators are officials and/or authorities of the Railway Departments. So there is every probability that the Arbitrators may introduce some facts in favour of the Railway which will seriously cause injury to the ease and cause of the Petitioner.

(7) That the very fact that the Railway Authorities without making the award for counter claim absolute began to- take steps for realization of the amount of counter claim by circulating the letters to stop the payment of payable amount to the Petitioner illegally.

(8) That due to illegal action of Railway authorities has stopped the payment those amount which will be adjusted against the counter claim.

(9) That the aforesaid action has effected the completion of others work taken by

the Petitioner in that department.

(10) That to determine all the grounds raised in the petition dated 23.8.03, the documents mentioned at the foot of the petition be called for from the Arbitrators named against those papers and documents.

Name and description of the documents.

From whom the same called for

(a) Entire record of arbitration proceeding from beginning to end.

(a) Sri D.K. Dhusia, Dy. FA & CAO, E.C. Rly., Hajipur.

(b) Sri P.N. Pandey, Dy. COS/DST/GKP, North Eastern Rly., GKP.

(c) Sri A. P. Singh, Dy. COM/FOIS/GKP, North Eastern Rly., GKP.

It is, therefore, prayed, that your honour may be pleased to call for the entire record of the arbitration proceeding from beginning to end from abovenamed Arbitrators.

And for which act of justice and kindness the Petitioner shall every pray

Filed through Sd/- Subodh Kr. Yadav Advocate 1.9.03

6. On the said application, an order was passed on 11.3.2004 by the court below which reads as follows:

7. It, however appears that the records of the Arbitrators as directed for producing was not filed before the court below and thereafter the court had commenced hearing of the miscellaneous case and had taken oral and documentary evidence of the applicant-contractor who had examined as many as six witnesses and produced as many as sixteen documentary evidences. On the other hand, the railway authorities had examined only two witnesses.

8. The impugned judgment thereafter was passed by the court below and only two paragraphs being paragraph Nos. 6 & 16 being relevant is quoted hereinbelow:

6. I have heard the learned Counsel for both sides and perused the oral and documentary evidence adduced on behalf of the applicant and the evidence of two witnesses examined on behalf of the O.Ps. Not even a single document has been proved on behalf of the opposite parties. The entire case of the O.Ps. has to be decided on the oral evidence of his two witnesses who are not the O. Ps. themselves. Also perused the case record It is most unfortunate upon the part of opposite first party of this case i.e. the three Arbitrators that they could not produce the original case Record of Arbitration Proceeding in spite of specific direction for the same of the court on 11.3.2004 on the petition of the learned Counsel for the Arbitrators as well as the Railway had also not raised any objection in calling for the Record of Arbitration Proceeding being involved in this

case and had assured to file the same in court. Requisition of the court for the Record of Arbitration Proceeding was sent to all the three Arbitrators separately through Requisition Nos. 12, 13 and 14 dated 16.4.2004 whose learned Counsel was present at the time of " order and has participated in the entire bearing of the case but the Arbitrators could not produce the Record of Arbitration Proceeding which was the deciding factor of the case to show that actually the Arbitration Proceeding has commenced in legal and proper manner and non-production of the record show that there is something wrong in the case Record of Arbitration Proceeding and due to that itself the same has not been filed in this case. Our Lordship of the Hon'ble Court has directed to expedite the trial of this case through the order dated 21.9.2004 passed in M.A. Case No. 379 of 2003 and this Court had no option but to decide this case without the case Record of Arbitration Proceeding which is under challenge in this case and the learned Counsel for this Arbitrators also could not taken any step to file the said case Record of Arbitration Proceeding to the reasons the best known to him. In my opinion the Arbitration Award passed by the opposite party Nos. 1 to 3 is liable to be set aside on the sole ground of non-filing of the case Record of Arbitration Proceeding by them in spite of specific direction of the court. The act of the Arbitrators and the D. Ps. also seems to be arbitrary from the fact that the applicant had to move thrice to the Hon'ble Patna High Court to get his dispute decided even when there was Arbitration Clause in the contract itself.

16. Considering the afore discussed facts and the evidence of the case, I find that the learned Arbitrators i.e. opposite-party Nos. 1 to 3 have not passed the Arbitration Award after complying the legal formalities for the same and due to that itself have not produced the record of the same before the court in spite of specific direction for the same and adverse inference of the same has to be drawn and the entire Arbitration Proceeding and the Award are liable to be set aside. From the facts of the both sides and the evidence adduced by them as discussed above, it is also find that the contract work of Rs. 1,09,20,000/- instructed to the applicant of this case by Railway was not completed by him due to fault of the Railway authority as the applicant had commenced and done some portion of the contract work which was stopped by the officials of Forest Department as the lease of so-called Railway Quarry of the opposite party Nos. 4 to 9 being involved in this case had expired in the year 1993 itself and the Railway had given the contract work for the same to the applicant in the year 1996-97 without obtaining the fresh lease for the same. It has also been find that the applicant was not at fault in completing the contract work who had spent a lot in performing the part of the contract which cannot be assessed by this Court but it much is quite just that the applicant is entitled for the profit of the contract work @ 1,09,20,000/- with compound interest upon the same at the rate specified by the Arbitrators in their Award against the applicant's upon the counter claim of Railway from the date of completion of the contract i.e. since after 31.12.1997 as he had made ready the-capital to be invested in the contract and had also performed the part of the contract which could not be completed

due to fault of Railway. It is also find that the applicant is entitled for the refund of his Earnest Money of Rs. 50,000/- and the security money of Rs. 2,50,000/- from Railway i.e. opposite party Nos. 4 to 9 with compound interest upon the same since the date of deposit of the same at the rate as has been imposed by the Arbitrators upon the counter claim of Railway in their Award. It is also find that the counter claim of Railway is quite wrong and illegal as the contract work could not be completed by the applicant due to the fault of the Railway authorities itself and also due to legal complication upon the site of the spot of contract work being suppressed by the authorities of Railway at the time of contract and not due to fault of the applicant. It is also find that this Court cannot assess and pass order in favour of the applicant upon other claims made by him before Railway vide Ext.-15 total amounting to Rs. 3,86,17,000/- except the amount of profit and interest as discussed above.

9. Counsel for the railway assailing the aforesaid findings would submit that in view of the limited scope u/s 34 of the Act, the court below had committed serious and manifest error in setting aside the award of the Board of Arbitrators only on the ground of non-production of the records of the arbitration proceedings. He would further submit that even if the court below had reasons to hold that there were some inherent flaw in the arbitration award, all that in such a case could have been done was to remit the matter back for reconsideration by the Board of Arbitrators instead of making its own exercise by looking into the oral and documentary evidence afresh by way of holding a de novo trial for the purposes of examining the merits of the award.

10. Counsel for the Respondent on the other hand would submit that the recourse adopted by the court below in the given case when the Arbitrators had failed to produce the original records of the arbitration proceedings cannot be faulted with and the appreciation of evidence for the purpose of allowing the claim of the applicant-contractor would be well within the scope of Section 34 of the Act, inasmuch as, such oral and documentary evidence were by way of "proof in terms of Section 34 (2) (a) of the Act.

11. Having given my anxious consideration to the aforementioned submissions as also the materials available on record including the records which were available before the court below, I am of the view that the court below has really expanded the scope of Section 34 of the Act by relying the parties to laid oral and documentary evidence. In my opinion, the application u/s 34 for setting aside of an award would not frame adducing of fresh oral evidence and in fact, the parties would also not be allowed to file fresh document or raise a new plea for the first time before the court. Section 34 of the Act would at best admit of a situation of looking into the documents which were already filed and considered by the Arbitrator.

12. Judged in this background, when this Court would find that the award itself refers to a large number of documents and in fact the applicant-arbitrator himself had produced not only the list of documents filed before the arbitrator but also

those documents before the court, a decision in respect of setting aside the award have to be passed by considering those very documents in the light of the grounds taken by the applicant in his application u/s 34 of the Act. If the court in course of deciding the application u/s 34 of the Act would start de novo trial for examining the reasons in the award, that would simply frustrate the object of the Arbitration Act. In this context, one must look to the scope and jurisdiction of the court u/s 34 of the Act where the expression "only if" in Section 34 (2) literally curtails or whittle down the power of the court to set aside the award on specified grounds only. Section 34 (2) of the Act reads as follows:

34 (2) . An arbitral award may be set aside by the Court only if:- (a) 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:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

(underlining for emphasis)

13. The expression "only if" in Section 34 (2) of the Act in fact has already been held by the Apex Court to mean and qualify that an award can be set aside only on the ground available in the statute. Reference in this connection may be made to the judgment of the Apex Court in the case of Food Corporation of India Vs. M/s. Veshno Rice Millers, and also in the case of Renusagar Power Co. Ltd. Vs. General Electric Co., and in the case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, wherein the Apex Court had gone to hold that under the 1996 Act, the ground of challenge to an award are very limited and an award can be challenged only in terms of Sections 12, 13, 16 & 34 of the Act. From reading of Section 34 of the Act, in fact, it is absolutely clear that the arbitral award is not

liable to be set aside on the ground that either on fact or in law it is erroneous and the court is entitled to set aside the award only if grounds mentioned in Sub-Section 2 of Section 34 of the Act read with the grounds stated in Section 13 and Section 16 of the Act are proved to its satisfaction by the authority making application for setting aside the award. The jurisdiction of the court is limited as expressly indicated in Section 34 of the Apt.

14. As a matter of fact, the scope of Section 34 of the Act has been recently decided by the Apex Court in the case of Delhi Development Authority Vs. R.S. Sharma and Co., New Delhi, where the Apex Court after making review of its earlier decision in the case of Grid Corporation of Orissa Ltd. and Another Vs. Balasore Technical School, in the case of General Manager Northern Railways and Another Vs. Sarvesh Chopra, in the case of State of Rajasthan Vs. Nav Bharat Construction Company, and in the case of Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation, , has laid down, the scope of Section 34 in the following terms:

21. From the above decisions, the following principles emerge:

(a) An award, which is (i) contrary to substantive provisions of law; or (ii) the provisions of the Arbitration and Conciliation Act, 1996; or (iii) against the terms of the respective contract; or (iv) patently illegal; or (v) prejudicial to the rights of the parties; is open to interference by the court u/s 34 (2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India?.

15. In the light of the aforementioned principles and statutory provisions particularly Section 34 (2) of the Act, if the facts and reasonings of the impugned judgment "is examined, it would be found that the court below has set aside the award only on the ground of non-production of the records of the arbitral tribunal before it. I am afraid that cannot be the sole ground for setting aside the award specially when the court below has not come to a conclusion that the Arbitrators had misconducted themselves or had committed any fatal infirmity in course of arbitration proceedings. In fact, the application of the applicant-contractor dated 1.9.2003 for summoning the records of the arbitration proceeding which was allowed by the court below by an order dated 11.3.2004 itself did not say a word about the Arbitrators misconducting themselves in course of proceedings. This Court would fail to understand the logic of the applicant-contractor in insisting for production of such records of arbitration proceeding when he himself had not only filed a copy of the award but also almost all the documents which were

either placed by it before the arbitrator or were taken into consideration by the arbitrator. It has to be noted that the applicant-contractor had exhibited the list of documents by way of Exhibit-14 before the court below which went to show that fifteen documents in all were filed before the Board of Arbitrators on 14.7.2003 in course of arbitration proceedings and all these documents were also filed by the applicant before the court below which as quoted above have been marked as Exhibits-1 to 16. In that view of the matter, non-production of the records of the arbitration proceeding by itself could not have become fatal and at least on that ground the award could not have been set aside.

16. The impugned order in fact cannot be sustained on yet another ground namely that the court below has not even looked into, much less, analyzed any of the reasons and the findings given in the award by the Board of Arbitrators though such an award was on record and had been assailed by the applicant-contractor. It has to be noted that the Arbitrators had given as many as 11 grounds for holding that the claim of the contractor was invalid and unjustified and the court below has not even touched one of them for coming to its conclusion that such award was vitiated. In fact, the court below as noted above has set aside the award only on the ground of non-production of the records of the arbitration proceeding. This Court, however, has analyzed such reasons in the award of the Board of Arbitrators which for the sake of clarify is quoted hereinbelow:

The claim of claimants Sri Phuleshwar Yadav, Proprietor of M/s Trimurti Enterprises, Munger is neither valid contractually nor justified and does not hold good as:

(I) Inspection of site at Jamalpur Railway Old Quarry revealed that no work had been carried out for installation of Crusher Machine (Fixed) . The claimants pointed out that they had arranged mobile crusher machine newly purchased from Pakur area for the above contract and as the work could not be performed because of objection raised by Forest and Police authorities, therefore, the mobile crusher machine had to be shifted to another site of the claimants. Both the Arbitrators visited the site where the mobile crusher machine was shifted, A scrap of an incomplete mobile crusher machine was found with worn out tyres (condition of tyre indicate exhaustive usage long time back) . As such, claim of claimants of purchasing of new mobile crusher machine for this contract and since then keeping it idle at the other site is not acceptable. Moreover, laborers & village people available at site were also questioned and they confirmed that in the area of Railway Old Quarry no Crusher Machine fixed or mobile has ever been seen.

(II) The claim of the claimants to have performed work of extracting/training out 50,000 cum, of boulder for crushing purpose for ballast is also not tenable as the site for crusher machine and space on either side cannot accommodate this amount of boulders at a time.

(III) Letter No. W/362/5/JMP (RQ) / 96-97/W-3 dated 1.1.97 from General Manager (Engineering) to M/s Trimurti Enterprises informing about acceptance of tender clearly stated in Para-4 for supply of only 5% of the contracted quantity in the first quarter. Matching amount of boulder was to be extracted/ trained out in the first quarter whereas the claimants claim to have extracted 50,000 cubic metre of boulder almost sufficient to meet the whole contract obligation of the year of the contract. Thus, if at all such activity was done it was against contractual stipulation and impossible also as space available was restricted and congesting it with boulders would have added to congestion to limit crushing activity and stacking of ballast if all this was done.

(IV) Claimants have alleged that the Respondents did not apprise the claimants about expiry of lease, invited tenders, accepted the tender of the claimants and executed agreement for the said work. The claimants unaware of the fact started the activity and made huge investments for which the claim has been preferred. Clause 15 of the agreement says "The tenderers must satisfy himself/themselves thoroughly about the site of work and the local conditions before submitting his/ their tender", Moreover the claimants have been in this quarry mining activity and cannot claim ignorance of the prevailing status.

Further according to the claimants in February '97 verbally and in March in writing Forrest authorities have apprised them of the fact that the lease had expired and that no mining activity was to be performed. At this moment, the claimants aware of all the facts, willfully went to request for reconsideration for renewed approval of contract (which had been terminated as security money had not been paid) by depositing security money in May '97 and then entering into contractual agreement in July '97 which was issued formally in Sept. '97.

(V) In the letter of claimants to Respondents dated 6.2.97 it is mentioned that:

That for want of regular loading approx. 37000 cubic metre passed materials are jammed since long in quarry without any reason-further the fact of extracting/ training out of 50,000 cubic metre of boulders.

(VI) In the letter of claimants to Respondents dated 14.3.97 the claimants have stated:

(a) "the site which has been allotted to this contractor have not been vacated till today."

(b) "it is further submitted that the contractor has not started any drilling hole in the Railway Hill and has not used any explosive. All the explosive shall be supplied by the railway authority for the performance of the contract."

(c) "That the contractor have to perform his duties only through his laborer and all materials regarding the manufacturing process shall be carried by the Railway and if the Railway authority the work shall not be done by this contractor and all responsibility shall be upon the Railway Administration the amount deposited for a sum of Rs. 50,000/- will be refunded to this contractor?".

From the above it is clear that no work had been performed till 14.3.97 and according to the claimants explosives for the work had to be supplied by the Railway Administration. and as such no work was performed since Railways has not made any supply of explosives for the aforesaid work.

(VII) From claimants letter dated 3.3.97 it has been mentioned of obstruction from Forest Department but nowhere it is mentioned that work has been started and any amount of work performed.

(VIII) In claimants letter dated 14.7.97 to Respondents it has been mentioned-

I am ready to execute the above work since opening of the tender and sufficient arrangement in this regard has already been done for execution of the above work."And "I can start the above work at the earliest.

Clearly states that work had not been started and that only arrangement had been made.

(IX) In claimants letter dated 14.8.97 he mentions of work getting obstructed for a months due to Forest Department and Railway Department has assured to get the obstructions removed but the Forest Department is still non-co-operative. On assurance of Railway Administration the mining area has been cleaned, benches have been constructed for safe mining, one year advance payment made to labourers and payment of interest on the loan secured for this purpose and after objection of Forest Department installation and removal of crusher machine and thereby heavy expenditure has been incurred on the above activities.

The claimant nowhere speaks in the letter issued in August of work of extraction of 50,000 cubic metre of boulder completed which is claimed later to have been performed in the first two months i.e. January & February. Moreover, here claimant mentions of installation of crusher machine and removal of crusher machine after objection received from Forest Department. On site inspection no indication was found of construction of benches for safe mining. Claimants speak of one year advance payment to labourers whereas the muster-sheet produced is of payment on daily basis which is self-contradictory.

(X) The claimants otherwise have also no basis for claimi as they had been advised to deposit Rs. 2.5 lac as remaining amount of security deposit (less Rs, 50,000 of earnest money) and to sign the agreement within 14 days of the receipt of letter issued on 1.1.97. On failure to deposit security money a reminder was issued on 28.1.97. Again on non-compliance 7 days notice was issued on 14.2.97. 48 hours notice was issued on 14.3.97. The contract allotted stood terminated as the claimants did not deposit security money even after lapse of 48 hours notice. The claimants instead of depositing security money wrote letters to Railway Administration to adjust money help up by Railway Administration as security in other contracts for which suitable reply was furnished to claimants that securities of any contract are released only after book

of that contract are closed. Claimants thereupon through letter dated 20.5.97 deposited the security amount of Rs. 2.5 lakhs (less Rs. 50,000/- of earnest money) and mentioned the delay on account of obstruction by Forest Department and Bihar Government employees strike. Railway Administration reconsidered on his application and revoked termination of contract and advised to sign the contract agreement through letter dated 26.5.97. Subsequently the contract agreement was signed in the month of July and issued on 21.9.97. The contractor had not deposited security money and signed the contract which was done on 20.5.97 and July, 97 respectively they have no locus standi for any claim for work performed, if any before this period. In fact 48 hours notice period issued on 14.3.97 getting completed the approval of contract stood terminated up to revival through letter dated 26.5.97. The claimants have rather tried to procrastinate the whole issue through letter writing and trying to prepare ground for fictitious compensation.

(XI) The claimants have not deposited labor Registration/License as desired by Respondents which would corroborate the claims of payment to staff and labour employed for which a daily muster sheet had been furnished to establish claims.

(XII) Respondents Railway Administration had lease license of the Railway Old Quarry/Jamalpur, the lease of which was up to 22.6.93. Railway Administration applied for extension of lease 90 days prior to expiry of lease. As no communication to this effect was received from Collector/District Mining Officer, Munger it was deemed to have been refused and Railway Administration applied Revision Case No. 428 of 1993 before the Court of Commissioner (Mines), Bihar, Patna mentioning all facts that Railway continue to work on the above leased area and status quo as existing prior 22.6.93 may be granted and District Mining Officer, Munger be directed to dispose of application of Railway Administration and renew the lease for further period as applied for. Status Quo was granted and as the prayer was to restore Status Quo as existing prior to 22.6.93, therefore Railway Administration calling for tenders for award of contract on the Railway Old Quarry was not contrary to the established system.

Forest Department has objected use of Railway Old Quarry for mining quoting Section 2 of Forest Act, 1980 only on application of the claimants of 1.3.97 and advised the claimants that the area was notified as Forest land and lease on that land can only be given by State Government Mining Department after getting clearance from Central Government (Ministry of Environment) . The mining area of Jamalpur (includes Railway Old Quarry) till 2001 remained under controversy as the District Magistrate, Munger in his letter to Secretary, Forest & Environment Department, Bihar, Patna dated 22.9.2001 has mentioned that till date the area has not been notified within Forest area. In such a situation the Railway Administration was not at fault to go ahead for Mining activity in Railway Old Quarry, Jamalpur on the Status Quo granted by Commissioner of Mines, Bihar, Patna. The jurisdiction of Commissioner of Mines, Bihar, Patna could not be challenged by Respondents Railway Administration. If at all the issue was to be

resolved it was between Forest Department and District/Mining Departments. In fact on letter of claimants dated 20.5.97 the Respondents in reply letter dated 26.5.97 have docketed copy to Sr. DEN/II/Sonepur to pursue the matter vigorously with the Forest Department to obtain NOC. In the meantime just after signing of contract agreement in July '97, the claimants approached Hon'ble High Court for claims against Railway Administration in August '97 which thereupon directed claimants to invoke Arbitration Clause under the said agreement.

The claimants have not been able to justify their claims which have been proved above as baseless and fictitious on the basis of papers available, inspection of site and contradictory statements available in record of the claimants and provision of General Conditions of Contract-1978.

17. The aforesaid reasons recorded in the award will definitely not amount to a non-speaking award and therefore, if the court below was satisfied that such reasons were contrary to any document and thus were based on error of record or its reasoning was perverse, it had to be at least looked into, discussed and then alone for the reasons recorded in writing could have been set aside. That having been not done as would appear from paragraph Nos. 6 to 16 of the impugned judgment, this Court must hold that the impugned judgment even otherwise is beyond the scope of Section 34 of the Act.

18. The court below in fact has, to say the least, acted on an impression that the moment a contractor having been awarded contract was precluded from working on account of the dispute created by the forest and mining authorities, it must be presumed that the contractor was entitled for payment of compensation. Its such approach obviously proceeds on a fallacy that the moment the contractor precluded from undertaking and completing the contract had become entitled to at least payment of contractors margin of 10%. In fact, there is no such presumption in law and as a matter of fact, when the findings of the Arbitrators including the one arbitrator nominated by the applicant-contractor was that no preparation was made by the contractor nor plant and machinery ever brought on the spot by the contractor and the contractor himself did not undertake the job, the court below ought to have not allowed the claim of the applicant-contractor to the tune of 10% of the contract amount being Rs. 10,92,000/-. As a matter of fact, the court while exercising its power u/s 34 of the Act had only a limited power either to set aside the award or to affirm the award or to partly set aside the award and partly affirm the award but in no view of the matter, it had power to allow the claim of the applicant-contractor which had been altogether rejected by the Board of Arbitrators.

19. The reasonings given, so far it related to allowing the counter claim of the Appellant-railway, is equally unsustainable. In fact, there is virtually no discussion on this aspect in the impugned judgment save and except one sentence in paragraph No. 16 of the impugned judgment already quoted above wherein the court below has held that the counter claim of the railway was wrong

and illegal as the contract work could not be completed by the applicant-contractor due to default of railway authority itself. The court below for this aspect of the matter was at least required to look into the reasoning in the award by the Board of Arbitrators where they did not allow the total claim of the railway of Rs. 4,10,79,267/- and had confined it to Rs. 2,32,59,600/- by holding that the said amount was the extra amount spent by the railway to procure similar amount of materials from other sources. The reasonings in the award for allowing the counter claim again cannot be said to be either perverse or beyond the scope of the agreement, inasmuch as, the Board of Arbitrators while allowing the counter claim had recorded following findings:

The Respondents have counter claimed compensation of Rs. 4,10,79,267/- due as Railways was forced to purchase the contractual material from other sources due to nonperformance of contract work by claimants. As it has been evident from records that the claimants had no intention to perform the work for which unnecessary correspondences were initiated, security deposit delayed leading to cancellation of contract agreement, subsequently reconsidered on claimants application after security deposit made in May '97 and contract agreement signed in July '97. On their own the claimants wrote to Forest Department on 1.3.97 (copy of which not submitted and the claimants mentioned that they had not written anything in writing but had approached forest officials verbally, however it is noted that the claimants have hidden this fact as they have already enclosed a copy of letter dated 1.3.97 to DFO, Munger as Annexure-8 in their writ petition CWJC No. 3625/ 97) leading to issuance of letter from Forest Department not to carry out Claims of Respondents (1) Claim of Rs. 3,42,056/- work. No work was performed earlier as is evident from papers presented by both parties and physical verification of site by two members of the Arbitration team and contradictory facts mentioned in the letter of claimants. It is obviously clear that the claimants exercised all their energy to process papers to maintain a record for successful utilization for claiming compensation which they did not immediately after the contract agreement was signed in July '97. As the claimants did not perform the work under the contract, the Respondents deserve compensation for the extra amount spent for procuring the same amount of material for other sources between 1997-1999 and the 50,000 cum of boulder worth Rs. 75,00,000/- which the claimants claim to have extracted/ trained out and is neither available at site nor supplied to Railways but this claim of Rs. 75,00,000/- is not in the term of reference of Arbitration hence not being considered.

Claims of Respondents

Claim of Rs. 3,42,056

Sl. No.

Details of Agreement through which supply of ballast at co. was taken through other agency

Qty

Rate Per Cum

Value

1.

DRM/TC/109 Dt. 30.6.97 Sri Binay Kr. Singh

3000

703

2109000

2.

DRM/TC/110Dt: 30.6.97 Sri Nikhil Kishor Singh

1000

703

703000

3.

DRM/TC/112 Dt. 3.7.97

3000

703

2109000

4.

DRM/TC/126 Dt. 26.8.97 M/s Elco Const.

16000

590

9440000

5.

DRM/TC/143 Dt. 5.11.97 Sri Vijay Kr. Shukla

4000

690

2109000

6.

DRM/TC/188 Dt. 24.4.98 M/s Jai MaaShardey Const.

6300

630

3969000

7.

DRM/TC/238 Dt. 30.3.99 Sri Binay Kr. Singh

6000

702

4212000

8.

DRM/TC/246 Dt. 23.4.99 M/s Jai MaaShardey Const.

7000

708

4672800

9.

DRM/TC/249 Dt. 4.6.99 Konark Const.

1457

702

1022814

10.

DRM/TC/250 Dt. 4.6.99 Sri Jogendra Pd. Singh

1457

702

1022814

11.

DRM/TC/255 Dt. 16.6.99 M/s MaaAmbika Const.

1457

702

1022814

12.

DRM/TC/278 Dt. 19.8.99 M/s Rama Shankar Singh

1457

702

1022814

Total

52128

(A)

34266056

For similar amount if the work had been carried out by claimants an amount of 10,92,000/- would have been paid by railways. Hence, the Respondents can claim only the difference i.e.

Payment for 52128 cum = Rs. 34266056

Cost of 1 cum = Rs. 657.3

Cost for 52000 cum = Rs. 3,41,79,600/-

Rs. 3,41,79,600/- minus Rs. 1,09,20,000/- = Rs. 2,32,59,600/-

(2) (a) Wages of Class-IV staff from Jan '97 to Dec, '97 = 8,27,393.00

(b) Salary of 10w/QJMP from Jan '97 to Dec, 97 = 1,00,771.00

C=a+b - Total = 9,28,164.00

(c) Loss sustained by the Railway @ 50;

on a/c of Railway. quarry= (c) /2 = Rs. 4,64,082.00 This claim is not tenable as this manpower would have been utilized in case the contract was performed and since the difference in supply of the similar material and amount have been claimed in para (1), hence this claim is duplication and therefore not accepted.

3) Lease rent for one year Total = 82800/- This amount is also duplication as excess expenditure has already been claimed in para (1) hence this claim is not accepted.

(4) Interest @ 18% Total = Rs. 62,66,329/- Payment of interest not under pervuew of Arbitrators

(5) Cost of extracted 50,000 cum of boulders as claimed by claimants but not supplied to railways nor available at site

Total=Rs, 75,00,000/-

Claimants have claimed for extracting/training out 50,000 cum of boulder. Respondents claim that at site no such boulder is available hence obvi-ously if it has been extracted it has been moved out illegally and for which claimants are responsible and liable to pay a sum of Rs. 75,00,000/- the value of the material

as stated by claimants but this claim of Rs. 75,00,000/- is not in the term of references of Arbitration hence not being considered.

Hence an Award of Rs. 2,32,59,600 (extra amount spent by Respondent to procure similar amount) is given to Respondents on this date of 23.7.2003 in C.A. No. DRIWTC/129 dated 21.9.97 as compensation for excess amount of material from other sources at higher rates (from private quarries) due to willful non-performance of work in CA No. DRM/TC/129 dated 21.9.97. This is issued without prejudiced to either party.

20. In the light of the aforementioned discussions, this Court would find that the impugned judgment setting aside the award of the Board of Arbitrators and allowing the claim of the applicant-contractor and dismissing the counter claim of the railway is wholly beyond the scope of Section 34 of the Act and as such, the same is set aside.

21. The matter is remitted back to the court below which would now reconsider the award of the Board of Directors (sic-Arbitrators?) afresh strictly in the light of the observations and findings recorded above in this judgment and of course, within the parameters of Section 34 of the Act.

22. It must be noted that another appeal filed by the applicant-contractor, the Respondent to this appeal, being M.A. No. 329 of 2005, has been dismissed by this Court for non-compliance of the pre-emptory order. Such appeal was directed against the same impugned judgment wherein the court below had not allowed the full claim of the Appellant-contractor to the tune of Rs. 3,86,17,000/- and had confined it to 10% of the contractor margin on the contract amount of Rs. 1,09,20,000/-. In that view of the matter, the applicant-contractor would now stand precluded from pressing any other prayer save and except setting aside of the award passed by the Board of Arbitrators.

23. In the result, this appeal, to the extent indicated above, is allowed but in facts and circumstances of this case, there would be no order as to costs.