IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.47 Of 2005
(Through hybrid mode)

Mahanadi Coalfields Ltd. .... ***Appellant***

Mr. Somadarsan Mohanty, Advocate

-versus-

M/S. B. S. Agrawal, Engineers and Contractors .... ***Respondent***

Mr. Adarsh Kumar Tiwari, Advocate
Mr. Tathagat Kumar Divyanshu Chaubey, Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
06.09.2022

Order No.
12. **1.** Mr. Mohanty, learned advocate appears on behalf of appellant. He submits, his client being aggrieved by the award, had challenged it. The learned Court below erred in not setting it aside. Hence, the appeal.

2. He submits, there was no arbitration clause. Settlement of disputes by arbitration clause was scored out in agreement dated 1st March, 1998. This was to knowledge of respondent-contractor. Without prejudice he submits further, respondent had obtained final

settlement and payment upon issuing 'no claim' certificate but, thereafter raised claim. Thirdly, on each item of claim his client is aggrieved. He hands up brief of documents with copy to Mr. Tiwari, learned advocate appearing on behalf of respondent.

3. On query from Court regarding his first contention, of the arbitration clause in the contract booklet having been scored out, he draws attention to the application made by his client under section 16 in Arbitration and Conciliation Act, 1996. He relies on paragraphs 4 to 6 in the application, extracted and reproduced below.

> *"4) That due to some disputes between the petitioner and the MCL the same has been referred to the Hon'ble Arbitrator for adjudication. Such reference is also inclusive of the dispute regarding existence or of the non existence of any arbitration agreement between the parties. In view of the same it has to be first decided by the Hon'ble Arbitrator whether the dispute raised by the petitioner is Arbitrable or not. If it is found by the Hon'ble Arbitrator that such dispute is not arbitrable, the Hon'ble Sole Arbitrator has got no jurisdiction to proceed further in the proceeding.*
>
> *5) That it is humbly submitted that the agreement no.GM©/SAMB/AGT/107/97-98 Dtd. 01.03.98 does not stipulate for reference of any dispute to arbitration. On the other hand the agreement dtd.27.03.98 has kept a provision for reference of dispute relating to the secured*

> *advance to an Arbitrator which is within its limited scope and sphere.*
>
> *6) That, while executing the said agreement for payment of secured advance, no specific provisions has been stipulated to take the same as a part of the original agreement executed by the HQ office nor the original agreement has been amended accordingly."*

He submits further, by order dated 5th July, 2003 the arbitrator decided that there exists adequate ground for going for arbitration. The order was made on his client's said application. He submits with reference to reasons given for the decision, they are advisory in nature and do not give a finding on fact of whether or not the arbitration clause in the agreement was scored out on consent of the parties. He then moves on to argue claim-wise on claims awarded.

4. Claim no.1, according to him, was awarded for interest. It was awarded in the face of clause 9.9 in the contract. Said clause is reproduced below.

> *"9.9. No interest shall be payable on the amounts withheld, under the terms of the Agreement/Work-order."*

Furthermore, there was no evidence nor reason given in support of the claim. That is true of all claims awarded. Claim no.2 was not awarded.

5. On claim no.3, he repeats, there was no evidence nor reason in awarding it. He submits, there could have been no award on this claim.

Clause 4.5 in the contract clearly provided for the situation and the arbitrator in awarding the claim, went beyond said clause.

6. Regarding claim no.4 Mr. Mohanty submits, only Rs.60,000/- was claimed for keeping the bank guarantee alive, beyond 30th May, 2000. He draws attention to letter dated 7th October, 2002 of respondent, from where the claim was made. Claim no.5 awarded was not raised as a claim in said letter dated 7th October, 2002. The arbitrator could not have adjudicated on this claim as it was beyond scope of terms of submission to the reference. He relies on judgment of the Supreme Court in **Inder Singh** vs. **Delhi Development Authority,** reported in **AIR 1988 SC 1007**, the passage extracted and reproduced below.

> *"xx xx xx There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion in denying not merely inaction to accede to a claim or a request. When in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."*

He cites another judgment of said Court in **Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd.**, reported in **AIR 2003 SC 2629**, paragraph 75. He submits, in said paragraph the Court had recorded

what were held. He relies on two propositions held as in paragraph 75 A(1)(iv) and (2)(c). Relied upon clauses in the paragraph are reproduced below.

> *"(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) (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."*

7. On claim no.6 Mr. Mohanty submits, award was against clause-12 (xxii) of the contract. The clause is reproduced below.

> *"The contractor shall, in connect with works, provide and maintain, at his own cost, all lights, security guards, fencing when and where necessary as required by the Engineer-in-charge for the purpose of protection of the works, materials at site, safety of workmen and convenience of the public."*

On claim no.7 Mr. Mohanty submits, the award was against aforesaid clause 9.9 in the contract, which provided for withholding sums and therefore, compensation could not have been awarded. Also, award calculated at the rate of 12% per annum interest is excessive as not

allowable by provisions under section 3 read with section 2 (a) in Interest Act, 1978. He submits further, award on claim no.8, though for Rs.30,858.15/-, was made as based on no evidence nor supported by reason. The award was contrary to clause 5.5 (d) and (e) of General Conditions of Contract. Lastly, on claim no.9 being for interest he submits, interest awarded on claim nos.1 and 5 was interest on interest since those claims themselves were for interest.

8. He submits, the Court below erred in not appreciating above contentions of his client. Both impugned judgment dated 19th July, 2005 as well as award dated 29th March, 2004 be set aside in appeal.

9. Mr. Tiwari, learned advocate appears on behalf of respondent. He submits, the award is well reasoned upon having given parties in the reference adequate opportunity of hearing. Section 37 appeal confines adjudication to be on whether impugned order is erroneous, with reference to grounds in section 34. This is not an appeal from decree in suit, for there to be adjudication on merits.

10. With reference to contention of appellant regarding existence of arbitration agreement he submits, the agreement was signed by his client subsequent to commencement of the work, under acceptance of tender. Appellant thereafter unilaterally scored out the arbitration clause and resorted to contending that it was done on consent, at the

time of execution. He supports reasons and finding in said order dated 5th July 2003, whereby the arbitrator decided to proceed to adjudicate on the reference.

11. Mr. Tiwari relies on **judgment dated 14th January, 2011** of the Supreme Court in **Civil Appeal no.3245 of 2003 (R.L. Kalathia and Co. Vs. State of Gujarat)**, reported in **(2011) 2SCC 400**, the passage from paragraphs 4 and 5 (Manupatra print), reproduced below.

> *"4. .... On going through the entire materials including the oral and documentary evidence led in by both the parties and the judgment and decree of the trial Judge, we are unable to accept the only reasoning of the High Court in non-suiting the Plaintiff.*
>
> *5. It is true that when the final bill was submitted, the Plaintiff had accepted the amount as mentioned in the final bill but "under protest". It is also the specific claim of the Plaintiff that on the direction of the Department, it had performed additional work and hence entitled for additional amount/damages as per the terms of agreement. Merely because the Plaintiff had accepted the final bill, it cannot be deprived of its right to claim damages if it had incurred additional amount and able to prove the same by acceptable materials."*

He submits, his client was made to tender 'no claim' certificate for obtaining payment. Allowing appellant to take advantage of its position in having obtained the certificate would result manifest justice

to his client.

12. On merits of claims awarded he submits, each and every awarded claim, including those not awarded, carry record of contentions of both parties, followed by adjudication on the claim. There is no error apparent on face of award on any claim, for it to be said as being patently illegal or against public policy. The arbitrator found the monies withheld were not duly withheld under the agreement and hence, awarded compensation by way of interest. With particular reference to claim no.4 he submits, the letter raising the claim was for seeking of reference. On appointment of arbitrator his client filed statement of claim, against which counter statement was filed and there was adjudication by the arbitrator to result in award of Rs.98,475/- against said claim made at Rs.1,13,811.78. He points out, in the letter the claim made was as on date of the letter and by the time adjudication on the reference happened, the arbitrator found, on analyzing the evidence, his client was entitled to the awarded sum. Furthermore, this and other points taken in the appeal were not urged in the reference or in the challenge before the Court below. He reiterates, scope of section 37 appeal is very limited. Adjudication on merit ought not to be done.

13. Regarding contention on claim no.5 that it was not indicated in

said notice dated 7th October, 2002 he reiterates, there was adjudication in the reference on claims made in it, denial by counter statement and argument. This point was not taken and cannot be urged in appeal. It is to be seen, whether on the controversy before the arbitrator, the award made bears patent illegality or is against public policy. He submits, there be no interference with impugned order and the appeal be dismissed.

14. First contention of appellant is, there was no arbitration agreement inasmuch as the agreement executed by the parties though contained arbitration clause, it was scored out at the time of execution. The original agreement from the record was produced and perused by Court.

15. There does not appear from the application made under section 16, allegation of scoring out of the arbitration agreement at the time of execution was made. Paragraphs 4 to 6 of the application have already been reproduced above. Court has minutely gone through the application. Elsewhere also there is no such allegation. Consequence of omission to allege the fact is absence of issue of such a fact. Therefore, there was no issue before the arbitrator regarding necessity of proof of omitted to be alleged fact that there was scoring out of the arbitration clause in the agreement. As aforesaid, Court perused the

original agreement. Stamp and signatures of respondent (partner) appear in all pages of the agreement. Same is not so regarding appellant. Signatures of the person duly authorized in that behalf by appellant (General Manager Construction) appear along with stamp on pages there is scoring out of clause 12 (pages-53 and 54 of the agreement). Signature of said person also appears at page-59 of the agreement, the last page. Logically, pages in the agreement containing the scored out clause should not have required execution by parties by appending their signatures thereto. There was no pleaded allegation by appellant that execution of the agreement was done simultaneously by both parties and at that time the arbitration clause was scored out. There was also no pleaded allegation, as to who scored out the arbitration clause. Scoring out or some endorsement made or any other thing done on a printed page of an agreement require additional signature to bear out that parties were aware of the alterations made by hand. As aforesaid, all agreement pages were stamped and signed by respondent. There is no additional signature of respondent in any page of the agreement. Court has noticed three pages in the agreement bear stamp and signatures on behalf of appellant. There is no other signature to indicate that the scoring out was done, in presence of and acknowledged by the parties on putting their signatures in addition,

on the relevant pages. Also, as aforesaid, there was no issue before the arbitrator to answer, on whether or not the scoring out was done or how it was done.

16. At this stage Mr. Mohanty points out, clause 7.1 in the agreement was also scored out. This appears in page-25 of the agreement. He points out further, there are also lines drawn in pages 1 and 2 of the agreement. Court finds, in addition to the General Manager having signed pages 53, 54 and 59, he had also put his signature on page-25 containing scored out clause 7.1 and page 1. Inference is, on drawing the line across page-2, the Manager omitted to put his signature. What becomes clear is that when the Manager put his signatures to signify execution of the agreement by appellant, the Manager had drawn lines in pages 1 and 2, deleted clauses 7.1 and 14, and signed only those and the last page in execution of the deletions and the agreement itself. Accordingly, Court made query of parties and Mr. Mohanty submits, the agreement was produced before the arbitrator by his client.

17. In circumstances aforesaid and on reiterating there was no allegation of fact, this Court in hearing the point in appeal does not find any patent illegality in said order dated 5th July, 2003, whereby the arbitrator decided to proceed for adjudication on the reference,

implying that he had jurisdiction. This is because law of procedure under order XIV rule 1 in Code of Civil Procedure provides, issues arise, when material proposition of fact or law is affirmed by one party and denied by the other. Where there was no allegation of scoring out, there was no occasion for respondent's denial, causing absence of basis to frame issue on the fact, alleged here in appeal. It is therefore, such reasons were given in said order for the decision to proceed with the adjudication. The Court below found concurrently and this Court also finds there is no patent illegality appearing from said order, for interference in appeal.

18. The Court below in impugned judgment found that in the instant case contract work was completed on 30th November, 1999 and payment on final bill was received by respondent on 21st December, 2001, i.e., almost two years after completion. One week after receiving the payment, respondent lodged protest by letter dated 29th December, 2001. Said Court found, thus there was no delay on part of respondent to lodge protest. The Court relied on **M/S. Kwality Construction Engineers Vs. Central University of Hyderabad**, reported in **1997 (Suppl.) Arb. LR 468 (Andhra Pradesh)** to accept submission of respondent on 'no claim' certificate as condition precedent for payment of final bill, to reject contention of appellant, of waiver. In

appeal no error is found.

19. On perusal of the award it appears that each and every claim has record against them, contentions of the parties separately stated, followed by adjudication thereon. Claim no.1 was claim for compensation. The claim was 18% interest on Rs.1,00,05,560.74 paid on delay of 23 months for raising claim of Rs.40,96,378.48. The arbitrator found inordinate delay and justification for compensation to award simple interest at 12% from 3 months after completion of work on the period (1st March, 2000 to 20th December, 2001) for aforesaid amount withheld. This was an assessment of compensation. Section 73 in Contract Act, 1872 provides for compensation for loss or damage caused by breach of contract. The arbitrator found that the final bill, upon completion of work, ought to have been paid by 3 months thereafter. Delay beyond that was breach. The arbitrator awarded compensation on a calculation of interest on 23 months for sum of just above Rs.1 crore, on the money had by appellant, to the use of respondent, in that period. Respondent, if had benefit of that money, it could have earned the amount of interest, lost thereby. Compensation is to be given for, inter alia, loss, which naturally arose in the usual course of things from the breach or which the parties, when they made the contract, knew to be likely to result from the

breach. Court is convinced that both parties having entered into the contract, it being for commercial purpose, were aware that interest is earned on money kept in deposit. In the circumstances, award for claim on compensation against claim no.1 does not appear to suffer from any illegality.

20. Claim no.3 was for payment of extra item of supplying and laying ceramic tiles. Appellant's contention is that there was no evidence nor reason given in adjudicating and awarding Rs.2,11,357.57/- against this claim. On perusal of adjudication of dispute under this claim there is nothing to indicate patent illegality. Again it is noticed that the adjudication follows record of rival contentions on the claim.

21. Claim no.4, apart from contention of appellant that there is no evidence nor reason as against all claims, specifically against this claim a further contention was that by letter dated 7th October, 2002 only Rs.60,000/- was claimed and thereafter, award of Rs.98,475/- on a subsequently inflated claim is clearly bad. One of the proofs for establishing a claim is also admission. Appellant, in other words has urged that clamant by having claimed at only Rs.60,000/- clearly and unequivocally admitted, said sum was the claim. This claim made earlier by said letter dated 7th October, 2002 at Rs.60,000/- is extracted

from said letter and reproduced below.

> *"Claim No.4: Compensation for loss suffered on account of delay in the release of security deposit.*
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> *We had submitted the Bank Guarantee for Rs.15.15 lacks in lieu of security deposit. As already stated the work was completed on 30.11.1999 and the maintenance period of six months was also over by 30.5.2000. MCL is under obligation to return the security deposit B.G. soon after the maintenance period was over,* ***but has not done so till date*** *resulting in loss to the tune of Rs.60,000/-. In keeping the B.G. alive and also in not being able to use the B.G. for furthering our business. We therefore pray for reimbursement of this amount of Rs.60,000/-."*
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> Emphasis supplied

The extract will show that the claim was made on the bank guarantee, as not released till date of the letter. The arbitrator found that even if the security was to be held beyond six months after completion and till monsoon was over on 30th September, 2000, bank charges on the bank guarantee at 3% was admissible from 1st October, 2000 to 30th November, 2002 on bank guarantee amount of Rs.15,15,000/-, to result in award of Rs.98,475/-. Here too Court finds that what has been termed to be an admission by respondent cannot be said to be one and even if said to be an admission, has been successfully explained.

22. Contention on claim no.5 was that it was not raised in the

arbitration notice. This of course was apart from the universal contention taken against all claims awarded, of them having been made as based on no evidence and without reason. Here on behalf of appellant there was again reliance on **Inder Singh** (supra). The adjudication resulting in the decision was on limitation. In context of deciding the prescribed period, there was declaration on when dispute arises. The judgment has no application in aid of appellant's contention that this claim was not raised in the arbitration notice. There is no dispute that it was raised in the statement of claim. There was a counter statement. Rival contentions of parties on the claims were recorded and adjudication made. Next, appellant contends on claim no.6 that award on it went against clause 12 (xxii). Perusal of the clause and record of argument/evidence by appellant in the award shows that appellant had argued on basis of said clause in respect of this claim. There was adjudication and award. Claim no.7 is similar to claim no.1. It is for delayed payment on running account bills. The arbitrator has referred to clause 2 (c) in respect of escalation given in page 147 of General Conditions of Contract. The reasoning gives particulars of only five running account bills paid during 15 months agreed period and five, withheld. The arbitrator also has referred to clause 9.7 in General Conditions of Contract regarding payment of

running account bills, to find that there was delay. In the circumstances, separate amounts were awarded and 12% simple interest also awarded in respect of delay in payment of labour escalation and material escalation bills.

23. Mr. Mohanty in contending on all claims awarded had pointed out that claim no.8 was for Rs.30,000/-. It is claim no.9, on which he laid emphasis, as being interest on interest. Focus was on claim nos.1 and 5 themselves being compensation by way of interest, having award of further interest on them was award for interest on interest. Reliance was placed on clause-(c) under sub-section (3) in section 3 of Interest Act, 1978. The provision says that nothing in the section shall empower the Court to award interest upon interest and it was pointed out earlier that reference to Court in the Act includes, inter alia, arbitrator.

24. Claim nos.1 and 5 awarded were on claims for damages. The compensation was assessed as interest since damages suffered was denial of money, had to the use of respondent, by appellant. This resulted in award on the items of claim. Clause-(a) in subsection (7) of section 31 in the 1996 Act, is reproduced below.

> *"31. (7)(a) Unless, otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for*

which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made."

25. On the award of these two separate sums of money, the arbitrator included in the award interest. He deemed the rate at 12% simple interest, the basis for it being exhibit C-49. It was letter from Bank of Baroda to substantiate rate of providing interest for the period of claim case, relying on judgment of the Supreme Court in **Executive Engineer, Irrigation Department Vs. G.C. Roy**, reported in **AIR 1992 SC 732.** Question that arises here for consideration is whether interest granted on award against claim nos.1 and 5 was grant of interest upon interest and barred by the Act of 1978.

26. Claim nos.1 and 5 fall within provision of clause-(b) under sub-section (1) in section 3 of the Act, of 1978. Said clause and following proviso are reproduced below.

"(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:

Provided that where the amount of the debt or damages has been repaid before the institution of the

proceedings, interest shall not be allowed under this section for the period after such repayment."

Above provision relates to providing interest on damages. It is to be from date mentioned in this regard in a written notice by the person entitled, to the date of institution of the proceedings. This is pre-suit interest. Section 5 in the 1978 Act makes section 34 in Code of Civil Procedure to be applicable. Said section 34 provides, inter alia, for interest pendente lite. Clause-(a) in sub-section (7) of section 31 in the 1996 Act provides for award of interest for period between date of cause of action arisen and date on which award is made. Therefore, under the 1996 Act the period for grant of interest is both pre reference and pendente lite. Thus, it transpires that the Act of 1978 only provides for grant of the interest up to date of institution of the proceeding. It does not provide for pendente lite interest. The 1996 Act covers both periods. On above analysis it is to be noticed that the 1978 Act providing for the interest up to date of institution of the proceeding, bars Court from granting interest on interest, for the period. This bar cannot be taken to go over to the period of pendency of the proceeding. Grant of interest for the period, upto the award including up to date of institution of the proceeding are provided for under section 31(7)(a) in the 1996 Act. There is no bar therein

regarding award of interest on interest. On the contrary, the provision is very wide inasmuch as it says the arbitral tribunal may include in the sum, for which the award is made, interest at such rate as it deems reasonable on the whole or any part of the money, for the whole or any part of the period between the date on which cause of action arose and the date on which the award is made. In view of above, here too, no apparent patent illegality is found.

27. In view of aforesaid, impugned order is confirmed. The appeal is dismissed.

(Arindam Sinha)
Judge

Prasant