

**HIGH COURT OF TRIPURA  
AGARTALA**

**Commercial Appeal No.05 of 2023**

The State of Tripura & another

..... Appellant(s);

Versus

Sri Ashes Deb, Contractor

.....Respondent(s).

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For Appellant(s) : Mr. Karnajit De, Addl. G.A.

For Respondent(s) : Mr. Somik Deb, Sr. Advocate,  
Mr. P. Chakraborty, Advocate.

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**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH  
HON'BLE MR. JUSTICE ARINDAM LODH**

**Order**

**24/01/2024**

Heard Mr. Karnajit De, learned Additional Government Advocate for the appellants-State and Mr. Somik Deb, learned senior counsel assisted by Mr. P. Chakraborty, learned counsel for the respondent-Contractor.

2. The present appeal is directed against the affirmation of the award by the learned Commercial Court of District Judge, Unakoti District, Kailashahar in Title Suit (Arbitration) 02/2022 vide impugned judgment dated 03.05.2023 confined to the issue No.3 decided in favour of the claimant/respondent. The learned Arbitrator proceeded to award a sum of Rs.18,36,967/- as difference of costs for executing 1455.60 meters of RCC piles as extra expenditure beyond the date stipulated in the agreement.

3. The arbitration proceeding commenced in respect of a dispute under agreement No.33/CE/EE/KD/2016-17 for "Construction of RCC bridge (Length=140.00 m) over river Manu on Sonaimuri- Telia Road" for a value of Rs.9,54,91,129/-, upon appointment of an Arbitrator by this Court vide order

dated 20.04.2019 passed in Arb.P. No.08/2019. The time for completion of the work was 24 months. The claimant-respondent handed over the work site on 19.01.2017 and the day of commencement of work was reckoned from the fifteenth day from the date of issue of work order i.e. 21.01.2017. The work was to be completed on or before 20.01.2019. During execution of the work, the claimant-respondent raised certain disputes which were referred for arbitration in terms of the arbitration clause contained in the agreement between the parties. The learned Arbitrator, upon completion of the pleadings, framed the following five issues for determination:

- “(i) Whether the claimant is entitled to get a sum of Rs.46,20,076/- being the value of steel utilized for lappages and wastage beyond the stipulated quantity of 5% of the total consumption of steel?
- (ii) Whether the claimant is entitled to get the balance expenses of Rs.17,65,362/- incurred for the purpose of welding executed by him but not paid?
- (iii) Whether the claimant is entitled to get Rs.18,36,967/- as difference of costs for executing 1455.60 mtr. of RCC piles as extra expenditure beyond the date stipulated in the agreement?
- (iv) Whether the claimant is entitled to get the cost of execution of 600 mm extra length of each pile and as such, entitled to get the cost of 39.60 mtr of piles for executing 66 nos. of piles?
- (v) Whether the claimant is entitled to Rs.1,43,360/- as cost of 0.15 mtr length of each piles for 66 nos. of piles?

Only issue No.3 was allowed in favour of the claimant-respondent awarding Rs.18,36,967/-. Being aggrieved by the award, the appellants herein- State of Tripura filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 [Act of 1996, *for short*] in Title Suit (Arbitration) 02/2022. The learned Commercial Court affirmed the award on issue No.3 and therefore, the appellants are before us under Section 37(1)(c) of the Act of 1996 as amended. The findings of the learned Arbitrator on issue No.3 are extracted hereunder :

- “24. Issue No. (iii) Whether the claimant is entitled to get Rs.18,36,967/- as difference of costs for executing 1455.60 mtr. of RCC piles as extra expenditure beyond the rate stipulated in the agreement;

24.1. In para-29 of the claim petition, the claimant has stated the detailed statement of claim regarding the issue No.iii and contended that *“in support of his claim, the claimant relies on his letter dated 30.01.2017 (Annexure 6 supra) by which he has submitted the Rate of Execution of per mtr. of 1200 mm RCC piles supported by details of the Analysis of Rates.*

*The claimant submits that he had to execute a total length of 1,455.60 Mtr. of 1200 mm diameter RCC pile as extra of the quantity of the piling work as stipulated in the Agreement, and in doing so, he has incurred a sizeable expenditure, which he is entitled to get from the department.*

*The claimant has executed a total length of 1,455.60 mtr. of pile and the claimant is furnishing here-in-below the details of the calculation reflecting his entitlement in a seriatim manner below :*

- i) total length of pile work executed = 1,455.60 mtr.
- ii) rate of execution of 1 mtr. of pile as per Analysis submitted by the claimant = Rs.12,336.42/-
- iii) Rate of execution of 1 mtr. of pile as per the rate stipulated in the Agreement = Rs.11,347.70/-
- iv) Difference of cost for 1 mtr. of pile (-) =Rs.988.72/-
- v) Add Tender premium of 27.61% above (+)= Rs.273  
=Rs.1261.72/-  
Say =Rs.1262/-
- vi) Difference of cost for 1 mtr. pile =Rs.1262/-
- vii) So, difference of costs for 1,455.60 mtr. =1,455.60 mtr x Rs.1262  
=Rs.18,36,967.2/-  
Say =Rs.18,36,967/-

*Thus, the claimant is entitled to the tune of Rs.18,36,967/- for the extra expenditure involved as the difference of cost in executing the length of 1,455.60 mtr. of RCC piles.*

*The claimant would therefore pray before this Learned Arbitral Tribunal for allowing this claim in his favour”.*

24.2. Further, by letter dated 30.01.2017 claimant intimated the respondent i.e. the Executive Engineer that the actual quantity should be 11.31 cum instead of 10.17 cum considering 10 mtr. length pile. Relevant portion of letter dated 30.01.2017 is extracted herein:

**“5. That, the agreement provides for casting of 1200 mm dia RCC pile of M-35 Specification. Schedule rate of 1200 mm dia RCC cast-in-situ pile as mentioned in the agreement is based on departmental analysis of rate vide chapter 12 item no.12.23 1100 & 1700 (c). The analysis of rate prepared by the department contains calculation mistake so far quantification of (a) materials is concerned. The quantity i.e. 10.17 cum as shown in the analysis for 1200 mm dia is basically wrong and the actual quantity should be 11.31 cum considering 10 mtr. length pile. The actual quantity and actual analysis of rate is enclosed herewith for your kind ready reference and the rate has been worked out as Rs.12,336.42 per mtr. length of 1200 mm. RCC pile M-35 Grade whereas in the tender document it has been mentioned that 1200 mm dia RCC pile @ Rs.11,347.70”.**

In the counter statement respondent did not specifically deny the contention of the claimant that the actual quantity should be 11.31 cum considering 10 mtr length pile instead of 10.17 cum as shown in the analysis for 1200 mm diameter.

In the counter statement page 12 respondent dealt with claim/dispute No.3, as under:

**“Claim-dispute No.3**

|                                                                                                                                                         |                |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| Whether on account of the expenditure incurred for execution of the extra length of each pile up to the height of 600 mm pile for 43 nos. of each pile? | Rs.18,36,967/- |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|

The claimant is not entitled to get any amount on the expenditure incurred for execution of extra length of each pile up to the height of 600 mm pile for 43 Nos. of pile, in view of the terms and conditions that the cut-off length of pile is not part

of measurement for payment. Hence, the claim is not also entertainable. Further contention of the respondent is that as per specification laid down in the agreement cut-off length of the pile is not meant for payment. Therefore, the claimant is not entitled the payment for cut-off length of the pile.”

Per contra the claim that has been raised in claim/dispute No.3 is whether on account of difference of costs of 1200 mm diameter RCC piles, the claimant is entitled to the balance expenses incurred, to the tune of Rs.18,36,967/-. Therefore it is evidence that the claim/dispute No.3 raised by the claimant has not been traversed by the respondent, in the counter statement.

Therefore, in my considered opinion the claim/dispute No.3 raised by the claimant would be deemed to be admitted on the ground of non-traverse, as per principle of law laid down in Rule-5 order VIII of the code of Civil Procedure and as such the claimant is entitled to get Rs.18,36,967.00 as difference of cost for executing 1455.60 mtr. of RCC piles as extra quantity. Reference may be taken from the decision reported in (1992) 2 SCC 51 (supra), wherein in paragraph 4 it has been held as under :

“We are unable to sustain the order of the High Court. Admittedly, there was a clear averment in the plaint by the appellant of non-payment of any rent by the respondent tenant since 16-11-1965 despite two decrees for recovery of rent having been passed, earlier against him. There was no specific denial of this fact. Even otherwise, the respondent tenant did not plead payment of any rent to the appellant or its deposit before any authority. The question of framing an issue for inquiring into this fact which would be deemed to be admitted on the ground of non-traverse by the respondent did not, therefore, arise. Learned Counsel for the respondent strenuously urged before us that the respondent tenant is entitled to the protection of Section 12(i) of the Jammu and Kashmir Houses and Shops, Rent Control Act, 1966 and that the respondent had in fact deposited arrears of rent within the meaning of Section 12(i) of the Act”.

Further in (1993) 4 SCC 6 (supra), the Hon’ble Supreme court held in paragraph 19 has held as under:

“Non-traverse would constitute an implied admission. In the facts of this case the findings of the trial court and that of the first appellate court could be upheld on this admission. Thus, we find the High Court was wrong in interfering with this finding. Accordingly, the appeal will stand allowed. No costs.”

Therefore, the issue no. (iii) is decided in affirmative i.e. in favour of the claimant.”

4. The claimant had executed piling work of 43 piles as per Clause 2 of the agreement which is extracted hereunder:

| Sl. NO. | Description of work                                                                                                                                                                                                                             | No. or Qty | Unit | Estimated Rate |                                                                           | Amount      |
|---------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|------|----------------|---------------------------------------------------------------------------|-------------|
|         |                                                                                                                                                                                                                                                 |            |      | Figure         | Words                                                                     |             |
| 2.00    | Bored Cast-in-Situ M-35 grade RCC pile excluding reinforcement complete as per Detailed Drawing & MoRT&H technical specifications Clauses 1100, 1700 and removal of excavated earth with all lifts and lead upto 1000 m (Pile diameter-1200 mm) | 1399.80    | Mtr  | 11347.70       | Rupees Eleven Thousand Three Hundred & Forty Seven and Paise Seventy Only | 15884510.46 |

The claimant had executed the length of 1455.60 meters of RCC piles instead of 1399.80 cum of pile as per the relevant clause. The dispute concerning issue No.(iii), therefore, fell within the terms of the agreement. The execution of the

extra length of piling work was not disputed in the written statement by the department; though they took a plea that payment for drilling extra length of piling work was not admissible under Clause 2 of the agreement which permitted drilling up to 1399.80 cum only. This issue was decided in favour of the claimant by the learned Arbitrator. The learned Commercial Court dealt with the challenge in the following manner and upheld the award:

“13. In this case the claim of the claimant of Rs.18,36,967/- on account of expenditure incurred for execution of the extra length of each pile upto the height of 600 mm pile for 43 nos. of each pile is not specifically denied by the petitioner side. It also reveals from the letter dated 30-01-2017 of the claimant that he intimated respondent that the actual quantity should be 11.31 cum instead of 10.17 cum considering 10 mtr length pile. The claimant also furnished details of the calculation relating to his entitlement.

14. Thus the learned Sole Arbitrator has rightly decided in his award that the claim/dispute no.3 raised by the claimant would be deemed to be admitted on the ground of non-traverse as per principle laid down in rule 5 order VIII of the code of Civil Procedure and the claimant is entitled to get Rs.18,36,967/- as difference of cost for executing 1455.60 mtr of RCC piles as extra quantity.

The findings of the learned Sole Arbitrator awarding Rs.18,36,967/- as difference of costs for executing 1455.60 mtrs of RCC piles as extra expenditure under claim no.3 is based on evidence and thus justified.

15. Hence, from the above discussion made, I am of the considered view that the learned Sole Arbitrator has correctly passed the arbitral award dated 14-01-2020 awarding difference of costs for executing 1455.60 mtrs of RCC piles as extra expenditure in favour of the contractor and the same does not warrant interference and hence it is not liable to be set aside. The award thus, does not suffer from any illegality or jurisdictional error.”

Whether the exercise of power by the learned Commercial Court under Section 34(2) of the Act of 1996 was proper or not is in question before us.

5. Mr. Karnajit De, learned Additional Government Advocate for the appellants-State, has argued that allowing payments beyond the permissible length of drilling work was outside the scope of the agreement. Therefore, the learned Arbitrator wandered outside the scope of the contract and committed an error of jurisdiction. The learned Commercial Court failed to appreciate that the error committed by the learned Arbitrator amounted to “*patent illegality*”

within the meaning of Section 34(2-A) of the amended Act of 1996. As such, the impugned judgment and the award are susceptible to be set aside.

6. Mr. Somik Deb, learned senior counsel for the claimant-respondent, submits that the dispute fell within the scope of work under the agreement and was capable of reference to the learned Arbitrator for adjudication. The learned Arbitrator is permitted to construct the terms of the contract and appreciate the evidence adduced by the parties to come to a finding. Re-appreciation of evidence is not permissible by the Court exercising powers under Section 34(2) or Section 34(2-A) of the amended Act of 1996. The finding of the learned Arbitrator did not amount to perversity in the sense that it was based on no evidence. Learned senior counsel for the claimant-respondent has relied upon paragraph 38-41 and 69 in the case of *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)* reported in (2019) 15 SCC 131. He also relies upon a decision of the Apex Court rendered in the case of *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited* reported in (2022) 1 SCC 131 where the case of *Ssangyong Engineering and Construction Company Limited* has been relied upon, and the expression “*patent illegality*” has been further delineated. Learned senior counsel for the claimant-respondent has also placed reliance upon paragraphs 17, 26 and 27 of the decision of the Apex Court rendered in the case of *Srei Infrastructure Finance Limited v. Tuff Drilling Private Limited* reported in (2018) 11 SCC 470 in support of his submission that Section 19 of the Act of 1996 though provides that the arbitral tribunal shall not be bound by the rules of procedure

as contained in the Code of Civil Procedure, but it cannot be read to mean that the tribunal is incapacitated in drawing sustenance from any provisions of the Code of Civil Procedure. Therefore, if the execution of the extra length of drilling work in terms of Clause 2 of the agreement remained undisputed by the department in their written statement, the application of the principles, under Order VIII Rule 5 CPC of non-traverse by the learned Arbitrator, was not an error of law while deciding the issue No.(iii) at hand. He also submits that the scope of exercise of power under Section 37(1)(c) by this Court is further circumscribed than what a court under Section 34 of the Act of 1996 can examine in the light of the limited scope of judicial interference in arbitration proceedings by a Court in view of the uncitral model. The present appeal therefore be dismissed as it does not raise any such tenable grounds under Section 37(1)(c) of the Act of 1996.

7. We have considered the submission of learned counsel for the parties. We have also taken note of the relevant provisions of the agreement in question which relates to the dispute in respect of issue No.(iii). The finding of the learned Arbitrator on issue No.(iii) does not amount to going beyond the scope of the agreement to be termed as wandering outside his jurisdiction. An error within jurisdiction of the Arbitrator is not to be corrected as in an appeal on any of the grounds under Section 34 of the Act of 1996 as amended, unless the finding is based on no evidence or has been rendered on the basis of documents introduced behind the back of the respondent-department or is devoid of reasons. The scope of interference by a Court under Section 37 has been delineated in the case of *Haryana Tourism Limited v. Kandhari*

*Beverages Limited* reported in (2022) 3 SCC 237 at paragraphs 8 & 9. The scope of interference under Section 37(1)(c) is further circumscribed or narrower than the scope of interference in an arbitral award on the grounds available under Section 34 of the Act of 1996.

8. In the instant case, if the plea of the appellant is accepted, it would amount to re-appreciation of the evidence and the terms of the contract on which the learned Arbitrator has based his findings. The dispute is not one which is completely beyond the scope of the agreement. The execution of drilling work under Clause 2 of the agreement was very much amenable to arbitration proceedings. The findings of the learned Arbitrator on that score do not appear to be perverse as based on no evidence. In this regard, the opinion of the Apex Court in the case of *Ssangyong Engineering* (supra) at paragraphs 40 & 41 are profitably quoted hereunder :

“40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders*, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator’s view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders*, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.”

The Apex Court has, in the case of *Delhi Airport Metro Express Private Limited* (supra) further delineated the meaning of the expression “patent illegality” at paragraph 29 to 31 of the report relying upon the decision in *Ssangyong Engineering* (surpa) as well.

9. The findings of the learned Arbitrator as upheld by the learned lower court under Section 34 of the amended Act of 1996 cannot be said to be such an illegality which goes to the root of the matter amounting to “*patent illegality*”. It cannot be either said that the Arbitrator’s view is not even a possible one or the interpretation of the Clause of the contract is such, which no fair-minded or reasonable person would arrive at. The Arbitrator has not committed an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to him. In fact, the learned Arbitrator has also drawn upon the principles of non-traverse under Order VIII Rule 5 CPC which is permissible for the arbitral tribunal to take, though Section 19 does not bound the arbitral tribunal by the provisions of the Code of Civil Procedure [*see (2018) 11 SCC 470 {paragraph 26 & 27}*].

Taking into consideration the above facts and circumstances and the position in law as laid down by the Apex Court and the reasons recorded hereinabove, we do not find any error in the impugned judgment. Accordingly, the instant appeal is dismissed.

Pending application(s), if any, shall stand disposed of.

**(ARINDAM LODH), J**

**(APARESH KUMAR SINGH), CJ**