



Serial No.01
Weekly List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Arb.A.No.3/2024

Date of CAV : 18.11.2024

Date of pronouncement : 16.12.2024

M/s N.J. Devani Builders (P) Ltd.

..... Appellant

Vs.

1. Union of India represented by the Chief Engineer, Shillong Zone
Spread Eagle Falls, Shillong-793001.

2. The Garrison Engineer (I) (P), Teliamura, Lichubagan Salbagan Post,
Agartala, 799012. Respondents

Coram:

Hon'ble Mr. Justice I.P. Mukerji, Chief Justice

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant

: Mr. K. Khan, AAG with
Mr. S.K. Hassan, Adv
Ms. M. Rahman, Adv

For the Respondents

: Mr. R. Debnath, CGC with
Ms. B. Khongiong, Adv

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| i) | Whether approved for reporting in Law journals etc.: | Yes |
| ii) | Whether approved for publication in press: | No |

Note: For proper public information and transparency, any media reporting this judgment is directed to mention the



composition of the bench by name of judges, while reporting this judgment/order.

JUDGMENT

(Delivered by the Hon'ble, the Chief Justice)

This dispute arises out of a works contract dated 29th July, 2000 between the Central government represented by the Chief Engineer Shillong Zone, Spread Eagle Falls (the respondent) and M/s N.J. Devani Builders (P) Ltd. (the appellant) valued at Rs.8,24,29,936.83/-. It contained an arbitration clause.

The contract was for construction of residential accommodations by the appellant for army personnel at Teliamura. The execution of the work was to commence on 9th October, 2000 and was to be done in two phases (Phase-I and Phase-II) which were to be completed by 8th January, 2002 and 8th April, 2003, respectively.

No substantial work was ever commenced. There was a continuing dispute between the parties with regard to the soil conditions and drawings. It was never resolved.



By a notice dated 19th February, 2001, the appellant accused the respondents of abandoning the contract. On 8th March, 2001, the appellant rescinded the contract.

The matter went to arbitration.

On 3rd April, 2002, Major General (Retd) C T Chari was appointed as the sole arbitrator by the Shillong Bench of the Gauhati High Court. The learned arbitrator entered upon the reference on 2nd July, 2002, and invited the parties to file their claims and counter claims as would appear from the recital part of the award.

In the statement of claim, the appellant made eight claims which are as follows:

“Claim No.1: Rs.35,37,346:00. Whether the Claimant is entitled to any balance payment for work done and materials at site.

Claim No.2: Rs.9,30,386:00. Whether the Claimant is entitled to any payment for infrastructure established.

Claim No.3: Rs.3,00,000:00 Whether the Claimant is entitled to any payment for infrastructure in the form of labour camps, shuttering materials and miscellaneous items.

Claim No.4: Rs.4,00,000:00 Whether the Claimant is entitled to any payment for loss suffered on account of movement of transport, labour, staff and personnel to and from site.



Claim No.5: Rs.6,00,000:00 Whether the Claimant is entitled to any payment for loss suffered on account of idle labour, T&P, personnel, labour and other establishment at site.

Claim No.6.: Rs.60,00,000:00 Whether the Claimant is entitled to any payment for loss suffered on account of overhead charges, idle T&P, personnel, labour and other establishment at head office and profit.

Claim No.7: Whether the Claimant is entitled to any payment by way of interest.

Claim No.8: Rs.1,00,000:00 Whether the Claimant is entitled to cost of reference.”

As a counter blast, the respondents made a counter claim comprising of eight heads of claim as follows:

“CLAIM NO.1: EXTRA AMOUNT INCURRED IN COMPLETING THE BALANCE WORK THROUGH OTHER AGENCY AT THE RISK AND COST OF THE DEFAULTING CONTRACTOR FOR Rs.99,24,828.25/-.

CLAIM NO.2.: DAMAGES ON ACCOUNT OF DELAY IN UTILISATION OF ACCN FOR Rs.10 LAKHS

CLAIM NO.3: EXTRA AMOUNT SPENT ON ACCOUNT OF ESTABLISHMENT OF GE (I) PROJECT OFFICE AND A PORTION OF CHIEF ENGINEERS OFFICE FOR DELAY AT ELEVEN MONTHS AND SEVENTEEN DAYS FOR Rs.13,05,406/-.

CLAIM NO.4 DEPRECIATION OF GE’S OFFICE T & P FOR DELAYED PERIOD OF 11 MONTHS AND 17 DAYS FOR Rs.46,900/-.

CLAIM NO.5: INFLATED COST OF FUTURE PROJECTS FOR Rs.43,57,709/-.

CLAIM NO.6: COST OF PREPARATION OF FINAL BILL FOR Rs.50,000/-.



CLAIM No.7: COST OF REFERENCE FOR Rs.2,00,000/-.

CLAIM NO.8: SIMPLE INTEREST @ 18% PER ANNUM ON ALL ABOVE CLAIMS FROM THE DATE OF CANCELLATION TO THE DATE OF PHYSICAL PAYMENT.”

On 30th November, 2003, the learned arbitrator made and published his award.

The following award was made claim wise as follows:

“Claim No.1	-	Rs.22,74,391.05/-
Claim No.2	-	Rs.2,32,600/-
Claim No.3	-	Nil
Claim No.4	-	Nil
Claim No.5	-	Rs.2,50,000/-
Claim No.6	-	Rs.2,50,000/-
Claim No.7	-	from the date of accrual of the cause of action till the date of the award i.e. 8 th March, 2003 (8 th March, 2001) to 30 th November, 2003 till the date of payment if not made within 90 days from the date of the award, 12% per annum. If made within 90 days, 9% per annum.
Claim No.8	-	Rs.1,00,000/-”

The records say that both the parties challenged this award before the learned Commercial Court, East Khasi Hills, Shillong, under Section 34 of the Arbitration and Conciliation Act, 1996 (Act of 1996). By a judgment and order dated 3rd September 2004, the learned judge set aside the award.



Only two reasons were assigned to set it aside. It was without reasons. Secondly, the counter claims of the respondents had not been considered. The award was described as being in conflict with the public policy of India. Liberty was given to the parties to have the claims and counter claims adjudicated through fresh arbitration.

From this judgment and order, the contractor appeals before us.

Mr. K. Khan, learned AAG appearing for the appellant cited two cases to justify the reasoning process of the learned arbitrator. First he relied upon *Tikka Brijinder Singh Bedi v. Metso Minerals (New Delhi) Pvt. Ltd.* reported in *2010 SCC OnLine Del 29*. In this case, a learned single Judge of the Delhi High Court laid down the following proposition of law:

“17. I must note that, the Arbitrator was not a legal man, but a technical man, being an architect. One cannot expect such a non legal person to write and give a judgment like a Civil Court.”

14. It is settled law that reasons do not have to be detailed like the judgment of court of law and nor is there any fixed format for an Award. Once reasons are given at different places in the Award and the reasons are such which have a necessary nexus to the conclusions arrived at, the requirement of the Award being a reasoned Award stands complied with. When I refer to the conclusions in the last four pages of the Award, from paragraphs 1 to 10, along with the factual narration and findings given in the earlier pages, it is quite clear that there are sufficient reasons as required in law. If such a detailed Award giving factual findings,



reasons and conclusions exists then I cannot appreciate the argument that the Award is not a reasoned award.”

Thereafter, he cited a three-judge bench judgment of the Supreme Court in ***Dyna Technologies Private Limited v. Crompton Greaves Limited*** reported in ***(2019) 20 SCC 1***. Paragraphs 34 and 35 are inserted below:

“34. The mandate under Section 31(3) of the arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.

35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. the court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration.”

Mr. Khan emphasised that the reasons given by the learned arbitrator were available across the award and that they were short, intelligible and proper.

Now, the learned arbitrator in our case is a retired army officer not a person trained in law. He does not possess the qualification, experience and finesse of a judge, versatile lawyer or a jurist. Therefore, some latitude is to



be given to him while adjudicating his award. What needs to be appreciated from the reasons given in support of the award is whether he understood the facts and law correctly, adjudicated the facts and applied the law reasonably or if the understanding of the law was capable of more than one interpretation or application, whether the application of the law by the learned arbitrator was acceptable or the view expressed plausible, in case more than one view was maintainable.

The learned arbitrator came to the finding that the respondents were in breach of the contract, after having been apprised of the law relating to breach of contract. Further, that the appellant had rightly rescinded the contract after upholding the allegation of the appellant that the respondents had abandoned the contract and were in breach of it. It is true that a trained lawyer, judge or jurist would have given more details of the breach and of the grounds why he held rescission of the contract by the appellant was justified.

The law is very clear on the subject that even short intelligible reasons showing proper application of mind to the issue involved would suffice to uphold an award.



Therefore, we hold that there was no dearth of proper reasons advanced by the learned arbitrator to hold that the respondents were in breach of the contract and that it was rightly rescinded by the appellant.

Now, let us examine whether the learned arbitrator had advanced reasons in support of the award. At internal page 4 and 5 of the award, the learned arbitrator had discussed the dispute which the respondents raised with regard to the plans and drawings submitted by the appellant. He observed that the respondents never suspended the work formally under Condition 9(c) of IAFW 2249 because of insufficiency of those documents but through its officers unofficially stopped the appellant from performing the work. He upheld the notice dated 19th February, 2001 issued by the appellant stating that the respondents had abandoned the contract and thereafter the appellant “rescinded the contract by its letter dated 8th March, 2001”. Having held that the respondents were in breach of the contract and upholding the appellant’s decision to treat the contract as abandoned by the respondents, the learned arbitrator upheld the rescission of the contract by the appellant and proceeded to deal with their claims.

Now, let us examine whether the specific claims were properly adjudicated upon by reasons by the learned arbitrator.



With regard to claim No.1, the learned arbitrator has valued the work done at Rs.45,69,663.94/-, valued the material at site at Rs.21,28,432.46/-, totalling to Rs.66,98,096.40/-. The other sub-claims for earth filling, removal of waste and disposal of earth were disallowed. For the sub-claim of jhama filling Rs.2,86,273.41/- was allowed. Hence, out of a total claim of Rs.35,37,346/-, Rs.22,74,391.05/- was allowed. The learned arbitrator while partly allowing the claim has tried to compute the value of the work and materials, taken into account the payments received by the contractor and also disallowed some sub-claims with the reason “not adequately justified”.

We find that the reasons given are succinct but very acceptable and most adequate.

Claim No.2 for Rs.9,30,386/- was for infrastructure setup by the appellant. The learned arbitrator, inter alia, held that this claim was exaggerated, no sanction of the “GE” was obtained to setup the infrastructure and allowed 25 per cent of the claim amounting to Rs.2,32,600/-.

This part of the award in our opinion cannot be sustained. The arbitrator under Section 28(2) of the Act of 1996 as applicable at that point of time was to decide the dispute “in accordance with the terms of the



contract”. When the contract was awarded to the appellant, it was expressly provided therein or to be implied from the terms that the appellant would have to setup its infrastructure to execute the contract. The value of the contract included the cost incurred in setting up the infrastructure. In claim No.1, which necessarily took into account the infrastructure expenses, the appellant claimed and has been partially awarded the balance claim for the work done. An award for the amount expended on account of infrastructure could not have been separately claimed or awarded. There was no justification for an award for this claim.

So this is an error of law apparent on the face of the award, rendering that part of the award patently illegal. This part of the claim was rightly set aside by the learned judge.

Claims No.3 and 4 were not awarded.

Claim No.5 for Rs.6,00,000/- was on account of loss suffered for deployment of idle labour, “T&P” personnel, labour and other establishment at site.

Claim No.6 for Rs.60 lakhs claimed similar damages on account of overhead charges, idle T&P, personnel, labour and other establishment at head office and profit. For each of these claims, the learned arbitrator ruled



that there was no evidence to justify the claims but nevertheless he awarded Rs.2,50,000/- for each of the heads of claims stating that it was “lumpsum” to “meet the ends of justice”.

Regrettably, this is no reason at all. The decision is flawed. When according to the finding of the learned arbitrator there was no evidence to justify the claims, he ought to have rejected them. He made a random award relying on his conception of a just award. Here he misdirected himself by failing to properly appreciate the consequences of lack of evidence. The reason given is against law and constitutes a patent error of law apparent on the face of the award. He had no jurisdiction to do charity. Hence, the award of Rs.5 lakh against claims No.5 and 6 was rightly set aside by the learned judge.

Claim No.7 and 8 relate to grant of interest and cost. We do not find any reason to interfere with those claims as they are in accordance with law.

Now, we have to deal with the argument that the award is vitiated by the arbitrator’s failing to consider the counter claims.

Mr. R. Debnath, learned counsel appearing for the respondents cited several authorities to argue that non consideration of the counter claim



vitiated the award. Reference may be made to ***Bharat Petroleum Corporation Limited v. Go Airlines (India) Limited*** reported in (2019) 10 SCC 250. The highest Court relied upon its earlier decision in ***State of Goa v. Praveen Enterprises*** reported in (2012) 12 SCC 581. The following paragraphs from the judgment in *Praveen* were highlighted in paragraph 23 of the judgment. Paragraphs 27 and 29 are reproduced below:

“27. Similarly, Section 23 read with Section 2(9) makes it clear that a respondent is entitled to raise a counterclaim “unless the parties have otherwise agreed” and also add to or amend the counterclaim, “unless otherwise agreed”. In short, unless the arbitration agreement requires the arbitrator to decide only the specifically referred disputes, the respondent can file counterclaims and amend or add to the same, except where the arbitration agreement restricts the arbitration to only those disputes which are specifically referred to arbitration, both the claimant and the respondent are entitled to make any claims or counterclaims and further entitled to add to or amend such claims and counterclaims provided they are arbitrable and within limitation.

29. Where the arbitration agreement requires the disputes to be formulated and referred to arbitration by an appointing authority, and the appointing authority fails to do so, the Chief Justice or his designate will direct the appointing authority to formulate the disputes for reference as required by the arbitration agreement. The assumption by the courts below that a reference of specific disputes to the arbitrator by the Chief Justice or his designate is necessary while making appointment of arbitrator under Section 11 of the Act, is without any basis. Equally baseless is the assumption that where one party filed an application under Section 11 and gets an arbitrator appointed the arbitrator can decide only the disputes



raised by the applicant under Section 11 of the act and not the counterclaims of the respondent.”

In this case, the counter claim of the appellant had been rejected at the threshold by the learned arbitrator on the ground that he had no jurisdiction. The Supreme Court ruled:

“24. The questions whether the issue regarding CENVAT invoices was outside the terms of agreement or whether CENVAT invoices relates to the agreement dated 1-1-2007 and 1-4-2009 and whether it is arbitrable and whether it falls beyond the scope of reference to arbitration and such other related questions, are to be determined only during the enquiry. It may be that after enquiry, the arbitrator might reject the counterclaim for CENVAT invoices as not arbitrable and the counterclaim beyond the scope of reference to arbitration. But to reject the counterclaim at the threshold on the ground that the arbitrator has no jurisdiction would not be proper. The High Court, in our view, has rightly set aside the order of the learned arbitrator dated 18-4-2011.”

Learned counsel also cited *(1994) 4 SCC 665*. In this case, the counter claim which had not been considered by the learned arbitrator was remitted back for consideration.

Learned counsel for the respondents very strongly relied on certain recitals and statements in the body of the award to establish that the learned arbitrator had ignored the counter claims.

He showed us the recital at page 2 of the award which is as follows:



“And whereas, I, Maj Gen (Retd) CT Chari was appointed as Sole Arbitrator in the above matter by the Shillong Bench of the Gauhati High Court by its order No.FAO No.1(T)18(SH)2001 dated 03 Apr 02, to adjudicate on the Claimants list of eight claims as included in the petition filed on 28 Aug 01.”

Then he relied on the following statement made in the award:

“In the light of the foregoing, I, Maj Gen (Retd) CT Chari, do hereby make and publish this award, limiting myself to the eight claims as petitioned by the Claimant to the Engineer-in-Chief and subsequently to the Honourable Court, for the reasons enunciated earlier, as follows:”

Mr. K. Khan, learned AAG appearing for the appellant brought to our notice another recital at page 2 of the award to the following effect:

“And whereas, I entered upon the reference on 02 Jul 02 and started the proceedings inviting both parties to submit their claims and counter claims, the limitation in the scope of the arbitration notwithstanding, on the assumption that the appointment order with a list of claims may be issued subsequently by the Engineer-in-Chief, Army HQ.”

He pleaded Section 2(9) of the Act of 1996 where it is stated that a claim included a counter claim. He submitted that the learned arbitrator is deemed to have considered the counter claim while considering the claims.

He, however, made a very substantial submission. He said that Section 33(4) of the Act of 1996 gave right to a party to apply to the arbitrator within 30 days from the date of receipt of the arbitral award to



make an additional arbitral award in respect of “claims presented in the arbitral proceedings but omitted from the arbitral award”. The respondents did not avail of this remedy and has approached the court directly to set aside the award much after the expiry of 30 days. Therefore, the respondents were prevented by the rule of estoppel to urge this point.

Learned counsel for the respondents contended that the right given under this provision did not envisage setting aside, review or modification of the award by the learned arbitrator. He had no power to do so. If the counter claim was considered by him under Section 34(4) of the Act of 1996, any decision would have resulted in supersession of the impugned award and its substitution by a new award. Therefore, the remedy under Section 34 was the right remedy.

The scope of Section 31(4) has to be properly understood. I agree with the view of *Saraf, J* of Allahabad High Court in ***National Highways Authority of India v. Musafir*** reported in **2024 SCC Online All 3920** cited by learned counsel for the respondents that under the above provision the arbitrator has no power to review or modify his award. For example if in an arbitral reference, the claimant presents ten claims. There is no counter claim. Eight claims are considered by the arbitrator and an award is passed in



favour of the claimant. Two are left out. They may have been allowed or disallowed. Under Section 31(4), the two claims which have been left out could be referred to the arbitrator. In that case, on their consideration either the awarded amount would be increased if they were allowed or would remain the same, if disallowed. But the moment the arbitrator is asked to adjudicate upon a counter claim then there is a possibility of re-adjudication of the claims in the light of the counter claim resulting in reversal, affirmation or alteration of the award. This might have the effect of review of the award or its modification. Therefore, asking the arbitrator to consider a counter claim not considered by him was not within Section 31(4) of the Act. The contention of the appellants in this regard is rejected.

The appellant approached the Court under Section 11 of the said Act for reference of his claims to arbitration. The respondents do not appear to have made any counter claim at that stage. Naturally, the order of Court referring the matter to arbitration referred to eight claims, which the arbitrator has recited in the body of the award. Thereupon, when he called the parties to a meeting, the respondents indicated that they had a counter claim. Thereupon, he directed filing of a statement of claim and counter



claim, if any. We find nothing wrong with the learned arbitrator's reference to eight claims initially.

It is true that before pronouncing the award, the arbitrator remarked that he had considered only the eight claims. There was no reference to the counter claims. He has made a mistake, making this statement.

The award is more than 20 years old. If we have to set aside the award on this ground and direct the parties to seek arbitration afresh to consider the counter claims it would reach more injustice than justice.

The matter has to be looked into this way. The learned arbitrator ruled that the respondents were in breach of the contract and that the appellant had rightly treated their conduct as abandonment of the contract. Thereafter, the appellant rescinded the contract. The learned arbitrator held that rescission by the appellant was rightful. No breach of contract was attributed to the appellant. This finding upheld by us expressly or impliedly suggests that the appellant could maintain a claim against the respondents but the respondents could not maintain one for risk purchase or otherwise. It negates even consideration of any counter claim by the respondents. Therefore, only the claims of the appellant were admissible and payable. We are prepared to give latitude to the technical arbitrator when he made the



statement that he only adjudged the eight claims. Consideration of the counter claims would have been an idle formality. So would it be now, if we order referral of the counter claim.

The reasons given by the learned arbitrator to support part of the award which we have upheld are more than adequate and reasonable and accepted by us. Therefore, the learned judge's observation and finding in relation to that part of the award which we have upheld that it is vitiated for non-supply of reasons is completely erroneous, liable to be set aside and is set aside.

This appeal is partly allowed. The award is partly set aside. The award for claims 2, 5 and 6 is set aside. The rest of the award is upheld and may be enforced. The impugned judgment and order is partly set aside. No order as to costs.

(W. Diengdoh)
Judge

(I.P. Mukerji)
Chief Justice