

HIGH COURT OF CHHATTISGARH, BILASPUR**ARBA No. 12 of 2015**

1. South Eastern Coal Fields Ltd., A Subsidiary Of Coal India Limited Having Its Registered Office At Seepat Road, Bilaspur, Chhattisgarh
2. The Chairman- Cum Managing Director South Eastern Coal-Fields Ltd., A Subsidiary Of Coal India Limited Having Its Registered Office At Seepat Road, Bilaspur, Chhattisgarh
3. The Chief General Manager Chirmiri Area, South Eastern Coal Fields Ltd., Having His Office At G.M. Complex, Mallviya Nagar, Chirimiri, District Korea, Chhattisgarh
4. The Deputy Chief Engineer (Civil) South Eastern Coal-Fields Ltd., Chirmiri Area, At Office Of The General Manager, G.M. Complex, Malviya Nagar, Chirmiri, Distt.- Korea, Chhattisgarh

---- Appellants**Versus**

1. Anjan Mukharjee S/o Late Manoranjan Mukherjee Aged About 57 Years Having his Office At His Residence At Chhotabazar, P.O. Chirimiri, District Korea, Pin 497449, Chhattisgarh
2. Shri C.L. Srivastava Retd. Director (Tech) Oprs., SECL, Bilaspur, Chhattisgarh

---- Respondent

For Appellants : Dr. N.K. Shukla, Sr. Advocate with Shri S. Shukla, Advocate.
For Respondent No.1 : In person.

Hon'ble Shri Justice Prashant Kumar Mishra**C A V Order**

Passed on : 24/06/2016

1. This is an Arbitration Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (henceforth 'the Act') assailing the order passed

by the District Judge under Section 34 of the Act refusing to set aside the award dated 5th March, 2013.

2. Briefly stated, facts of the case are that erstwhile Western Coal Fields Limited, predecessor in interest of appellant South Eastern Coal-Fields Limited (SECL), issued a tender for construction of 100 miner quarters at NCPH Colliery Chirmiri Area, SECL. The offer submitted by respondent No.1 was accepted and the work was awarded to him on 4th/6th February, 1985. Total value of the contract was Rs.20,25,570.98/- and the period of completion was 15 months commencing from 1.1.1985 and ending on 31.7.1986 excluding the rainy season. The time for completion was subsequently extended up to 31.3.1987.
3. Respondent No.1 raised an arbitration dispute and moved an application under Section 11(6) of the Act before this Court bearing MCC No.267/2007. The Arbitrator was appointed on 26.10.2007 and the arbitration proceeding commenced on 12.2.2008. An award was passed on 5.3.2013. Initially the Arbitrator was appointed by the High Court on 22.8.2006 in MCC No.57/2003, however, the Arbitrator expressed his inability to accept the appointment for some personal reasons. Therefore, the second order was made on 26.10.2007.
4. The claim raised by the non-applicant, as is discernible from the material available on record including the notice dated 16.2.2000, the legal notice dated 5.2.2002 and the claim application as well as the

contents of the award, are that the site was not handed over to him in time inasmuch as spaces for 73 units out of 100 units were initially handed over which was in breach of contract. Even the said handing over of the space was in installments of 12, 20 and 41 units. The area is affected by scarcity of water and the SECL did not supply water which hindered smooth execution of the work. Payment of running bills was also delayed which caused liquidity crunch for which the SECL was responsible. The SECL also failed to supply cement and steel within time, however, despite above shortcomings, the claimant completed construction of 32 quarters. In these 32 quarters, the claimant fitted doors and windows which was not provided in terms of the contract, therefore, he is entitled to cost of the doors and windows. For the remaining 41 units, doors and windows were supplied by some other agency which was fitted by the claimant.

5. The claim petition submitted by the claimant/respondent No.1 runs into 80 pages. It elaborately narrates the entire history and the contents of the documents relied by him. As against initial contract value of Rs.20,25,570.98/-, the claimant raised claim of Rs.91,31,059/-. The claim has been made in various heads which are detailed hereinbelow:-

<u>Sr. No.</u>	<u>Heads</u>	<u>Amount</u>
(1)	Claim based on revised estimate	Rs.18,000/-
(2)	Claim towards fixing of wooden shutters in compound wall portion	Rs.34,814.27/-

(3)	Fixing of wooden door frame (Choukhat) in compound wall	Rs.59,766.77/-
(4)	Fixing of wooden shutters in 73 miner quarters unit inclusive of cost of screw, hinges, door bolt, handle, chain hooks, labour charges etc. (after subtracting the amount already paid)	Rs.1,40,138.34/-
(5)	Claim for painting work of doors and windows	Rs.2,49,429.97/-
(6)	Claim towards release of security deposit	Rs.45,895.32/-
(7)	Claim towards reimbursement of cost of material like cement, steel, bricks etc. used by the claimant by paying from his own pocket	Rs.99,375.00/-
(8)	Claim towards difference of rates in extra item work	Rs.49,497.83/-
(9)	Claim for reimbursement of cost of transportation of steel	Rs.4067.00/-
(10)	Cost towards salary paid to idle labours and idle establishment	Rs.2,46,037/-
(11)	Claim towards extra cost and damages for executing the work during extended time	Rs.4,88,000/-
(12)	Claim for compensation for overstay and reduced profitability	Rs.1,48,030.48/-
(13)	Claim towards compensation for loss of profit for the balance work not allowed to be executed	Rs.82,035.62/-
(14)	Claim towards compensation for loss of material collected but not utilized for want of handing over of the work site	Rs.1,80,000/-
(15)	Claim for compensation towards loss suffered due to shifting of establishment from place to place	Rs.1 lakh
(16)	Claim towards cost incurred for filling	Rs.48,838/-

	of the side	
(17)	Claim for compensation towards excess payment made to the transporters in 41 units	Rs.69,730/-
(18)	Claim for compensation towards loss of business and reduction in rank	Rs.5,32,423.95/-
(19)	Claim towards fuel and conveyance charges	Rs.50,000/-
(20)	Total claim including the accrued interest on the above heads	Rs.91,31,059/-

6. The SECL denied the claim on merits and raised specific plea that the arbitration proceeding having been initiated by moving an application under Section 11 of the Act for the first time in 2003 and thereafter arbitration having commenced in the year 2008, it is hopelessly barred by limitation. The issue of limitation was raised by way of preliminary objection in the written statement on the averment that the claimant served a notice for appointment of arbitrator on 5.2.2002, however, soon thereafter also no immediate step was taken for appointment of Arbitrator. Therefore limitation being 3 years from the date of completion of construction or accrual of cause of action as provided under Article 137 of the Indian Limitation Act, the claim is barred by limitation. It was further stated that the claimant completed construction of only 73 units of miner quarters and has thus failed to complete the entire contract work, therefore, to avoid penalty, the claim application has been moved.

7. In course of arguments, learned Senior Counsel for the appellant urged that the SECL was not allowed to cross-examine the claimant or his witnesses because the claimant refused to present himself for cross-examination, therefore, the award deserves to be set aside on this ground alone. Reference has been made to Section 137 of the Evidence Act to put forth that under the principle of testimonial compulsion the claimant was bound to present himself for cross-examination in the absence of which the claim raised is not proved in accordance with law. It is also argued that the claim was hopelessly barred by limitation. However, the Arbitrator misconducted itself by not deciding the issue of limitation.
8. Per contra, the claimant appearing in person has stated that the appeal has no substance and the claim has been awarded in accordance with law. He would rely on the judgments in the matters of **Hari Krishan Wattal Vs. Vaikunth Nath Pandya¹**, **Bharat Coking Coal Ltd Vs. L.K. Ahuja²**, **National Insurance Co. Ltd. Vs. M/s Boghara Polyfab Pvt. Ltd.³**, **Payyavula Vengamma Vs. Payyavula Kesanna and others⁴**, **Deutsche Post Bank Home Finance Limited Vs. Taduri Sridhar and Another⁵**, **J. Kodanda Rami Reddy Vs. State of Andhra Pradesh and Others⁶**, **International Airports Authority of India Vs. K.D. Bali and Another⁷**, **Milkfood Private Limited Vs. GMC Ice**

1 1973 AIR 2479

2 Appeal (Civil) No.5489-5490 of 1995, decided on 12.4.2004

3 AIR 2009 SC 170

4 AIR 1953 SC 21

5 (2011) 11 SCC 375

6 (2011) 1 SCC 197

7 (1988) 2 SCC 360

Cream Private Limited⁸, O.P. Pathrose Vs. State of Kerala and Another⁹ and Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and Others¹⁰.

9. Before proceeding to deal with the merits of the award, it is necessary to dwell on objections and arguments raised by the appellant on purely legal issue concerning limitation and refusal by the claimant to be cross-examined.

10. Perusal of the proceeding recorded by the Arbitrator in 9th sitting on 1.2.2009 clearly states that preliminary objection and preliminary issue will be taken up first as the claimant has no objection in taking up of the same. The Arbitrator thereafter proceeded to hear the arguments and fixed the case for 21.2.2009. The record does not contain any sitting held on 21.2.2009 and the proceeding of the 10th sitting was recorded on 3.4.2011, however, without expressly dealing with the issue of limitation, the Arbitrator observed that the entire claim of the claimant without detailed examination cannot be declared time barred and each claim/issue and all issues raised by the respondent (SECL) have to be examined and final hearing is required to be conducted. Thus, there was no decision by the Arbitrator on the issue of limitation. The award passed on 5th March, 2013 has also not dealt with the issue of limitation. Thus neither as preliminary issue nor at the time of rendering the final award the Arbitrator dealt with the issue of

8 (2011) 12 SCC 573

9 (2010) 12 SCC 100

10 (2008) 7 SCC 169

limitation. Since the prescribed period of limitation is 3 years from the date of accrual of cause of action as provided under Article 137 of the Indian Limitation Act and the final measurement was completed on 25.2.1987, the objection raised by the SECL regarding limitation should have been decided by the Arbitrator. In the considered opinion of this Court, the Arbitrator has misconducted itself by not deciding the issue of limitation.

11. The next legal question is about evidentiary value of claimant's statement in the absence of he being cross-examined as he has refused to be cross-examined.

12. In this regard, Section 137 of the Evidence Act needs reference which is reproduced hereinbelow:-

“137. Examination-in-chief.- The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.- The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.- The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.”

13. The requirement and necessity of a statement to be termed as lawfully tendered evidence is fulfilled only when the person making statement presents himself for cross-examination and is cross-examined, unless the party gives his right to cross-examination or fails to cross-examine the witness. The right to cross-examine the witness of the other side is

always treated as facet and necessary ingredients of principles of natural justice.

14. Way back, the Supreme Court in **M/s Bareilly Electricity Supply Co. Ltd. Vs. The Workmen and others**¹¹ held thus in para-14:-

“14.

.....

.....
 the application of principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used.....”

15. Yet again, the Supreme Court in **New India Assurance Co. Ltd. Vs. Nusli Neville Wadia & Another**¹² has held thus in paragraphs-44, 57 and 58:-

44. If some facts are to be proved by the landlord, indisputably the occupant should get an opportunity to cross-examine. The witness who intends to prove the said fact has the right to cross-examine the witness. This may not be provided by under the statute, but it being a part of the principle of natural justice should be held to be indefeasible right. [See 1984 (1) SCC 43, K.L. Tripathi vs. State Bank of India and others and 2005 (10) SCC 634, Lakshman Exports Limited vs. Collector of Central Excise]

57. Even if we assume that in terms of the statutory provisions the respondents must lead evidence first the same can be waived, Appellant not only had filed affidavits in one of the cases but time and again sought

¹¹ AIR 1972 SC 330

¹² AIR 2008 SC 876

adjournments when the deponent of the affidavit was to be cross-examined. Although the appellant had pleaded requirements of the premises on an urgent basis, it kept on taking adjournments for more than 2 years. Why the witnesses were not produced before the Estate Officer for cross-examination for such a long time is not known. Only after a long period, an application was filed asking the respondents to show cause. Cause had already been shown by the respondents. They pleaded that no case has been made out for their eviction. We, therefore, fail to understand on what basis the Estate Officer passed the order impugned before the High Court.

58. We, therefore, direct that both the parties must file their documents within a week from today and the Estate Officer must give both the parties inspection of the said documents within a week thereafter. In the appeal arising out of SLP (C) No. 10348 of 2006 the appellant must file the affidavits of its witnesses within two weeks and thus shall be produced for cross-examination within one week thereafter. In appeal arising out of SLP (C) No. 8232 of 2006 the witnesses must be produced for cross-examination as expeditiously as possible, but not beyond a period of two weeks.”

16. The issue concerning right of cross-examination being an integral part of principles of natural justice was again dealt with by the Supreme Court in the matter of **Ayaaubkhan Noorkhan Pathan Vs. State of Maharashtra and Others**¹³ wherein the following has been held in paragraphs 23, 24, 25, 29 & 30:-

23. A Constitution Bench of this Court in *State of M.P. v. Chintaman Sadashiva Vaishampayan*, AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses

¹³ AIR 2013 SC 58

examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: Union of India v.T.R. Varma, AIR 1957 SC 882; Meenglas Tea Estate v. Workmen, AIR 1963 SC 1719; M/s. Kesoram Cotton Mills Ltd. v. Gangadhar and Ors., AIR 1964 SC 708; New India Assurance Company Ltd . v . Nusli Neville Wadia and Anr., AIR 2008 SC 876 : (2008 AIR SCW 208); Rachpal Singh and Ors. v. Gurmit Singh and Ors., AIR 2009 SC 2448 : (2009 AIR SCW 4567); Biecco Lawrie and Anr. v. State of West Bengal and Anr., AIR 2010 SC 142 : (2009 AIR SCW 5779); and State of Uttar Pradesh v. Saroj Kumar Sinha, AIR 2010 SC 3131 : (2010 AIR SCW 1077)).

24. In Lakshman Exports Ltd. v. Collector of Central Excise, (2005) 10 SCC 634 : (2003 AIR SCW 2938), this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examination of a witness. In the said case, the assessee had specifically asked to be allowed to cross-examine the representatives of the firms concern, to establish that the goods in question had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. audi alteram partem.

25. In New India Assurance Company Ltd., v. Nusli Neville Wadia and Anr., AIR 2008 SC 876 : (2008 AIR SCW 208); this Court considered a case under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and held as follows :-

"If some facts are to be proved by the landlord, indisputably the occupant should get an opportunity to cross-examine. The witness who intends to prove the said fact has the right to cross-examine the witness. This may not be provided by under the statute, but it being a part of the principle of natural justice should be held to be indefeasible right."

(Emphasis added)

In view of the above, we are of the considered opinion

that the right of cross-examination is an integral part of the principles of natural justice.

29. In *Rajiv Arora v. Union of India and Ors.*, AIR 2009 SC 1100 : (2009 AIR SCW 269), this Court held:

"Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review."

30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice."

(Emphasis supplied)

17. Resting on the above discussion, it would appear to this Court that when respondent No.1/claimant examined himself in support of his claim but refused to be cross-examined even though the appellant was ready and willing and has also requested to cross-examine the claimant but he refused to cross-examine, there is violation of principles of natural justice. This has created a situation where the claimant's examination-

in-chief cannot be treated as evidence in the absence of he having agreed to be cross-examined. In addition to this, the Arbitrator has also failed to deal with the issue of limitation, therefore, for both reasons the impugned award deserves to be set aside.

18. Accordingly, the appeal is allowed and the impugned award is set aside.

The matter is remitted back to the Arbitrator to re-examine the claimant and thereafter direct the claimant to be cross-examined by the appellant.

The Arbitrator shall thereafter decide the claim including the issue of limitation.

Sd/-
Judge
(Prashant Kumar Mishra)

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