

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MA No. 609 of 1998

- Central Mine Planning & Designing Institute Ltd. & Anr.

---- Appellant

Versus

- M/s Telekrik Electricals (Nagpur) Pvt. Ltd.& Ors

---- Respondent

For Appellant : Shri Vaibhav Shukla, Advocate.
For Respondents : None.

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Arvind Singh Chandel

Judgment On Board

The following judgment of the Court was passed by **Prashant Kumar Mishra, J.**

28/06/2017

1. The present appeal under Section 39 (1)(vi) of the Arbitration Act, 1940 (henceforth 'the Act') has been preferred to assail the legality and validity of the impugned common order passed by the District Judge, Bilaspur in Civil Suit No.5-A/96 and Miscellaneous Civil Case No.141/96 on 17.2.1998 rejecting the appellant's prayer for

setting aside the award dated 5.2.96 and at the same time allowing the application of the respondents under Sections 17 & 29 of the Act for making the award the rule of the Court.

2. We have heard Shri Vaibhav Shukla, learned counsel for the appellant in great detail. The respondents failed to appear before this Court despite issuance of SPC, however, the appeal being of the year 1998, we proceed to decide the appeal on merits.
3. Facts of the case, very briefly stated, are that the appellants invited tenders for Plant Illumination System of Bharatpur Colliery in the year 1989, in response to which the respondents, amongst other contenders, submitted its tender which was found suitable. The Letter of Intent (LoI) was issued on 17.2.89 and eventually the work order was issued and an agreement executed on 27.2.89 and 19.4.89 respectively. The contract value was Rs.64,58,580/-. Completion period of the contract was 12 months from the date of LoI as per clause 4.2 of the agreement. Even without completion of the work, the respondent raised a dispute on 26.12.91 that he has suffered loss on account of delay in providing the site by the appellant. Since clause 2.59 of the General Conditions of Contract (GCC) contained arbitration clause, one Mr. P.P. Bagroy was appointed as Officer Arbitrator upon nomination by the appellant

who passed the award on 26.9.94 rejecting the entire claim of the respondent. Clause 2.59 of the GCC provided for two tier dispute resolution system under which upon the order by the Officer Arbitrator, aggrieved party can initiate arbitration proceeding to be settled under the rules of Indian Council of Arbitration by one or more arbitrators appointed in accordance with the rules of conciliation and arbitration framed by the Indian Council of Arbitration.

4. The respondent being dissatisfied with the rejection of his claim by the Officer Arbitrator invoked arbitration clause upon which Mr. A.P. Paracer (Retired Additional Director General, CPWD) was appointed as Arbitrator after he gave his consent for such appointment on 13.5.95. The Arbitrator held 8 sittings on 4 dates of hearing, twice on each day of hearing and allowed the claim by passing award on 5.2.96 to the extent of Rs.11,26,600/-. Aggrieved by the award, the appellant moved before the District Judge under Section 30 of the Act for setting aside the award and at the same time, the respondent moved under Sections 17 and 29 of the Act for making the award the rule of the Court. The District Judge has rejected the application preferred by the appellant and allowed the application preferred by the respondent. Thus the award has been made rule of the Court.

5. Assailing the impugned order as well as the award, learned counsel for the appellant would make four fold submissions. Firstly, he would attack the exercise of jurisdiction by the Arbitrator by referring to clause 2.59 of the GCC. The second ground of attack is on the count that the Arbitrator having failed to decide the counter claim, it has violated clause 18 (a) of the Rules framed by the Indian Council of Arbitration. On third count, challenge to the award is thrown on the ground that it is unreasoned and non-speaking, therefore, there being no adjudication by the Arbitrator, it deserves to be set aside, in view of the language employed in Rule 44 framed by the Indian Council of Arbitration. Fourthly, award is challenged on the ground that for defects in 3 previous counts, the award suffers from patent illegality.
6. We shall deal with the grounds raised by learned counsel for the appellant *in seriatim*.
7. The first ground revolves around the express bar contained in clause 2.59 of the GCC. The relevant part of clause 2.59 relied by the appellant provides that “.....The arbitrator/s shall not enter on the reference until after the completion or alleged completion of the works unless with the written consent of the Prime Consultant and the Contractor provided always. that such

reference may be opened before such completion or alleged completion in respect of the withholding by the Engineer of any certificate or in respect of the exercise of the Engineers' power to give a certificate under clause 2.55. (1) hereof. that the giving of a certificate of completion under clause 2.45 hereof shall not be a condition precedent to the opening of any such reference.”

8. On the strength of the above clause of the agreement, it is put forth in para-A.3 of the preliminary objection raised by the appellant that the arbitration proceeding is premature. Bolstering his submissions, learned counsel would refer to the judgments of the Supreme Court in the matters of **Oil and Natural Gas Corporation Vs. Wig Brothers Builders and Engineers Private Limited¹**, **Municipal Corpn., Jabalpur and Others Vs. Rajesh Construction Co.²**, as also the judgment of the M.P. High Court in the matter of **Dilip Construction Company Vs. Hindustan Steel Ltd.³**.
9. In **Municipal Corpn., Jabalpur** (Supra), the Supreme Court was dealing with a contract wherein clause 29 provided that if any dispute arises between the parties, the party seeking invocation of the arbitration clause shall first approach the Chief Engineer and on

¹ (2010) 13 SCC 377

² (2007) 5 SCC 344

³ AIR 1973 MP 261

his failure to arbitrate the dispute, the party aggrieved may file an appeal to Municipal Corporation, failing which, the Corporation shall constitute an Arbitration Board to resolve the disputes in the manner indicated in clause 29. However, before doing so, the party invoking the arbitration clause is required to furnish security of a sum to be determined by the Corporation. Since in the said case, admittedly, the contractor did not deposit the security, the Supreme Court on interpretation of clause 29 held that the obligation of the Corporation to constitute an Arbitration Board to resolve disputes between the parties **could not arise** because of failure of the respondent to furnish security as envisaged in clause 29(d) of the contract. The Supreme Court eventually concluded that the High Court was not justified in appointing a retired Chief Justice of a High Court as arbitrator because the contractor had failed to comply with the essential terms of the contract.

10. In **Oil and Natural Gas Corporation** (Supra), the Supreme Court held that if the arbitrator ignores any express bar contained in the contract, the Arbitrator is said to have exceeded his jurisdiction.

The Supreme Court held thus in paras-7, 8, 9 & 10:-

7. In view of the above, in the event of the work being delayed for whatsoever reason, that is, even delay which is attributable to ONGC, the contractor will only be entitled to extension of time for

completion of work but will not be entitled to any compensation or damages. The arbitrator exceeded his jurisdiction in ignoring the said express bar contained in the contract and in awarding the compensation of Rs. 9.5 lakhs. This aspect is covered by several decisions of this Court. We may refer to some of them.

8. In *Associated Engg. Co. v. Govt. of A.P.* {(1991) 4 SCC 93} this Court observed: (SCC p. 103, para 24)

“24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction.”

9. In *Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises* {(1999) 9 SCC 283} this Court held: (SCC pp. 300 & 310, paras 22-23 & 44)

“22. ... The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may tantamount to mala fide action.

23. It is settled law that the arbitrator is the creature of the contract between the parties and hence if he

ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose agreement is required to be considered.....

* * *

44. (h) ... He cannot award an amount which is ruled out or prohibited by the terms of the agreement.”

10. In Ramnath International Construction (P) Ltd. v. Union of India {(2007) 2 SCC 453} a similar issue was considered. This Court held that Clause 11(C) of the general conditions of contract (similar to Clause 5-A under consideration in this case) was a clear bar to any claim for compensation for delays, in respect of which extensions had been sought and obtained. This Court further held that such a clause amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of claims for delay and not to claim any compensation; and that in view of such a bar contained in the contract in regard to award of damages on account of delay, if an arbitrator awards compensation, he would be exceeding his jurisdiction.”

11. The present contract provides for a bar on the Arbitrator to enter on the reference until after completion or alleged completion of the work which the Arbitrator can do even without completion provided written consent is obtained from the Prime Consultant and the Contractor. In view of this bar, we are required to ascertain as to on which date the Arbitrator entered the reference and on which date the work was completed by the Contractor. Admittedly, the Arbitrator has not obtained written consent from the Prime

Consultant and the Contractor before entering the reference.

12. The meaning of the word 'entering reference' has been considered by the Supreme Court in the matter of **State of West Bengal Vs. Amritlal Chatterjee**⁴ wherein the following has been held in para- 9 & 13:-

9. Mr. Ray would contend that Section 21 of the 1996 Act would not be applicable in the instant case. He would submit that the words "in relation to arbitral proceedings" which commenced for the purpose of the 1940 Act must be given the same meaning as contained in Rule 3 of the First Schedule appended thereto.

13. The Court having regard to the duty imposed upon the arbitrator held that the arbitrators enter on the reference as soon as they have accepted their appointment and have communicated to each other about the reference. If the Arbitrator fails in his duty to enter on the reference or make a public award during the period stipulated under Rule 3 of the First Schedule indisputably a cause of action will arise for his removal or appointment of a new arbitrator in terms of Sections 11 and 12 of the 1940 Act. The words "commencement of the arbitration proceedings" have not been defined in the 1940 Act. They have to be given their ordinary meaning having regard to the provisions contained in Chapter II thereof."

13. Thus the Arbitrator enters the reference on the date he accepted the appointment as Arbitrator. In the case at hand, the Arbitrator accepted and gave his consent for appointment on 13.5.1995, thus

⁴ AIR 2003 SC 4564

he entered the reference on this date.

14. We are now required to ascertain from material available on record as to on what date or period the work was completed by the Contractor. Perusal of the original record contained in Volume-I of the proceeding before the Arbitrator contains the record of the proceeding of 2nd and 3rd meeting held on 6th October, 1995. Para-4 of this proceeding drawn by the Arbitrator records that the parties submitted the particulars before the Arbitrator according to which the work was completed in September, 1995. Thus it is abundantly clear that as on the date the Arbitrator entered the reference, the work was not complete, therefore, the mandate with which the parties have bound themselves under clause 2.59 of the contract applies with full force and the Arbitrator could not have exercised the jurisdiction to resolve the dispute, as on the date of entering reference the work was not complete. The Arbitrator has thus exceeded his jurisdiction by proceeding further in the matter without the work being completed and proceeded to pass lump sum award. The award is thus vitiated on this ground alone because the Arbitrator exceeded jurisdiction and acted contrary to the terms of contract.

15. The next ground of challenge is failure of the Arbitrator to

adjudicate the counter claim. There is no dispute about the fact that under clause 2.59 of the contract the arbitration was to be governed under the rules framed by the Indian Council of Arbitration. Rule 18 (a) provides that the Bench appointed to adjudicate upon original claim shall also adjudicate upon the counter claim. Thus the mandate to the Arbitrator is for deciding the counter claim simultaneously with the claim put forth by the claimant. The award refers to the counter claim filed by the appellant, however, there is no adjudication either by rejecting or allowing the counter claim. Thus the Arbitrator has violated the mandate contained under Rule 18 (a) of the Rules framed by the Indian Council of Arbitration, which itself is an illegality and error of law on the face of the award, as held by the Supreme Court in the matter of **Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others**⁵. Para-15 of the judgment records thus:-

“15. The appellant’s grievance regarding non-consideration of its counter-claim for the reason given in the award does appear to have some merit. In view of the fact that reference to arbitrator was made by this Court in an appeal arising out of refusal to stay the suit under Section 34 of the Arbitration Act and the reference was made of all disputes between the parties in the suit, the occasion to make a counter-claim in the written statement could arise only after the order of reference. The pleadings of the parties were filed before the arbitrator, and the reference covered all

⁵ (1991) 1 SCC 533

disputes between the parties in the suit. Accordingly, the counter-claim could not be made at any earlier stage. Refusal to consider the counter-claim for the only reason given in the award does, therefore, disclose an error of law apparent on the face of the award. However, in the present case, the counter-claim not being pressed at this stage by learned counsel for the appellant, it is unnecessary to examine this matter any further.”

16. The third ground of challenge is about the award being unreasoned and non speaking. Drawing attention of the Court to the contents of the award, it is argued that it is lump sum award without discussing the material put forth by both the parties and recording finding on each of the items of claim raised by the contractor. Referring to Rule 44 of the Rules, Shri Shukla, learned counsel for the appellant would submit that it was the duty of the Arbitrator to have ascertained from the parties at the first hearing as to whether they wish to have reasoned award. If both the parties indicate their agreement, the award will contain reasons. He would submit that even if the parties have not desired that the award should contain reasons, at the first instance, the Arbitrator was required to ascertain from the parties and in any case, referring to para-2 of the proceeding drawn on 6th October, 1995 wherein the Arbitrator has recorded confirmation of the parties that the Arbitrator was required to adjudicate upon all 16 claims, the award should have contained reasons because there cannot be any adjudication

without reason.

17. Para-2 of the minutes recorded on 6th October, 1995 reads thus:-

“2. **Number of Claims:** It was confirmed by the parties that the Arbitrator was required to adjudicate upon 16 claims of the Claimants and 1 counter claim (relating to cost of arbitration) of Respondents.”

18. Apart from above recording of the proceeding, the counter claim put forth by the respondents would indicate that the respondents had claimed liquidated damages on account of delay in execution of the work by the contractor. It appears, the Arbitrator recorded that the parties are requiring the Arbitrator to adjudicate claim and counter claim, yet the Arbitrator proceeded to pass lump sum award which does not contain any reason or foundation on which the claim deserved to be allowed. Moreover, there is no discussion in the award about the counter claim raised by the appellant.

19. In **Gora Lal Vs. Union of India**⁶, the Supreme Court held thus in para-7:-

“7. The point for determination in this case is: whether the arbitrator ought to have given reasons in support of his findings, along with the sums awarded, on each item of dispute. To decide this point, we have to go by the text and the context of clause 70 of the arbitration agreement quoted above. Under the said clause, the arbitrator was

⁶ (2003) 12 SCC 459

required to identify each individual item of dispute and give his findings thereon along with the sum awarded. In this context, one has to read the word “findings” with the expression “on each item of dispute” and if so read it is clear that the word “finding” denotes “reasons” in support of the said conclusion on each item of dispute. The word “finding” has been defined in “*Words and Phrases*, Permanent Edn., 17, West Publishing Co.” to mean “an ascertainment of facts and the result of investigations”. Applying the above test to clause 70, we are of the view that the arbitrator was required to give reasons in support of his findings on the items of dispute along with the sums awarded. We make it clear that this order is confined to the facts of this case and our interpretation is confined to clause 70 of the arbitration agreement in this case.”

20. In the case at hand, the parties have required the Arbitrator to adjudicate the claim and counter claim, therefore, giving of reasoned award was necessary in the absence of which the Arbitrator has committed serious illegality in proceeding to settle the dispute by passing unreasoned award contrary to desire of the parties.

21. Three grounds of challenge discussed in the preceding paragraphs having been established, they are sufficient enough to hold that the Arbitrator having exceeded his jurisdiction, having acted contrary to the terms of contract and having failed to pass reasoned award despite the parties having required the Arbitrator to do so, the Arbitrator has committed patent illegality in conducting arbitration

proceeding. Therefore, the award rendered by the Arbitrator is vitiated.

22. For the foregoing, the appeal succeeds and is allowed. The impugned order passed by the District Judge and the award dated 5.2.1996 deserve to be and are hereby set aside.

Sd/-
Judge
(Prashant Kumar Mishra)

Sd/-
Judge
(Arvind Singh Chandel)

Barve

HEADLINES

The Arbitrator exceeds his jurisdiction if he ignores any express bar contained in the contract. Failure of the Arbitrator to adjudicate counter claim is an error of law on the face of the award. If the Arbitrator fails to pass reasoned award despite request by the parties, the same amounts to commission of serious illegality.