

HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Appeal No.32 of 2014

(Arising out of judgment and decree dated 25-7-2014 passed by the District Judge, Korba in Civil Suit No.7 A/2005)

South Eastern Coalfields Ltd. a Company Subsidiary of Coal India Ltd. an Undertaking of Government of India, Registered Office at Seepat Road, Bilaspur, Through its Chief General Manager, Gevara Area, District Korba (C.G.)

---- Appellant

Versus

1. M/s Tirupati Construction Structural Engineers and Building Contractors, Budhar, District Shahdol (M.P.) Representative Proprietor Rajendra Singhaniya.

2. Shri S.B. Chhachhariya, General Manager SECL, A-104 Koyala Vihar, Vasundhara, V.I.P. Road, Post Airport, Kolkata (73052)

---- Respondents

For Appellant: Dr. N.K. Shukla, Senior Advocate with Mr. Vikram Sharma, Advocate.

For Respondent No.1: Mr. V.R. Rao, Senior Advocate with Mr. A.K. Prasad and Mr. Shreyash Dharmadhikari, Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

06/10/2017

1. Impugning legality, validity and correctness of judgment and decree dated 25-7-2014 passed by the District Judge, Korba, the appellant herein has preferred this appeal under Section 37 (1) (b) of the Arbitration and Conciliation Act, 1996 (for short 'the Act'), whereby and whereunder the learned District Judge has rejected an application filed by the appellant under Section 34 (2) of the Act.

2. Brief facts in nutshell for adjudication of the present arbitration

appeal are as under: -

2.1) South Eastern Coalfields Limited (SECL) awarded work for construction of Training Institute at Gevra Project, Korba West Area to respondent No.1 by work order dated 24-4-1989. Clause 9 of the agreement provides for settlement of all disputes by recourse to arbitration. Under the said clause, the Chairman-cum-Managing Director of SECL is authorised to nominate a person to whom disputes are to be referred for adjudication.

2.2) During the course of execution of work, disputes and differences arose between the parties with respect to claim of ₹ 6,09,80,771-90 with interest leading to invocation of arbitration clause by memo dated 5-7-1996 calling upon the Chairman-cum-Managing Director of SECL to nominate a person to resolve the arbitral dispute as per the agreement.

2.3) Respondent No.1 finding no response from the appellant SECL to its afore-stated request for appointment of arbitrator, filed an application under Section 8 of the Arbitration and Conciliation Ordinance, 1996 on 22-7-1996 before the District Judge, Bilaspur for calling upon SECL to file agreement (contract document) in the Court and thereafter, for referring the dispute to the arbitrator as contained in the memo dated 19-6-1996 to a person of its choice.

2.4) The appellant SECL filed its reply before the learned District Judge on 11-9-1996 and opposed the application on merits and no plea of jurisdiction of the District Judge to hear the application was raised and prayed for dismissal of the application.

2.5) The learned District Judge by its order dated 30-10-1996 partly granted the application and directed that the matter be referred to the Sole Arbitrator to be appointed by the Chairman-cum-Managing Director of SECL.

2.6) Feeling dissatisfied with the order passed by the District Judge, the appellant SECL filed Misc. Appeal No.1358/1996 challenging the said order before the High Court of Madhya Pradesh. By order dated 11-4-1997, the said appeal came to be dismissed finding that the certified copy of the order dated 30-10-1996 has not been filed along with the memorandum of appeal.

2.7) In the meanwhile, on 30-5-1997, the Chairman-cum-Managing Director of the appellant SECL appointed Mr. J.P. Thakur, Chief Engineer (Civil), SECL as Sole Arbitrator to adjudicate the dispute arisen between the parties. Upon the appointment of Mr. J.P. Thakur as Sole Arbitrator duly appointed by the Chairman-cum-Managing Director, he entered into reference and thereafter, respondent No.1 filed its statement of claim. The appellant SECL filed its written statement as well as counter claim before the Sole Arbitrator. It is pertinent to mention here that the appellant SECL did not raise any question of jurisdiction before the Arbitrator as provided in Section 4 read with Section 16 (1) of the Act.

2.8) During the pendency of arbitration proceeding, Mr. J.P. Thakur, the Sole Arbitrator appointed earlier, was transferred to the other subsidiary of Coal India Limited, resultantly, the Chairman-

cum-Managing Director, SECL by order dated 2-1-2002, appointed respondent No.2 herein in place of Mr. J.P. Thakur as Sole Arbitrator by virtue of power conferred under clause 9 of the general terms and conditions of the contract.

2.9) The Sole Arbitrator so appointed by the Chairman-cum-Managing Director, SECL considered the claims of both the parties and after affording due opportunity of hearing to both the parties, passed an award on 26-9-2003 on merits directing SECL to make payment of ₹ 19,92,498-32 with interest, whereas counter claim of the appellant SECL was rejected for want of evidence.

2.10) Impugning legality and correctness of the award passed by the Sole Arbitrator, the appellant SECL filed an objection under Section 34 (1) of the Act before the District Judge for setting aside the award stating inter alia that the award passed by the Sole Arbitrator is contrary to the facts and law available on record. During the pendency of the application for setting aside the award, an application under Section 151 of the Code of Civil Procedure, 1908 was also filed on 17-12-2004 stating that the learned District Judge had no jurisdiction to entertain the application under Section 8 of the Arbitration and Conciliation Ordinance, 1996, therefore, the Sole Arbitrator appointed at the instance of the District Judge had no jurisdiction to entertain the statement of claim made by the parties and the entire arbitration proceedings which have culminated into award are null and void and, therefore, the award be set aside.

2.11) The learned District Judge by its order dated 29-3-2006 allowed the application under Section 151 of the CPC holding inter alia that the District Judge has no jurisdiction to appoint arbitrator. Questioning legality and validity of the order dated 29-3-2006, Misc. Appeal No.982/2006 was preferred by respondent No.1 herein before this Court and this Court by its order dated 18-12-2013 allowed the appeal and remitted the matter back to the learned District Judge for hearing and disposal in accordance with law. This time, the learned District Judge by its impugned order, rejected the application under Section 34 (2) of the Act against which this appeal under Section 37 (1) (b) of the Act has been preferred by the appellant SECL.

3. Dr. N.K. Shukla, learned Senior Counsel appearing for the appellant SECL, made two fold submissions, (1) that the findings of the learned Arbitrator qua claim Nos.5, 6 and 8 awarded by the Arbitrator as affirmed by the learned District Judge, is perverse and contrary to the material available on record; and (2) that the interest awarded by the Arbitrator of pre-reference period and *pendente lite* interest is unsustainable and bad in law.
4. Mr. V.R. Rao, learned Senior Counsel appearing for respondent No.1, would oppose the submissions advanced on behalf of the appellant SECL and would submit that the findings of the learned Arbitrator on claim Nos.5, 6 and 8 are findings of fact based on the evidence available on record, as such, it has rightly been awarded by the learned Arbitrator and rightly been affirmed by the learned

District Judge. He would further submit that there is no prohibition in the contract agreement prohibiting the payment of interest of pre-award period and *pendente lite* interest and therefore the learned Arbitrator has rightly awarded interest and the application of the appellant SECL in that regard has rightly been rejected by the learned District Judge.

5. I have heard learned counsel for the parties and considered their rival submissions and also gone through the material available on record with utmost circumspection.
6. Learned Senior Counsel for the appellant SECL has submitted that the findings on claim Nos.5, 6 and 8 are contrary to facts and law available on record, as the learned Arbitrator has travelled beyond the agreement to award the said amount. On being asked, it could not be demonstrated how the findings recorded by the learned Arbitrator are perverse to record.
7. In a decision recently delivered by Their Lordships of the Supreme Court in the matter of **Swan Gold Mining Limited v. Hindustan Copper Limited**¹, the Supreme Court has considered the question, whether the finding of facts recorded by the arbitrator can be interfered with by re-appreciating the evidence or material available on record and held that the arbitrator appointed by the parties is the final judge of the facts and the finding of facts recorded by him cannot be interfered with on the ground that evidence has not been properly appreciated. Their Lordships observed in paragraphs 11 and 12 as under: -

1 (2015) 5 SCC 739

“11. [Section 34](#) of the Arbitration and [Conciliation Act](#), 1996 corresponds to [Section 30](#) of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of [Section 34](#) of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The arbitrator’s decision is generally considered binding between the parties and therefore, the power of the court to set aside the award would be exercised only in cases where the court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well-settled proposition that the court shall not ordinarily substitute its interpretation for that of the arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the arbitrator or by the court would be erroneous or illegal.

12. It is equally well settled that the arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.”

8. In the afore-cited case, Their Lordships have clearly held that the court will not substitute its interpretation for that of the arbitrator and the finding of facts recorded by the arbitrator cannot be interfered with on the ground that the arbitrator has not properly appreciated the facts of the case.
9. Applying the principles of law laid down in **Swan Gold Mining Limited** (supra), if the facts of the case in hand are examined and the submissions of Dr. N.K. Shukla, learned Senior Counsel appearing for the appellant SECL, are appreciated, the argument of Dr. Shukla, in sum and substance, would be that the findings recorded by the Arbitrator qua claim Nos.5, 6 and 8 are perverse and contrary to record and beyond the terms of the agreement. The learned District Judge while considering the application under

Section 34 of the Act clearly and specifically considered those findings and came to a conclusion that the findings are not perverse and do not suffer from any illegality. The above-stated findings recorded by the learned Arbitrator on claim Nos.5, 6 and 8 are findings of fact based on the material available on record in which I do not find any perversity warranting interference.

10. This brings me to the next question of award of interest on the amount awarded.

11. The Supreme Court in the matter of **State of Haryana and others v. S.L. Arora and Company**² laid down the following principles for grant of award by arbitral tribunal as under: -

“In a nutshell, in regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of contract, as per discretion of the Arbitral Tribunal. On the other hand, in regard to the post-award period, interest is payable as per the discretion of the Arbitral Tribunal and in the absence of exercise of such discretion, at a mandatory statutory rate of 18% per annum.”

12. So far as interest is concerned, it would be appropriate to notice a recently delivered judgment of the Supreme Court in the matter of **Sri Chittaranjan Maity v. Union of India**³ in which the Supreme Court has relied upon its earlier decisions and it has been held that if the agreement prohibits award of interest for the pre-award period (i.e. pre-reference and *pendente lite* period), the Arbitrator cannot award interest for the said period. Relevant portion of paragraph 15 of the report states as under: -

² (2010) 3 SCC 690

³ 2017 SCC OnLine SC 1181

“In this Section, a specific provision has been created, whereby if the agreement prohibits award of interest for the pre-award period (i.e. pre-reference and *pendente lite* period), the Arbitrator cannot award interest for the said period.”

13. In this regard, two broad facts can be noticed herein. The appellant SECL while filing application under Section 34 (2) of the Act before the learned District Judge raised a ground that the award of interest @ 15.70% from 1-11-1991 is highly excessive and the award of interest at such a high rate is not at all justified. Before amendment in the Arbitration and Conciliation Act, 1996, with effect from 23-10-2015, Section 31 (7) (b) states as under: -

“(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.”

14. The aforesaid provision clearly directs grant of 18% interest per annum from the date of the award to the date of payment.

15. In **S.L. Arora and Company's** case (supra), the Supreme Court while highlighting the high rate of interest at the rate of 18% held as under: -

“A comparatively high rate of post-award interest is provided in Section 31(7)(b) of the Act, not because it is normal rate of interest to be awarded in arbitrations, but purely as a deterrent to award-debtors from avoiding payment or using delaying tactics.”

16. The submission of Dr. Shukla is that interest is prohibited by the terms of agreement. He refers to clause 5 of the special terms and conditions of the contract which provides that no interest is payable on the amounts withheld under the items of agreement. Likewise, clause 18 (b) of the tender document provides that the security

deposit appear in the Department shall not bear any interest.

17. Answering this argument, Mr. Rao, submits that respondent No.1 has neither claimed any interest on the security deposit nor claimed any interest on the withheld amounts and the same have neither been awarded by the Arbitrator, therefore, the aforesaid clauses are clearly inapplicable and the Arbitrator has rightly awarded interest for the pre-reference period from the date of cause of which action includes pre-reference period and *pendente lite* interest.

18. As such, I do not find any prohibition in the contract agreement prohibiting award of interest for the pre-award period. Accordingly, it is held that the interest awarded by the learned Arbitrator is strictly in accordance with Section 37 (1) (a) of the Act in absence of any specific bar created under the agreement and against the bar contended and shown, no such interest has been awarded by the Arbitrator as such, the learned District Judge has rightly rejected the application under Section 31 (7) (a) of the Act.

19. As a fallout and consequence of aforesaid discussion, the appeal preferred by the appellant SECL deserves to be and is accordingly dismissed leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge