

HIGH COURT OF CHHATTISGARH, BILASPURArbitration Appeal No.37 of 2007

(Arising out of order dated 9-10-2007 passed by the District Judge, Bilaspur
in MJC No.75/2006)

Sushil Kumar Agrawal, Railway Contractor, S/o Shri K.L. Agrawal,
Aged about 41 years, R/o Jhajharia Bhawan, Tikrapara, Bilaspur
(C.G.)

---- Appellant

Versus

1. Union of India, Through the General Manager, South Eastern Central Railway, Bilaspur (C.G.)
2. Senior Divisional Engineer (East), South Eastern Central Railway, Bilaspur (C.G.)
3. Shri Yogesh Partaity, Sole Arbitrator, Dy CEE (Trd & G)/HQ, South Eastern Central Railway, Bilaspur (C.G.)

---- Respondents

For Appellant: Mr. N. Naha Roy, Advocate.

For Respondents No.1 and 2: -

Mr. R.M. Solapurkar, Advocate.

For Respondent No.3: None present.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

08/12/2017

1. Respondents No.1 and 2 executed an agreement with the appellant for execution of the work of unloading and dressing of track ballast under the jurisdiction of ADEN/CPH on 27-2-2004, but the ultimate work order was not issued in favour of the appellant. The appellant thereafter, invoked the arbitration clause and the matter was referred to the arbitrator appointed by respondents No.1 and 2. The said arbitrator passed award on 12-10-2006 only granting refund of security deposit to the tune of ₹ 20,000/- and rejected the claim

relating to loss of profit, interest and other expenditure finding that no work was carried out at all by the appellant. Against the rejection of claim, the appellant preferred an application under Section 34 (2) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996') to the District Judge, Bilaspur, for setting aside the award. The learned District Judge declined to interfere with the award finding no merit against which this appeal under Section 37 of the Act of 1996 has been preferred.

2. Learned counsel for the appellant submits that the appellant is entitled for loss of profit which has not been awarded as the award is against the public policy and the appellant kept his labour and machinery ready for execution of work, but on account of non-issuance of work order, he could not execute the work and suffered loss of profit. He placed reliance upon the decisions of the Supreme Court in the matters of Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.¹, Kailash Nath Associates v. Delhi Development Authority and another² and Govt. of A.P. and others v. V. Satyam Rao³.
3. Learned counsel appearing for respondents No.1 and 2 would support the award and the order of the District Judge and would submit that since no work was available, only agreement was entered into and in case of availability of work, respondents No.1 and 2 could have issued work order, but as stated earlier, since no work was available, the appellant could not be awarded work by issuing work order, therefore, the appeal deserves to be dismissed.

1 (2003) 5 SCC 705

2 (2015) 4 SCC 136

3 AIR 1996 Andhra Pradesh 288

4. I have heard learned counsel for the parties and considered their rival submissions and also gone through the records with utmost circumspection.
5. It is not in dispute that agreement was entered into between the parties for execution of work, but ultimately, on consideration, the Railways did not issue any work order in favour of the appellant herein and the learned Arbitrator has declined to award loss of profit finding that no work was carried out at all by the appellant.
6. Learned counsel for the appellant placed reliance in **Oil & Natural Gas Corporation Ltd.** (supra) stressing upon para 68 holding that the appellant is not required to prove actual loss or damage suffered by him and he is entitled for loss of profit. He further placed reliance in **Kailash Nath Associates** (supra) in which in para 43.6 it has been held as under: -

“43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.”

7. In the matter of **Bharat Coking Coal Ltd. v. L.K. Ahuja**⁴, the Supreme Court has clearly laid down two principles for awarding loss of profit, firstly, that the contractor/claimant should establish that had he received amount due under contract on time, he could have utilised the same elsewhere and earned profit thereon and secondly, that he must establish that he has suffered loss of profit by placing material,

4 (2004) 5 SCC 109

and observed as under: -

“24. ... What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in *Sunley (B) & Co. v. Cunard White Star Ltd.*⁵ by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs. 6,00,000 award to the claimant.”

8. The fact remains that only mere agreement to award work was executed between the appellant and respondents No.1 and 2, but no actual work was awarded to the appellant by issuance of work order and the appellant has not undertaken any such work and therefore the question of suffering damage does not arise. Even otherwise, the appellant has failed to establish claim for loss of profit by placing adequate material before the arbitrator and as such the same has rightly been declined. Therefore, the appellant has not suffered any loss and as such the arbitrator and the learned District Judge are absolutely justified in rejecting the claim of loss of profit and the application as well. I do not find any illegality and perversity in the order of the learned District Judge.
9. For the foregoing reasons, there is no merit in the appeal and it is hereby dismissed. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

5 (1940) 1 KB 740 : (1940) 2 All ER 97 (CA)