NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Appeal No.79 of 2016

1. Union of India, Through General Manager, SECR, Bilaspur (CG)
2. The Chief Electrical Engineer (Con.), South East Central Railway, Bilaspur (CG)

Presenting Officer Narinder Singh Bharel, Deputy Chief Electricity Engineer (Con.), SECR, Bilaspur (CG)

(Applicants)
---- Appellants

Versus

M/s. Eskay Build Works Pvt. Ltd., Through Director A.K. Agrawal, S/o S.K. Agrawal, R/o 27/4, Motilal Nehru Nagar, East-34, Bhilai, Distt. Durg (CG)

(Non-applicant)
---- Respondent

For Appellants:	Mr. H.S. Ahluwalia, Advocate.
For Respondent:	Mr. Rahul Jha, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

16/05/2017

1. Union of India through the General Manager, South East Central Railway (SECR), Bilaspur and its Chief Electrical Engineer (Construction), the appellants herein, have invoked the jurisdiction of this Court under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter called as 'the AC Act') calling in question the order dated 22-11-2016 passed by the District Judge, Bilaspur in M.J.C. Civil No.39/2015 rejecting their application under Section 34 (2) of the AC Act.

2. Essential facts requisite to judge the dispute raised herein-above are as under: -

2.1) The appellants floated a tender for modification of OHE in connection with extension of down ice-land platform at Brijrajnagar in Bilaspur Division of SECR which was finally awarded to the respondent Company by letter of acceptance dated 13-3-2008 and agreement was executed on 11-5-2008. The total contract value was ₹ 82,64,496/- with a completion period of 6 months to be reckoned from the date of issuance of the letter of acceptance i.e. 13-3-2008, but the work in question could not be completed leading to termination of contract by order dated 26-9-2008 and the dispute arisen between the parties. Sole Arbitrator was appointed by this Court on 27-8-2012. The Arbitrator by its award dated 19-10-2014 allowed the claims on ten heads including pre-reference interest, ante-lite interest and loss of profit and also awarded an arbitration cost.

2.2) The appellants Union of India aggrieved against the award of claim particularly against pre-reference interest, ante-lite interest, loss of profit and award of arbitration cost have filed an application under Section 34(2) of the AC Act stating inter alia that pre-reference interest and ante-lite interest are barred by Clause XX (3) of the General Conditions of Contract (GCC) as well as Clause 64.5 of the GCC. Likewise, award of arbitration cost is also prohibited by Clause 64.6 of the GCC and further pleaded that so far as loss of profit is concerned, same is barred by Clause 47 of the agreement and also pleaded that loss of profit has neither been clearly pleaded nor it has been adequately established by placing material on record, therefore, such a claim is not permissible to be awarded.

2.3) The learned District Judge by its impugned award rejected the application finding no merit. Feeling aggrieved and dissatisfied with the order of the learned District Judge rejecting the application, this appeal, as stated above, has been filed.

3. Mr. H.S. Ahluwalia, learned counsel appearing for the appellants, would raise following submissions: -

    1. Pre-reference interest and ante-lite interest awarded by the learned Arbitrator are barred by Clause 16.3 and 16.4 of the GCC.

    2. The arbitration cost is prohibited by clause 64.6 of the GCC and loss of profit is also barred by clause 47 of the agreement. The alternative plea is that such a plea of loss of profit is not established sufficiently by the respondent claimant Company. Therefore, the award to that extent deserves to be set aside and consequently, the order of the learned District Judge deserves to be set aside.

4. Mr. Rahul Jha, learned counsel appearing for the claimant/ respondent, would submit that the appellants have failed to raise the issue of interest being barred before the Arbitrator under Section 61 of the AC Act, as they have never objected such a

grant of interest and as such, they cannot be permitted to raise that issue for the first time in the application under Section 34 (2) of the AC Act and therefore such a plea is not to be granted by this Court also. He would rely upon the judgment of the Delhi High Court in the matter of **S.N. Malhotra & Sons v. Airports Authority of India and others**[1] to buttress his submission. Loss of profit is neither expressly nor impliedly barred by the General Conditions of Contract and therefore it is claimable and it has rightly been claimed, and in view of the decisions of the Supreme Court in the matters of **M/s. A.T. Brij Paul Singh and Bros. v. State of Gujarat**[2] and **Dwarka Das v. State of M.P. and another**[3], once it is proved that there is breach of contract then the contractor would be entitled to claim damages for loss of profit which be expected to earn by undertaking the works contract.

5. I have heard learned counsel for the parties and considered their rival submissions and also gone through the record with utmost circumspection.

6. Before entering into the dispute, the issue to be considered is power and jurisdiction of the Arbitrator while arbitrating the dispute referred by the parties to adjudicate.

7. In this connection, the decision of the Supreme Court rendered in the matter of **Rajasthan State Mines & Minerals Ltd. v.**

1 2008(2) Arb. LR 76 (Delhi) (DB)
2 AIR 1984 SC 1703
3 AIR 1999 SC 1031

<u>Eastern Engineering Enterprises and another</u>[4] may be referred herein in which Their Lordships of the Supreme Court have considered the jurisdiction of arbitrator under the Arbitration Act, 1940 and held that where fundamental terms of agreement between the parties are ignored by the arbitrator, such arbitrator exceeds his jurisdiction even where the arbitration clause itself is widely worded and such deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct, but may be tantamount to mala fide action. Their Lordships further held that if the agreement specifically bars certain claims from being raised and yet an award has been made then court must not uphold such award. In paragraph 44 of the report, the Supreme Court culled the principles applicable so far as the jurisdiction of the arbitrator is concerned. Since clauses (g), (h), (i) and (j) of the said principles are applicable to the facts of the present case, therefore, omitting the other clauses, they are being reproduced herein-below: -

> "(g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.
>
> (h) The award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a

4 (1999) 9 SCC 283

jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in *Continental Construction Co. Ltd. v. State of M.P.*[5] by relying upon the following passage from *Alopi Parshad v. Union of India*[6] which is to the following effect: (SCC p. 88, para 5)

> "There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous."

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

(j) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he

5 (1988) 3 SCC 82
6 AIR 1960 SC 588

> thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law."

8. Thus, in the aforesaid case, Their Lordships have clearly held that the arbitrator is a tribunal selected by the parties to decide the disputes according to law and he has to consider the agreement between the parties containing the arbitration clause and if there is specific bar as to raising of claim by the contractor, then such a claim cannot be granted.

9. Similar is the decision laid down by the Supreme Court in the matter of **Bharat Coking Coal Ltd. v. Annapurna Construction**[7] in which it has been held that the arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract and the role of the arbitrator is to arbitrate within the terms of the contract, he has no power apart from what the parties have given him under the contract and if he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record.

10. Thus, the arbitrator has to act strictly in accordance with law and pass award as per the arbitration agreement agreed between the parties while deciding the arbitrable dispute referred to him by the parties.

11. With this preface with regard to the jurisdiction of arbitrator, I will

7 (2003) 8 SCC 154

proceed further with the merits of the matter.

12. The Arbitrator has awarded pre-reference interest and ante-lite interest to the respondent claimant. Clause XX (3) of the General Conditions of Contract, which have been made applicable to the work in question by the agreement dated 25-6-2008, provides as under: -

> "No interest will be payable upon the Earnest Money and Security Deposit or amounts payable to the Contractor under the Contract."

13. Similarly, clause 64.5 of the General Conditions of Contract provides as under: -

> "Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made."

14. The aforesaid clause in the General Conditions of Contract clearly stipulates that where the arbitral award is for payment of money, no interest shall be payable on whole or any part of the money for any period until the award is made. Thus, award of interest is expressly barred by the contractual provisions.

15. This would bring me to notice clause (a) of sub-section (7) of Section 31 of the AC Act which provides as under: -

> "(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made."

16. A focused glance of the aforesaid provision clearly states that unless otherwise agreed by the parties, where and in so far as an arbitral award is for payment of money, then only the arbitrator can award interest at such rate as he deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

17. The provision of clause (a) of sub-section (7) of Section 31 of the AC Act has been considered by the Supreme Court from time to time and it has clearly been held that unless the agreement permits, no interest can be payable from the date of accrual of cause of action till the date of award. (See **Union of India v. Bright Power Projects (India) Private Limited**[8] and **Union of India v. Concrete Products and Construction Company and others**[9].)

18. Very recently, the issue of power of arbitrator to award pendente lite interest was considered by a three-Judge Bench of the Supreme Court in the matter of **Union of India v. Ambica Construction**[10] and it has been clearly held that if there is express stipulation which bars pendente lite interest then it cannot be granted by the arbitrator. All other decisions mentioned in the earlier part of the order have been considered and it has been answered in paragraph 34 as under: -

8 (2015) 9 SCC 695
9 (2014) 4 SCC 416
10 (2016) 6 SCC 36

> "34. Thus, our answer to the reference is that if the contract expressly bars the award of interest pendente lite, the same cannot be awarded by the arbitrator. We also make it clear that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal, as ouster of power of the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court, it would be for the Division Bench to consider the case on merits."

19. Thus, there is not an iota of doubt that the arbitrator is not empowered to grant interest on the amount held or which the contract is entitled unless the contract between the parties expressly provides for grant of interest and if the contract does not provide grant of interest then the arbitrator cannot grant interest ignoring the terms of contract.

20. Now, going by the principles of law laid down by Their Lordships in above-stated judgments specifically in **Ambica Construction's** case (supra) and applying the same to the facts of the present case, it is quite apparent that in the present case, clause 64.5 of the GCC read with clause XX (3) of the GCC clearly prohibits payment of interest on money claimed for any period till the date on which the award is passed. Thus, payment of interest for pre-arbitration period or pendente lite interest is expressly barred. Therefore, once the clause of contract expressly bars the award of interest pendente lite, interest cannot be awarded by the arbitrator. Thus, the learned Arbitrator has committed illegality in awarding the claim towards interest and cost of arbitration contrary to the agreed terms of contract

and contrary to the principles of law laid down by the Supreme Court in **Rajasthan State Mines & Minerals Ltd.** (supra) and **Annapurna Construction's** case (supra). However, at this stage, the plea of counsel for the respondent to be noticed is that the appellants ought to have raised this plea of express bar of interest before the arbitrator. The appellants have shown before this Court, the copy of written statement / claim which he made before the arbitrator and in reply to claim 8, the appellants have clearly stated that there is no provision stipulated in the contract agreement to pay interest and therefore the claimant is not entitled for interest on delayed payment. Apart from this, the appellants' claim is that the arbitrator has passed the award ignoring the terms of contract and it is not the case that the arbitrator has no jurisdiction to adjudicate the dispute or arbitrate the dispute which has been referred to him. Therefore, the appellants have raised the plea that interest is not payable and the appellants were not required to file application under Section 16 (3) of the AC Act challenging the jurisdiction of the arbitrator. So this objection is rejected and it is held that claim of interest of pre-reference and pendente lite, both, are expressly barred by the terms of contract and they were not admissible and the learned Arbitrator has committed legal error which is covered by the ground enumerated in Section 34(2)(a)(iv) of the AC Act.

21. Similar is the error which the learned Arbitrator has committed while awarding arbitration cost. Clause 64.6 of the GCC clearly

states as under: -

> "The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of arbitrator(s) as per the rates fixed by the Rly. Administration from time to time."

22. Thus, the above clause clearly prohibits payment of cost of arbitration, as it has to be borne by respective parties. The award of cost of arbitration is hit by clause 64.6 of the GCC applicable between the parties.

23. Now, finally, this would bring me to the question of loss of profit to the extent of 10% which has been awarded by the arbitrator.

24. It is submitted on behalf of counsel for Union of India that clause 47 of the agreement is a bar for payment of compensation or otherwise, whatsoever on account of any profit of advantage which the contractor might have derived from the execution of the left part of contract. In alternative, it has been submitted by Mr. Ahluwalia that even if it is held to be no bar then also the respondent contractor is not entitled for loss of profit, as there is no material placed on record to establish that he is likely to suffer loss of profit and the material proof of loss of profit is a condition precedent for claiming loss of profit before the arbitrator which the contractor has miserably failed to plead and establish.

25. On the other hand, Mr. Rahul Jha would submit that in **Dwarka Das** (supra), the Supreme Court has clearly affirmed the principle that claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It is correct to

say that in **M/s. A.T. Brij Paul Singh** (supra), it has clearly been held by Their Lordships that in a works contract, the party entrusting the work commits breach of contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract and allowed 15% of the value of remaining parts of the works contract as damages for loss of profit. Thereafter, the Supreme Court in **Dwarka Das** (supra) has affirmed the principle that claim of expected profits is legally admissible on proof of the breach of contract by the erring party. But in the matter of **Bharat Coking Coal Ltd. v. L.K. Ahuja**[11], the Supreme Court has clearly laid down two principles before the claimant for awarding loss of profit, firstly, that the contractor/claimant should establish that had be 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 and observed as under: -

> "24. ... What he should establish in such a situation is that had be 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. Ltd. v. Cunard White Star Ltd.*[12] by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs 6,00,000 awarded to the claimant."

11 (2004) 5 SCC 109
12 (1940) 1 KB 740 : (1940) 2 All ER 97 (CA)

26. In view of the said principle of law, if the facts of the present case are examined, the Arbitrator has simply awarded loss of profit to the extent of 10% relying upon the decision of the Supreme Court in **<u>Dwarka Das</u>** (supra), whereas the claim raised by the claimant before the Arbitrator states as under: -

Claim No.7 Claim for loss of profit due to loss of turn over.	The termination of contract by the respondent was unlawful, and un-contractual, owing to above the claimant suffered loss of turnover during the period of the contract. The claimant hereby claims the loss of profit due to loss of turnover which works out to Rs.6,63,000/- as equivalent to 10% value of unexecuted work, in accordance with the settled law.	Rs.6,63,000/-

27. This plea of loss of profit is not a plea at all. The claimant has simply claimed that the termination of contract is illegal, arbitrary and to harass the contractor and therefore he is entitled to loss of profit to the extent of 10%. What is the requirement of law as stated herein-above and observed by the Supreme Court in **<u>L.K. Ahuja's</u>** case (supra), there is no whisper in the claim nor any material has been placed to establish that the claimant suffered loss of profit which should be awarded to him by the Arbitrator. In absence of any evidence or material on record to establish the fact of loss of profit, the learned Arbitrator has exceeded its jurisdiction to award the claim at the rate of 10% loss of profit amounting to ₹ 6,63,000/- which is not permissible in absence of

clear proof, pleading, evidence and material brought by the claimant in this behalf. Therefore, the award of loss of profit is also hereby deleted/set-aside from the award. In the light of this finding, I deem it inappropriate to deal with the plea of the appellants that there is bar to claim loss of profit.

28. Consequently, it is held that the respondent claimant / contractor is not entitled for interest of pre-reference period, pendente lite and post-award to the extent of ₹ 4,14,853/-, 10% loss of profit to the extent of ₹ 6,63,000/- and arbitration cost of ₹ 25,000/-. It is accordingly directed to be deleted from the award. Rest of the award will remain intact.

29. As a fallout and consequence of aforesaid discussion, the appeal is allowed to the extent indicated herein-above and the order of the learned District Judge and the award are set-aside to that extent leaving the parties to bear their own costs.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma