

.NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Arbitration Appeal No. 57 of 2015**

M/s. Teja Electricals, Through – Proprietor Rajesh Jairam Das Tejwani (Jairam Das Tejwani mentioned in the impugned order) 5, Jaidev Complex, Byramji Town, Nagpur (M.S.)

---- Appellant**Versus**

Union of India, Through : Chief Administrative Officer/CON,
South East Central Railway Bilaspur – (C.G.)

[Presented by V.K. Ahirwar, Dy. Chief Electrical Engineer,
South East Central Railway, Bilaspur -(C.G.)]

---- Respondent

For Appellant:	Mr. Prafull N. Bharat, Advocate.
For Respondent :	Mr. H.S. Ahluwalia, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****01/09/2017**

(1) Invoking jurisdiction of this Court under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (henceforth “Act, 1996”) setting aside the arbitral award under Section 34 of the Act, 1996, this appeal has been filed by the appellant/claimant herein.

(2) The essential facts requisite to consider the plea raised at the Bar are as under:-

(2.1) The appellant entered into contract with the respondent- Union of India on 28.11.2005 for the purpose of electrification/modification of OHE of IB Yard in the Jharsuguda

Byepass line. The agreement was executed on 23.02.2006 and after completion of work, the appellant submitted his bills but he could not receive the payment on account bill No. CC2 dated 26.05.2009 for Rs.21,95,780/-. The appellant also could not receive the final payment of Rs.11,25,103/-.

(2.2) Arbitral Tribunal was constituted for adjudication of the dispute consisting of three arbitrators and after hearing both the parties, the Arbitral Tribunal evaluated the evidence on record and thereafter vide order dated 27.06.2013 passed an award to the tune of Rs.37,44,315/- .

(2.3) Feeling aggrieved against the award passed by the learned Arbitral Tribunal, the respondent-Union of India preferred an application under section 34 of the Act, 1996 for setting aside the arbitral award before the District Judge, Bilaspur.

(2.4) Learned District Judge, Bilaspur, by its impugned order dated 14th September, 2015, set aside the arbitral award in exercise of power conferred under Section 34(2) of the Act, 1996.

(2.5) Questioning that order, this appeal has been preferred by the appellant/claimant.

(3) Shri Prafull N. Bharat, learned counsel appearing for the petitioner would submit that learned District Judge has set aside the order of Arbitral Tribunal in light of clause 52-A of the General Conditions of the Contract and such a ground is even not covered by Section 34 (2) of the Act, 1996. He would submit that the

respondent-Union of India is not entitled to the money which is payable under award to the appellant as the payment of a sum of money arising out of or under any other contract and as the arbitration proceedings pending before the arbitrator as the Civil Court has referred the matter to the Arbitrator for adjudication of the dispute and, therefore, the impugned order is liable to be set aside.

(4) Per contra, learned counsel for the Union of India/respondent would submit that the learned District Judge has rightly set aside the order passed by the arbitral Tribunal in view of clause 52-A of the General Conditions of the Contract and, therefore, the same deserves affirmation.

(5) I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove with utmost circumspection.

(6) The only question for consideration in this appeal would be whether the learned District Judge is justified in setting aside the arbitral award in view of clause 52-A of the General Conditions of the Contract.

(7) In order to consider the plea raised at the bar, it would be appropriate to notice clause 52-A of the General Conditions of the Contract, which states as under:-

“52-A. Lien in respect of claims in Other Contracts.--
Any sum of money due and payable to the contractor

(including the security deposit returnable to him) under the contract may be withheld or retained by way of lien by the Railway, against any Claim of this or any other Railway or any other Department of the Central Government in respect of payment of a sum of money arising out of or under any other contract made by the contractor with this or any other Department of the Central Government.

It is an agreed terms of the contract that the sum of money so withheld or retained under this clause by the Railway will be kept withheld or retained as such by the Railway till the claim arising out of or under any other contract is either mutually settled or determined by arbitrator, if the other contract is governed by arbitration clause or by the competent court as the case may be and contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the contractor.”

(8) The respondent-Union of India filed a civil suit for recovery of Rs.1,32,95,340/- before the 8th Joint Civil Judge, Senior Division, Nagpur against the petitioner, in that case, the Civil Court by its order dated 18.04.2016 referred the matter to the Arbitrator under Section 8 of the Act, 1996.

(9) The question for consideration is whether the amount, which the respondent – Railway is claiming i.e. ₹ 2.7 crores against the petitioner is payable by petitioner-claimant or not.

(10) The word “payable” has been defined by the Supreme Court

in the matter of **New Delhi Municipal Committee Vs. Kalu Ram and another**¹ in which their Lordships of the Supreme Court held as under:-

“**3**..... The word 'payable' is somewhat indefinite in import and its meaning must be gathered from the context in which it occurs 'payable' generally means that which should be paid. If the person in arrears raises a dispute as to the amount, the Estate Officer in determining the amount payable cannot ignore the existing laws. If the recovery of any amount is barred by the law of limitation, it is difficult to hold that the Estate Officer could still insist that the said amount was payable. When a duty is cast on an authority to determine the arrears of rent, the determination must be in accordance with law.”

(11) Likewise, in the matter of **J.K. Synthetics Limited Vs. Commercial Taxes Officer**², their Lordships of the Supreme Court has defined the word “payable” as under:-

“**14.** Therefore, the expression 'tax payable' under the said two sub-sections is the full amount of tax due and 'tax due' is that amount which becomes due ex-hypothesi on the turnover and taxable turnover 'shown' in or based on the return'. The word 'payable' is a descriptive word, which ordinarily means 'that which must be paid or is due, or may be paid' but its correct meaning can only be determined if the context in which it is used is kept in view. The word has been frequently understood to mean that which may, can or should be paid and is held equivalent to 'due'.

1 AIR 1976 SC 1637

2 AIR 1994 SC 2393

(12) The next question for consideration would be whether the respondent authorities are justified in issuing notice for recovery of the aforesaid subject amount in dispute without having due adjudication by the competent authorities.

(13) In the matter of State of Karnataka etc. v. Shri Rameshwara Rice Mills Thirthahalli etc.³ contractor had entered into an agreement with the State for construction of certain buildings. As the contractor failed to complete the work, the contracts were terminated in terms of agreement entered into by them and damage payable were assessed and sought to be recovered as arrears of land revenue, without there being any adjudication upon the question with regard to the liability of the parties. The Supreme Court considering clause 12 of the agreement observed as under: -

“Even assuming for argument's sake that the terms of clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is

3 AIR 1987 SC 1359

consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of clause 12.”

(14) A Division Bench of this Court in the matter of **A.K. Construction Company v. The State of M.P.**⁴ where work of construction was awarded after completion of work, bills were submitted and the claim bills, however, were not released which led to dispute between the parties and the aggrieved party approached Arbitration Tribunal constituted under the Chhattisgarh Madhyastham Adhikaran Adhiniyam, 1983. Defence of the State Government was that the Government dues were to be recovered and in terms of the agreement, the Government was entitled to recover “sums recoverable” not only under the contract in question, but also under other contracts. The Division Bench speaking through A.K. Patnaik, CJ (as then His Lordship was), held that the Government could not be arbiter, Judge of its own cause and could not recover the amount unless the amount is held to be due and recoverable by way of adjudication either by the Court or by the Arbitration Tribunal, and observed as under: -

“It will be clear from second sentence of the aforesaid clause that in the event of the security being insufficient or if no security has been taken from the contractor, then the

4 2005 (4) M.P.H.T. 15 CG

balance or the total sum recoverable, as the case may be, shall be deducted from any sum then due or which at any time thereafter may become due to the contractor under the instant or any other contract with the Govt.. The expression 'sum recoverable' would mean any sum that is admitted by a contractor to be due to the Govt. or that is disputed by the contractor but adjudicated by the Court or the arbitrator to be due and recoverable from the contractor. This can be the only interpretation of Clause 4.3.39.1 consistent with the principle of natural justice that no person can be a Judge of his own cause. In case, it is held, as has been held by the Arbitration Tribunal that the “sum recoverable” is any amount which the Govt. or any authority of the Govt. considers to be recoverable from the contractor, then the Govt. or such authority will be a Judge of its own cause and would be entitled to recover any sum from the contractor, even though the said sum is disputed and not adjudicated to be due and recoverable from the contractor by the arbitrator or the Court.”

(15) Similarly, the Division Bench of this Court in M/s. Macadum Makers (supra) following Shri Rameshwara Rice Mills Thirthahalli's case (supra) and A.K. Construction Company (supra), has laid down similar proposition as under: -

“20. It is therefore, apparently clear that though respondents claimed certain amount to be recoverable from the petitioner, alleging that the work of the petitioner was unsatisfactory and he failed to repair the road within the time stipulated as per letter dated 06.11.2008, the petitioner took recourse to the provision contained under the arbitration clause-29 by raising a dispute before the Superintending Engineer. However, without adjudication of the petitioner's liability towards payment, alleged sum is sought to be recovered against the petitioner, and respondent-Executive Engineer has proceed

to issue impugned letter dated 03.12.2010. This act on the part of the respondents-State authority can only be termed as arbitrary and unreasonable, violative of Article 14 of the Constitution of India. Moreover, respondents could not bring to the notice of this Court any law operation in the field, authorizing the respondents authority to recover the amount by stretching their hands to the due payment and deposits of the petitioner with other offices in connection with other works. Even in the agreement, no such terms have been stipulated. Present is not a case where even after adjudication, petitioner failed to deposit the amount and, therefore, the respondents have proceeded to recover the amount as arrears of land revenue.”

(16) In the matter of **Bharat Sanchar Nigam Ltd. and another v. Motorola India Pvt. Ltd.**⁵, the Supreme Court has followed the principle of law laid down in **Shri Rameshwara Rice Mills Thirthahalli's** case (supra) holding that a party cannot be a judge in his own cause.

(17) In the matter of **J.G. Engineers Pvt. Ltd. v. Union of India and another**⁶, the Supreme Court has relied upon **Shri Rameshwara Rice Mills Thirthahalli's** case (supra) to hold that adjudication upon the issue relating to a breach of condition of contract and adjudication of assessing damages arising out of breach are two different and distinct concepts and right to assess damages arising out of a breach would not include a right to adjudicate upon as to whether there was any breach at all and one of the parties to an agreement cannot reserve to

5 AIR 2009 SC 357

6 (2011) 5 SCC 758

himself the power to adjudicate whether the other party has committed breach.

(18) Very recently, in the matter of **M/s. Gangotri Enterprises Ltd. v. Union of India and others**⁷, the Supreme Court while considering the question of encashment of bank guarantee has held that the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon arbitration proceedings. Their Lordships observed in paragraph 42 of their report as under: -

“42. On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22.08.2005 are still pending. Secondly, the sum claimed by the respondents from the appellant does not relate to the contract for which the Bank Guarantee had been furnished but it relates to another contract dated 22.08.2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable. In other words, the sum claimed by the respondents is neither an admitted sum or a sum which stood adjudicated by any Court of law in any judicial proceedings but it is a disputed sum and lastly, the bank guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14.07.2006 (Anand Vihar works) and the work having been completed to the satisfaction of the respondents, they had no right to encash the Bank Guarantee.”

7 AIR 2016 SC 2199

(19) In the matter of Hameeda Hardware stores Vs. B. Mohan Lal Sowcar⁸, their Lordships of the Supreme Court have held as under:-

“13..... The word 'claim' means “a demand for something as due” or “to seek or ask for on the ground of right” etc.”

(20) In view of the above-stated settled legal position that the respondent cannot recover the above-stated amount from the petitioner without due and prior adjudication by the competent authority.

(21) As a fallout and consequence of the aforesaid discussion, the arbitration appeal is allowed. Impugned order dated 14th September, 2015 is set aside and the award dated 27.06.2013 passed by the Arbitrator is hereby restored and it is held that learned District Judge has absolutely unjustified in setting aside the award passed by arbitrtior without any prior adjudication by the competent authority leaving the parties to bear their own costs.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

